Richard Nixon Presidential Library
White House Special Files Collection
Folder List

| Box Number | Folder Number | Document Date | Document Type | Document Description |
|---|---|---|---|---|
| 18 | 8 | N.D. | Report | The Consumer and the Federal Trade Commission critique of the consumer protection record of the FTC by Cox, Fellmeth and Schulz. 67 pgs. |

# THE CONSUMER
# AND
# THE FEDERAL TRADE COMMISSION

A critique of the
consumer protection
record of the FTC

by

Edward Cox
Robert Fellmeth
John Schulz

This report is the product of a three-month empirical investigation of the Federal Trade Commission conducted during the summer of 1968 with the assistance of Ralph Nader.

Project members: John Schulz, Director
Judy Areen
Peter Bradford
Edward Cox
Andrew Egendorf
Robert Fellmeth
William Taft, IV

Biographies of Project Members

Judy Areen: AB, 1966, Cornell University. Third-year student at Yale Law School.

Peter Bradford: AB, 1964, LL.B., 1968, Yale University. Special Assistant to Governor of Maine.

Edward Cox: AB, 1968, Princeton University. Pre-architecture and law student at Yale University.

Andrew Egendorf: AB, 1967, Massachusetts Institute of Technology. First-year student, Harvard Law School.

Robert Fellmeth: AB, 1967, Stanford University. Second-year student at Harvard Law School.

John Schulz: AB, 1961, Princeton University, LL.B., 1968, Yale Law School. Assistant Professor of Law, University of Southern California.

William Taft, IV: AB, 1966, Yale University. Third-year student at Harvard Law School.

TABLE OF CONTENTS

TABLE OF CONTENTS, CONT'D

# INTRODUCTION

1. Background

As the representative of the American consumer in Washington, Mr. Ralph Nader has recognized the benefits which might accrue to the consumer from a Federal Trade Commission which lived up to its full potential.

In order to determine what this potential is and how the FTC is fulfilling it, Mr. Nader brought together a group of law students to commence a unique study.

Providing their services without pay, seven students worked on the project at varying tasks during last summer. Their personal motivations covered a wide spectrum, but to a certain degree they were all convinced of the need for peaceful change, based on a rigorous and thoughtful examination of our existing institutions in the light of present realities. This they saw as an alternative to the violent means of change advocated by certain of their contemporaries.

They came to Washington at the start of June, 1968, having read the small number of previous reports and featured articles on the Commission. They conducted interviews of selected high-level personnel, simultaneously noting and requesting all possible written reports, memoranda, data sheets, computer programs, and other materials at the FTC useful to such a study. While the limited materials made available by the Commission were being assimilated, other personnel in the Commission were singled out for in-depth interviews. Outside people who had an intimate knowledge of the Commission, either from having been there previously or from daily contact in line with their work were also interviewed. The students made a total of forty internal and twenty-five external interviews. In addition, an undetermined number of informal conversations were held with persons both inside and outside the Commission.

By the end of the summer the vast amount of information

collected had been roughly assimilated and categorized. At this point the students recognized that their report in its final form would have to be unlike any report done previously on a government agency. The paradigm of all previous reports had been the law review article which usually ended a longwinded and tiresome discussion of the law and organization of an agency with a recommendation for reshuffling the organization chart. Over the summer the students had come to know the FTC too intimately to ignore the obvious fact that the Commission's troubles stem in great part from specific weaknesses in personnel. The report therefor searches thoroughly into personalities and attitudes of high staff members, since substantive reforms in Commission performance will be impossible to achieve without imaginative top and middle-level leadership.

This report is exclusively the product of the students' efforts and its conclusions are entirely their own. As such, it is a possible prototype for similar studies of other governmental agencies. It is by no means a final document, but rather should be considered an interim report in a continuing study.

2. The FTC and the Consumer: Scope of Report

An early section of this report analyzes developments in American society which seem to threaten the already precarious position of the consumer.

The Federal Trade Commission is the major federal government agency for consumer protection.* It is the only agency with a potential for effectively policing business frauds in many parts of the United States where state and local laws are inadequate, and it alone has the potential resources to control the practices of nationwide business empires.

The FTC does not and cannot, however, fulfill its potential at the present time, as the remainder of this report will demonstrate. The toll in consumer abuses which continue to flourish due to the inactivity of the Commission is impossible to calculate. The agency must be reformed immediately.

Because of the pressing need for reform of the FTC in the consumer-protection sphere, this report is devoted entirely to that subject. It does not deal with the equally large and important topic of the FTC's antitrust duties.

3. A Brief Overview of the FTC and its Consumer-Protection Legislation, and its Procedures

The Federal Trade Commission is an independent regulatory agency created in 1914. Its regulatory duties are divided between direct consumer protection and antitrust.

The agency's consumer-protection duties are defined by the Federal Trade Commission Act (FTC Act) and several specialized statutes. The former generally empowers the Commission to

---

* See Appendix 16 for legal and historical arguments in favor of the propositions that the FTC has important consumer protection responsibilities and that Congress intended it to be a vigorous enforcement agency.

enforcement under threat of contempt and for criminal sanctions for failure to respond or false responses.

The only coercive legal enforcement tool generally available* to the FTC is the "cease and desist order," which imposes no retroactive sanctions, but merely prohibits future repetition of the sort of conduct against which it is aimed. Once a cease and decist order becomes final (after 60 days or appeal to U.S. Courts of Appeals and Supreme Court), it remains in effect permanently, and any violation may be punished by an action in the Courts of Appeals on behalf of the United States for recovery of "civil penalties" of up to $5,000 per day of violation. FTC Act, Sec. 5(1).

Formal adjudicative proceedings leading to the issuance of cease and desist orders are prescribed by Section 5 of the FTC Act and the Commission's "Rules of Practice for Adjudicative Proceedings." They are begun by the Commission's filing a "complaint"; Section 5(b) directs the Commission to file a complaint

> Whenever the Commission shall have reason to believe that any . . .person, partnership or corporation (subject to the FTC Act) has been or is using any . . . 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 <u>to the interest of the public</u>. . .

The "public interest" requirement was written into the statute to enable the Commission to plan its enforcement program free of the requirement that all citizen and merchant complaints be acted upon.

FTC Rules also provide procedures for securing "consent" (non-contested) cease and desist orders without going through the adjudicatory process (hearing, initial decision, appeal,

---

* In food and drug cases and under the textile and fur statutes, the Commission has the additional powers, in theory, to seek preliminary injunctions and even criminal penalties.

Commission decision) involved in regular cease and desist order cases.

The Federal Trade Commission presently uses several additional enforcement techniques which do not lead to issuance of cease and desist orders (and thus cannot draw on the coercive powers underlying enforcement of cease and desist orders). Two of them are methods for dealing on an "industry-wide" rather than individual basis with practices found upon investigation to be widespread; these are proceedings leading to issuance of "Industry Guides" and "Trade Regulation Rules." Two others are designed to deal with individual merchants: (1) a means by which businessmen can solicit and receive "Advisory Opinions" on proposed courses of business action. (2) procedure for acceptance by FTC of informal "assurances of voluntary compliance" in lieu of cease and desist orders.

The FTC presently employs some 1230 persons, including 473 attorneys and 464 secretarial and clerical employees. These employees are divided between the agency's principal office, located on Pennsylvania Avenue in Washington, D. C., and eleven field offices in Atlanta, Boston, Chicago, Cleveland, Falls Church, Va., (serving Washington, D. C.) Kansas City, Los Angeles, New Orleans, New York, San Francisco and Seattle.

The FTC staff at the principal office is divided into administrative offices and operating bureaus; the latter are structured primarily along "program" rather than "functional" lines, that is, according to statutes or programs administered rather than the kinds of tasks performed by employees (e.g., investigation, litigation, etc.) The major operating Bureaus are those of Deceptive Practices, Economics, Field Operations,

Industry Guidance, Restraint of Trade and Textiles and Furs. This report deals with Deceptive Practices, Industry Guidance, and Textiles and Furs, for the most part.

The major administrative offices are those of the Secretary, Program Review Officer, General Counsel, Hearing Examiners and Executive Director (including Office of Administration). This study focuses on the General Counsel Office.

The Commission itself is composed of five members appointed for staggered seven-year terms. It has delegated some of its statutory authority to the Chiefs of various operating bureaus; however, the overall decision-making process of the Commission remains highly centralized, for no powers have been delegated to personnel beyond Assistant Bureau Directors, all of whom are located in the central office.

The Chairman has extensive powers and responsibility in the management of the FTC, for he is its top Administrative Officer. He is thus responsible for hiring and promoting persons on the staff.

# THE CRISIS

Throughout the history of our country, the American people have presumptively relied on the forces of the marketplace to determine their economic destiny. American business has traditionally modified its practices in order to take advantage of new technology and new opportunity. But another force in American society -- a force of conscience -- has opposed the unmoderated exercise of economic power and has sought to keep the new mechanisms and forms of economic power from bypassing the theoretical market checks to deceive, injure or exploit. This force has acted in several ways, including self-regulation by ethical businessmen, the formation of consumer groups exerting power in the marketplace, consumer education movements, and public pressure on government for legal regulation.

Traditionally, the most serious threats to the American public, the most dangerous economic crises, have occurred when changing business practices bypass market pressure and subvert the legitimate operating principles of free enterprise, sometimes becoming in themselves reified symbols of worship. In such a case the resultant system can resemble in practice the monolithic structure of a communist economic system -- the economy allied with the state in an impregnable combination. Only by keeping government separate and strong in relation to economic forces, and vice versa, can a balance of power be sustained that will promote a democratic government and a desirable economic system.

As for the worship of the forms of free enterprise, it is always important to prevent an association of specific business practices with the genuine operating principles of

free enterprise such that their mere utterance, like magical incantations, dispels legitimate worries and assuages justifiable fears. Such results pose a constant threat to rational analysis and viable adjustments.

Many times in the past America has paid a heavy price before recognizing the futility of worshipping the forms and not the substance of the free market. The growth of trusts in the last century, the impure drug and adulterated food abuses early this century, the Great Depression, these are all examples of dangers which required the intervention of forces outside the market for correction. But many paid the heavy price of injury, poverty or loss before substantial corrective action was taken. There is no reason why America should have to pay that kind of price now, and indeed one of the putative characteristics of rational man is an ability to predict the effects of present trends on existing institutions in such a way as to meet change without sacrificing valued elements of those institutions.

Past experience suggests that healthy business competition helps preserve a successful free enterprise economic system. In this age of growing economic concentration, however, it is no longer wise nor efficient for government to rely solely on fostering competition to do the job. Government must now begin to direct its energies towards direct protection of legitimate consumer interests as well. Minimally, this means guaranteeing that consumers obtain adequate and accurate information about products available in the market; it should probably also include some control of types of sales approaches which constitute overpowering appeals to strongly irrational elements

of human psychology. And in addition, government must make certain that all consumer products are safe for consumption when reasonably used.

The chief destructive trends in the economy which must be taken into account in planning for consumer protection are the following:

1/ The rise of the corporate economy and its accompanying phenomena such as intra-corporate tyranny over executives, price leadership, oligopoly or shared monopolies, conglomerate empires, tacit agreements precluding challenge to mutual vested interests, corporate domination of regulatory agencies, product fixing, manipulation of credit, and other subtle forms of coercion which block new competitors and new ideas.

Where industries have very low cross-elasticity of demand, and where competitors within each industry manufacture products of a similar nature, the consumer will not learn the negative aspects of such products. No manufacturer will advertise against his own product type and no one will advertise against a product that is not competing with his own. This oligopolistic model is a rapidly growing characteristic of the new economy.* The result has been a glut of information regarding what are in reality contrived distinctions between identical products, but a dearth on the drawbacks of any particular product type. Cigarette ads have long been the paradigm example. But one rarely ever hears about the disadvantages of mouthwashes (which many dentists say irritate the mucous membranes of the mouth), detergents (most of which now add particles to your clothes rather than remove them, many of which can irritate the skin), cars of all types, drugs of almost every variety, deodorants (which now clog pores

---

* Concentration is increasing the most rapidly in the consumer goods industry.

to promote the magic of "dryness"), "brightening" toothpastes (which contain abrasives, see appendix 10), diet soft drinks (some of which can harm internal organs), and so on.

2/ The communications revolution, including increasing use of nationwide television and the rising cost of access to this public forum. This development has made it possible for businessmen to perpetrate fairly blatant frauds or deceptions, bilking large numbers of people of a small amount in a short time without feeling any significant market check. A recent example of this is the chinchilla ads on TV last year (see appendix 14). Another example is the extremely efficient TV chopping and grinding demonstrations by a number of products which are purchased by mail and almost invariably perform in a manner vastly inferior to what is represented. It is indisputable that it is now easier than ever before to reach large numbers of people with more subtle forms of influence.

3/ The information explosion, including increasing use of mass data-handling techniques to attack the privacy and autonomy of the consumer. This trend has made possible social-psychological analysis of the various potential markets. Market researchers have divided and subdivided the market along various lines to make possible special appeals to different social groups. Most of these appeals are based on distinctions which have nothing or very little to do with the products themselves, but are associated with them to produce "empathy." Virginia Slims are marketed to appeal to feminists, Camel cigarettes to appeal to he-man, Lark to the suburban set, and so on.

4/ The growing sophistication of the science of applied psychology, involving influence by suggestion, subtle deception through image manipulation, and the creation of demand through

associations with sex, fear and power fantasies. These advances facilitate subtly effective appeals and unapparent deceptions. Some of these seem ridiculous when directly explained, but nothing testifies more to their effectiveness than their consistent success. Not only do businessmen attempt to utilize the most accomplished psychologists in the academic world to appeal via symbolic ties to the public's fears and frustrations in almost psychotic association attempts, but they experiment increasingly in more direct forms of forced persuasion, as in the micro-second flashes of Aqua Velva lotion or in the hypnotic waving of keys in front of the screen in Washington D.C. during the Fairfax Plymouth ads with the accompanying deep voice intoning over and over, "you will buy a Plymouth at Fairfax motors."

There have traditionally been three major arguments against government entry into the field of advertising. First, is the argument by business interests that the "perfect" or all wise consumer can not be deceived. Second, there are appeals to free speech and subsidiary interests (the desire for imaginative ads, etc.). Third, there is a general feeling by some that the problems are unimportant, unreal, or will go away.

The answer to the first argument is contained in the analysis above of the consumer's plight given contemporary trends. It is worth adding, however, that although corporate giants justify the system and their activities by constant reference to the omniscient consumer, their ads reveal their true estimation of him. Briefly, he is an insecure, sex and attention starved, paranoid neurotic with an attention span of 10 seconds. Even if today's consumer is capable of understanding

the complexities of, say, comparative reliability characteristics of standard automotive engines -- which industry moguls pretend he is -- these moguls will not give him that information. Instead, they prefer to sell sex and power in relation to various phallic symbols, undulating women and potent wild animals.

The second argument is admittedly a valid consideration. There is a competing interest in favor of the free exercise of communications capacity and indeed in favor of diverse and clever ads. But this does not mean that the trends now evolving within our economy do not present questions of the greatest importance. Sadistic appeals by Silva Thins or paranoid appeals by Listerine are not symptoms of a past era, they are precursors of a new one. Further, certain issues presented by the trends above are capable of easier determination. When the question is not irrelevance but deception, that is, the deliberate creation by advertisement of an impression which in actual fact does not represent the performance of the product, there is no substantial claim of competing value. Larceny by deception has been a crime for many years at common law. There is little free speech interest in the right to say "your money or your life," nor is there much in the right to say "if you give me x dollars I'll give you y object," fully intending and subsequently delivering, inferior z object.

The third approach to the problem of deceptive practices is to minimize its importance or duration. But given the evolution of modern society this problem must not be underestimated. It is easy to dismiss the matter because many deceptions are hard to detect. If a false claim is apparent it is ignored and faile. If it is successful it is often not recognized at all. Even when the product is deficient it is often not easy to trace to

to a specific deception. This is particularly true when the deceptive claim is relative to the products of other competitors with direct comparisons unlikely. How many, for instance, will buy two sets of tires to see if one stops faster as claimed. Finally, it is easy to make small lies of omission or implication which generate great market advantage and attract little attention. It is foolhardy to minimize the effect of these processes, for they can eventually threaten general promotional credibility to the detriment of everyone (but particularly the honest businessman and the consumer).

The increase in deceptive practices in advertising is manifest throughout the trade. It is clearly a rising phenomenon with more current abuses than any single person or group could document fully.

The longstanding practice of relabeling substantially old products as "new" with every successive ad campaign has made the term meaningless. Detergents are particularly guilty of this transgression, but so called "new" cars, appliances and other product types are all guilty.

During the first quarter of 1968 ten specific products (not corporations) spent over thirty million dollars on TV advertising alone (see appendix 3). Deceptions are widespread among those products most advertised on TV. For example, Salem, Winston and Kool were among the top advertisers over this period, spending almost ten million between them on TV over three months trying to convince millions of people that death-and-disease-dealing smoke is actually analogous to fresh air, spring, and cool mountain brooks. The current Newport ad repeats the word "refreshing" five times. Another three of the top ten for the

first quarter of 1968 were analgesic companies, with Anacin leading the pack with expenditures of over four and one half million. All three ads are blatantly and persistently deceptive: Anacin claiming that two of its magical pills "contain as much of this (unnamed) pain reliever as four of the other (unnamed) extra strength tablets," pointing out, of course, that one shouldn't take four of the other; Bayer advises that "Doctors and public health officials" recommend aspirin when flu strikes as one of three recuperative steps, and that since Bayer is pure aspirin...; Bufferin claims to go to work "in half the time" (see appendix 9).

Other ads currently flooding the TV networks which are deserving at least of inquiry are the Dyno dollars, Esso gas station and other game gimmicks implying advantageous odds of winning substantial prizes, the Firestone Tire claim that its wide oval tires are "guaranteed to go through ice, mud and snow or we pay the tow," the Shetland vacuum cleaner test with the machine's suction supposedly drawing a resistant bowling ball up a plastic tube, the mock Ken-L Ration butchers who can't tell the difference between Ken-L Ration and real beef*, the Colgate toothpaste claim that it is "unsurpassed" implying superiority, the assertions of Crest ads, the use of government tar statistics by Pall Mall, the Johnson lemon wax demonstration with unnoticeably disparate rags, the new Geritol ads (in open defiance of a rare standing FTC cease and desist order, see section on compliance, p.49), the Coldpower claim to "germproof," the Bravo wax representation that detergents absolutely can not dull the surface, the Mrs. Filbert's Diet Safe Margarine ad implying that if you can pull 1" of flesh off

---

* This group, with no butchers among us in any form, had no trouble differentiating.

the tricep of hubby he is too fat and will therefor die prematurely (unless saved by Mrs. Filbert's of course),* the Ultra-Brite sex appeal (brightness) claims and the MacCleans whiteness test (see appendix 10 for ADA preliminary warning), the Goodyear tire "up to double the mileage" polyglas tire ad, and on and on.

---

* It is worth noting that at 6'1" and 165 lbs. this author can easily pull 1" and more of flesh from his tricep (underside of upper arm).

# THE FAILURES

The statues in front of the FTC building in Washington D.C. represent the purpose of the agency in the eyes of the sculptor. Their symbolic message is accurate with regard to the founding statute of the Commission, but stands in stark contrast to the recent history of the agency -- both in philosophy and in practice. The statues depict an unruly and powerful horse -- American business, a danger and a menace unharnessed, being restrained by a strong and determined young man -- the FTC. Such a juxtaposition does not in any way represent the performance or the attitude of the prevalent powers in the FTC. The FTC is not young or young thinking, it is not strong nor does it seek to be strong, and it has no desire to restrain. It would rather give the horse its head, only occasionally throwing a small stone at it. Indeed, the Commission does not view American industry as a wild horse at all, but rather as a docile beast who now and then needs guidance, and every so often a mild "whoa."

The responsibilities of the FTC demand that it see business for what it is -- a sometimes unruly animal. The lack of such a posture is evident through the attitudes of its present Chairman. In a typical address before a business audience in North Carolina, Mr. Dixon opened his remarks as follows:

"I've come here with the high hope that I can persuade you that the Federal Trade Commission is not socialistic, bureaucratic, damyankee, tool of the devil that may have been pictured to you. Instead, I'd like to convince you that you've got a friend in the FTC -- a real friend --..." "Needed: A Combined Attack," Before Joint Meeting of the Better Business Bureau and Advertising Club, Winston-Salem, North Carolina,

Jan. 8, 1968, p. 1.

It is worth noting that even if the FTC vision were a correct one, and even if it were appropriate for the agency, it would still have one difficulty. For if a businessman were to encounter a competitor's practice of any kind that he would rather not engage in, he must either lower himself and engage in it or commit economic suicide. If he complains to the FTC he is going to have to survive in virtuous poverty for years while the case is being litigated and his competitors rake in their fortunes. Such a businessman would not only have to be pure to fit into the FTC mold -- but he would have to be either dumb or suicidal. Most American businessmen are neither. They are no more pure, concerned, dumb or suicidal than the FTC is a young, strong force restraining the economy for the public welfare. The statue lies.

This attitude of the Commission, spawned through connections, backscratching arrangements and cronyism, pervades every aspect of FTC activity. When viewed after a cursory examination of FTC public relations, the failures of the FTC reveal one outstanding feature of its operation -- its continual and consistent violation of its own statute with regard to deceptive practices. The FTC itself is one of the most serious and blatant perpetrators of deceptive advertising in America. It has avoided congressional or other investigation or review for a decade by consistently responding to the vector theory of power -- feeding and serving those who would or do threaten it. Substantially, this means feeding and serving big business and congressional interests attached thereto.

For the FTC to work with any effectiveness it is going to have to: 1/ detect violations, 2/ establish priorities for the

most efficient expenditure of enforcement energy, 3/ enforce the given laws with energy and speed, 4/ acquire effective statutory authority where present authority is insufficient, 5/ remain independent from illegitimate interests which could distort, blunt or block enforcement.

1. Failure to Detect Violations

The assumption discussed above concerning competitor notice of deceptive practices is one of the two more or less exclusive means relied upon by the FTC for the detection of violations. The second is not much more useful, given present economic structure, than the first. The second assumption relied upon by the FTC is "mailbag notice"* -- reliance for detection primarily on complaints (called by the FTC "applications for complaint") from the aggrieved consumer. These complaints from the public do not provide notice of many problems. Because of product fixing and product complexity, the consumer often doesn't even know he is being deceived. The FTC is not going to receive complaints from a person who is not seriously injured,** or who can not trace the difficulty to a particular product, or who does not know of other alternatives, or who does not know what is happening to him either before or after making a purchase, or who perceives the historic futility of appealing to the FTC.

Another fallacy in the mailbag approach can be found in America's ghetto problems. There, as finally shown by the Commission's own study of consumer deception in Washington D.C. (at the insistence of Senator Magnuson), the system contradicts the Commission's assumptions about deceptive practices. The

---

* See the 1967 Senate Hearings of the Independent Offices Subcommittee, p. 464 for a discussion of this practice.

** A consumer will not be motivated to complain about petty frauds (even if on a massive scale) since the FTC has no refund power, and no private civil suit can be based on an FTC order.

victims here do not care about the flood of inferior goods, they are numb through the lack of any higher expectation. If they were to complain they would not know how. They don't have lawyers and they don't know a thing about the FTC.

The mailbag source of complaints is certainly useful, relevant, and can often be indicative of certain types of outright fraud (as in the chinchilla cases). But this source is not sufficient. The FTC must establish vast new means of detection. It must initiate aggressive and intensive investigations, particularly into ghetto areas. It must monitor TV and radio carefully in a general surveillance effort. It must, perhaps, establish FTC investigative teams in every trouble spot, particularly in ghetto areas. It must, perhaps, require pre-submission of certain categories of advertising.*

At present, the FTC monitors haphazardly** and occasionally, and several sources have confided that the one TV monitoring operation extant (which consisted of several matrons watching the set) was discontinued because they "paid too much attention to the programs"(mostly soap operas) and would leave for snacks, etc. during commercials. It is obvious that there must be alert and extensive monitoring operations with pre-screening by expert engineers, doctors, and other professionals.

It is also obvious that one ghetto investigation, which was

---

* According to Advertising Alert No. 2, Feb. 12, 1962, the FTC monitored 50,000 scripts from TV and radio pre-submissions. Investigation has revealed this claim to be doubtful at best, but even if true, such monitoring would do little toward the detection of visual deceptions, nor do experts pre-screen copy.

** Monitoring brings in only 10% of the investigatory targets of the FTC according to the 1967 Senate Hearings before the Independent Offices Subcommittee, p. 464.

Washington D.C. Vicinity*

| Year | Number of Orders |
|---|---|
| Last half 1964 | 2 |
| 1965 | 2 |
| 1966 | 6 |
| 1967 | 9 |
| First half 1968 | 11 |
| TOTAL | 30 |

Sample Size = 248

Total % from D.C. vicinity = 12.1%

* "Vicinity" is defined as within approximately a thirty mile radius.

** Cases are classified according to business location of violator.

to personal problems of Congressmen living in the District or in surrounding suburbs (see discussion of personnel). It is worth noting in this regard that there are several cities in Tennessee which approach Washington in terms of inordinate concentration of attention.

Ideally, priorities must be carefully set to help those who need help most. Deceptions and other practices which endanger health and physical safety must come first. The number of persons affected must also be a factor. Practices affecting the poor must be given priority because the poor can afford to lose less. Unconscionable practices engaged in by large corporations must be given great weight, for they have greater potential for harm if unchecked. Most important, the Commission should not proceed in purely random fashion on the basis of complaints received, or on the basis of extraneous motivations--political, geographical, or personal--which distort the criteria of maximum efficiency appropriate to an enforcement policy.

While conducting one of the first studies of the FTC in 1924, Gerard Henderson found a general lack of any system of priorities for case selection: "the Commission is handling too many cases, and it should exercise a greater discretion in selecting those cases which involve questions of public importance." Henderson, The Federal Trade Commission, p. 337 (1924). There has never been any argument that the FTC should handle these lesser cases if it could obtain the resources to do so in addition to more momentous problems. But since limited resources are imposed upon it by Congress, it should deal with more important issues. The FTC has not tried vigorously to

expand its resources (see section on seeking authority) but, moreover, it has not established an explicit real system of priorities. In addition to its fear of big corporations, its decline in activity and its ineffective enforcement, it is allocating what dwindling energies it has left to the prosecution of the most trivial cases. Its system of priorities, if there is one, is according to the origin of the application for complaint, not according to the importance of the problem. If the source is a favored Congressman (see discussion of personnel) some action is assured. Otherwise, one relies on chance or a personal contact with the agency.

Twenty-five years after the Henderson report, the Task Force of the Hoover Commission made its study. The situation was unchanged: "As the years have progressed, the Commission has become immersed in a multitude of petty problems.... The Commission has largely become a passive judicial agency, waiting for cases to come up on the docket.... In the selection of cases for its formal dockets, the Commission has long been guilty of prosecuting trivial and technical offenses and of failing to confine these dockets to cases of public importance." Hoover Commission Report, pp. 125, 128 (1949).

More recently, Professor Carl Auerbach conducted an intensive study of the FTC on behalf of the Administrative Conference of the United States. He too observed that "the important question is whether the Commission has a system of priorities by which it is guided in discharging all the tasks entrusted to it by Congress. To date, the answer is no." Auerbach, "The Federal Trade Commission," 48 Minnesota Law Review (1965).

And according to the statistics and all available evidence the answer is still no. Just this year the Commission reconsidered

for the third time a case which had occupied over four years of Commission and staff time on the issue of whether or not a watchband chain representing less than 1% of the value of the finished watchband should be explicitly labelled as originating in a foreign country or not. They eventually decided that it should.

What is particularly frustrating about these recurring criticisms is the fact of their persistence for some forty-four years. Still, nothing has been done. In fact, despite numerous specific suggestions, nothing has even been attempted which might improve the situation.

The fact of the present preoccupation with the trivial is reflected in statistics and examples ad infinitum. A recent and rather typical reflection of FTC priority failure is found in the 1968 Senate Hearings on appropriations. For some five years the Commission has been mentioning imminent studies of the food market situation. Meanwhile the problem has become more and more critical. Several reports were compiled, none of which seemed to have had any effect. Senator McGee suggested the necessity for a continuous examination or study of the food industry from which concrete and effective action might be taken to correct dangerous trends and rampant practices. The importance the FTC attaches to such an effort relative to its other activities is revealing:

> I agree with you, the Federal Trade Commission was created by Congress to carry on this type of study, but this is something that if we are to carry on, the necessary money should be supplied. For you to say, well, why do you not do it out of what you have -- you are going to give us a terrible management problem. At the present time we are receiving some 9,000 complaints per year and we have not as yet dared to say to anyone, 'we are not going to look at your matter, because it is not as important as some of the rest.' We are having difficulty in handling our increasing workload with our available staff.
>
> I hope you will restore the $225,000 and that you do not overlook our new program to do something about nearly $400 million worth of wool imports into this land.

Chairman Dixon before Senate Subcommittee on Independent Offices, pp. 430 (1968).

The fact that Mr. Dixon's statement carries numerous and quite typical misrepresentations, such as the implication that the Congress has failed to supply the money when it really has never been actively sought or requested, the fact that although the applications for complaint are many and increasing, the workload of the Commission, as performance records show clearly, has been decreasing, are matters that will be treated later. What is noteworthy here is the priority allocation given an investigation into a multi-billion dollar industry of necessities which is reaching a crisis stage versus the FTC's favored on-going operation of wool and textile "inspections."*

But this is not the only example of wool and textile fixation. FTC preoccupation with these specific laws reflects a theme which ran throughout our study, that is the great importance attached to anything which involves the protection of American business interests. This is not a situation which deserves only condemnation -- certainly many of the FTC's legitimate activities, at least theoretically, benefit honest businessmen as well as consumers. But these laws are an ideal "out" for the Commission. They can spend great energy on their enforcement --offending mostly Japanese and other foreign producers, while spending relatively little on deceptive practice transgressions or for that matter restraint of trade activity which offend American big business interests.

The FTC pretense is that Congress specifically requested enforcement in these matters. Of course this is true, just as Congress has called for the enforcement of deceptive practices and restraint of trade. Because these latter issues are more complex and required a more general statute, does not imply that

---

* These inspections are part of the program of enforcement of specialized textile statutes. With one exception, they prohibit such trivial deceptions as the mislabeling of wool or furs.

they are less important. Indeed, it is up to the FTC, not Congress, to allocate its own resources in the enforcement of the full panoply of its legal obligations according to some sensible criteria. This does not mean automatic deference to one particular law over another solely on the basis of the timing of the law or on the basis of political or economic friends who might be alienated.

Further, an examination of FTC priority determinations within the textile and fur category reveals a final myopia.

Textile and Fur Breakdown:*

| | 1963 | | 1964 | | 1965 | | 1966 | | 1967 | |
|---|---|---|---|---|---|---|---|---|---|---|
| Wool, Fur and Textile | 208 | 90.8% | 218 | 70% | 189 | 87.7% | 201 | 94.4% | 179 | 94.2% |
| Flammable Fabrics | 21 | 9.2% | 94 | 30% | 54 | 22.3% | 12 | 5.6% | 11 | 5.8% |
| Total T & F Cases | 229 | | 312 | | 243 | | 213 | | 190 | |

The flammable fabric cases within the Bureau of Textiles and Furs represent the most important category of violation because the protection of life is involved. The statistics above could reflect merely a smaller number of violators in the flammable fabrics area. There are several other factors, however, which give the statistics greater significance. First, there is the small number of civil penalties invoked against flammable fabric violators, despite the potential danger involved. Although the act was passed in 1953, the first civil penalty action was not brought until 1966 (FTC News Summary, Aug. 8, 1966) and there have been altogether only three civil penalty actions in the field (see section on civil penalties). In addition to this, interviews and conversations with staff and Commission members

---

* For FTC presentation of this breakdown, see 1967 FTC Annual Report, p. 32.

reveal a lack of concern or a lack of awareness about the need for a higher priority for flammable fabric enforcement vis-a-vis wool, fur or textile.*

A more explicit example of myopia in this sphere (which also involves collusion and secrecy) is a recent episode concerning a shipment of flammable Japanese rayon. Chairman Dixon cited the assurance of voluntary compliance obtained with regard to this shipment as an example of the advantages of "persuasion" and industry "guidance" before the 1965 House Appropriation Hearings. And indeed the FTC had barred future shipments of the dangerous materials into the country. But the Chairman failed to mention that most of the shipment had already been distributed to clothes manufacturers, and that the staff had strongly recommended to the Commission that the rayon then in the hands of the manufacturers be seized. In fact, the enforcement order or agreement which was the subject of the Chairman's boasting represented a gross and mysterious concession to defense attorney Peyton Ford. Not only is this

---

* "Commissioner MacIntyre: I wish you could tell us in a letter just what you think we ought to tell Congress in a situation like that about these consumer protection laws such as the Wool Products Labelling Act; the Textile Fiber Identification Act, the Fur Labelling Act, the Flammable Fabrics Act.

Mr. Schulz: I didn't mention that one. I think that is an important one.

Commissioner MacIntyre: How do you distinguish it?

Mr. Schulz: Because that deals with physical health.

Commissioner MacIntyre: But consumer information you don't care about?

Mr. Schulz: No, I care about it, but I think it is more important in some areas than in others.

Commissioner MacIntyre: I thought maybe there was some reason for distinguishing it."

FTC Consumer Hearings, Nov. 12, 1968, Afternoon Session, transcript pages 137-138.

episode indicative of the callous lack of concern for a matter affecting the fundamental health and safety of the American consumer, but it is an example of the lengths the Chairman will go to protect those interests more dear to his heart, and the brashness with which he will cloak his activities. That rayon is right now on the backs of American men, women and children who are unaware that it is dangerously flammable.

Apart from the failure to attack important problems, the FTC has failed on every aspect of the reasonable priority test described above. It has not focussed on matters which involve physical health and safety, as shown by the above chart and as demonstrated by such failures as the avoidance of any significant action in the area of medical devices. The FTC has not favored the poor or the elderly except for the recent Washington D.C. report. It has not given appropriate attention to the largest companies.

FTC claims of priority planning for the benefit of "those most in need" is a typical example of Commission empty rhetoric. Indeed, the only example the agency can come up with in the annual report of 1967 is that attorneys assigned to the field offices sought out opportunities to address meetings of business and consumer groups to give them a clearer understanding "of the FTC's purpose." 1967 FTC Annual Report, p. 67. The idea is to alert these people of trickery, which the FTC points out hurts the low income people the most. But poverty lawyers in Boston, for example, report virtually no such activity in the ghetto areas. In any case, lower class people are generally not organized into consumer groups. An analysis of the groups addressed by the Commission's Chairman (see section on business collusion) indicates the more likely audiences.

Aside from the wool and textile concentration and the watch chain country-of-origin identification examples above, there are a large number of specific examples of FTC passivity. For while the Commission either ignores or delays requisite enforcement activity against Geritol, analgesics, Firestone, the home improvement frauds, auto warranties, medical devices, the ads mentioned in the first section, and so on, it has spent great sums of manpower and money on the following trivial matters which have been extracted from FTC News Summaries over the past four years:

1/ From News Summary No. 34, July 3. 1964:

> The Federal Trade Commission has ordered Korber Hats Inc., Fall River, Mass., to stop using the word "Milan" to describe the material of men's straw hats not manufactured in Italy of wheat straw."

2/ From News Summary No. 25, Nov. 4, 1965:

> Parfumerie Lido, Inc., 115 W. 30th St., New York City, is charged in a Federal Trade Commission complaint announced today, with misleading and deceiving the public as to the identity of its toilet preparation." (resemblance to French names).

3/ From News Summary No. 2, January 26, 1966:

> Ogus, Rabinovich & Ogus, Inc., 304 E. 45th St., New York City, has consented to an order forbidding it to falsely invoice and advertise fur products....
>
> The Commission's complaint charges that the concern has omitted and abbreviated required information on invoices covering various fur products."

4/ From News Summary No. 19, June 17, 1967:

> The Federal Trade Commission has issued a consent order forbidding Adrian Thal, Inc., 345 - 7th Ave., New York City, a retail furrier....
>
> They are charged in the FTC's complaint with: omitting and abbreviating required information and setting it forth in improper sequence on labels. Making fictitious pricing and savings claims and omitting required information in newpaper advertisements."

5/ From News Summary No. 6, Feb. 8, 1968:

> The Federal Trade Commission has issued its consent order forbidding Alex Kirschner, a paint and varnish brush manufacturer trading as Kirschner Brush Co., at 58 W.

15th St., New York City....

The Complaint charges that, contrary to these representations:

1/ The brushing part of the brushes marked "Pure Chinese Bristle" is not made entirely of hog bristle imported from China, but is in fact composed of a mixture of bristle and some other material; and,

2/ The brushing part of the brushes marked "All Pure Bristle" is not made entirely of hog bristle...."

These examples are not extreme but are quite typical of FTC priorities. They were selected almost at random from a larger sample. A study was made based on this sample, a summary of which is reproduced below. The sample consisted of all cease and desist orders from July 3, 1964 to June of 1968. These orders were divided into two categories: 1/ textile and fur cases (except for flammable fabrics) plus cases which involved country of origin misrepresentations and 2/ all other misrepresentations. It is worth noting that the all other misrepresentations category is not in the least devoid of trivia itself, but the first category generally includes only those matters which are unimportant to the American consumer relative to the many things happening in American ghettos or, for another example, on nationwide TV.

The "all other deceptive practices" category is already less than half of the total number of orders issued over this four-year period, but the category can be broken down further. The first chart below presents the number and progression of the first two categories and the second chart below attempts to analyze further the "all other" grouping. When dismissals, the selling of re-used golf balls and oil, the use of fake prizes to entice people and mislabeled soldering irons are subtracted, there are only some 188 cases left from the total of 562 formal enforcement actions over these four years. Of these 188, 30, or almost 1/6, are in the Washington D.C. area. The

(Text continued on page 37.)

# ENFORCEMENT ANALYSIS*

| | Consent Orders | C & D Orders** | Textile and Fur*** case or matter involving country-of-origin protection for business interests | All other deceptive practices |
|---|---|---|---|---|
| Last half of 1964 | 77 | 28 | 60 | 45 |
| 1965 | 75 | 27 | 49 | 53 |
| 1966 | 108 | 22 | 58 | 72 |
| 1967 | 106 | 32 | 78 | 60 |
| Last half of 1968 | 72 | 15 | 41 | 46 |
| TOTAL | 438 | 124 | 286 | 276 |

* Source is all FTC News Summaries over the period indicated

** Normally computed from initial decision stage

*** Does not include flammable fabrics

## Further Analysis of "Others"*

| | |
|---|---|
| TOTAL "OTHERS" | 276 |
| minus dismissals | 31 |
| minus re-used oil and golf balls | 11 |
| minus fake prizes, fake "regular" price tags, mislabeled soldering irons, etc. | 46 |
| | 188 |

Of the 188 left of potential importance, 30 are in the vicinity of Washington D.C.

Of the 158 potentially important matters outside Washington D.C.:

| | |
|---|---|
| flammable fabrics | = 28 |
| bait and switch | = 25 |
| collection agencies | 22 |
| aluminum siding | = 19 |
| chinchillas and insurance | = 17 |

* Source is all FTC News Summaries from July 1964 to July 1968.

rest of the nation accounts for the other 158. Of the 158 all but about 40 fall into one of six categories.* Five of these categories represent real and important, although very specific, deceptive practice problems. The sixth is the rather primitive bait and switch tactic which is of some importance.

But even the statistics regarding these five areas are illusory. The most important category, for example, is probably the home improvement frauds. But the 20 or so cases treated by impotent enforcement procedures have not even scratched the surface. These frauds are so widespread** and so severe in their effects that people (usually those who are poor and trying to raise the standard of their home and neighborhood) are virtually robbed of everything they own. Often their house is taken, their wages garnished. A number if them commit suicide every year. The effect of the racket on the victim is similar to the impact of the chinchilla frauds (see appendix 14 for sample letters from complainants), but it is much more extensive and the abuses are particularly aggravated throughout America's ghettos. Further, the situation has been getting progressively worse for a number of years. The Commission's response to this need, aside from the five or six scattered and toothless*** orders issued each year as a gesture is contained in the Chairman's response to Senator Magnuson's appeal for action:

---

* See appendix 11 for breakdown and pattern over time.

** "An official of a large lending institution has estimated that there are over 50,000 firms engaged in the sale and installation of residential siding and storm windows." Letter from Chairman Dixon to Senator Warren Magnuson, Nov. 28, 1967. "The Consumer Council's Report lists home improvement fraud as one of the biggest areas of consumer deception today." Commissioner Mary Jones, Non-Agenda Matter Re: Home Improvement Cases, Feb. 8, 1967.

*** "The home improvement situation is one of these in which the ultimate enjoining of fraudulent practices is not an adequate deterrent to the unethical operator." Letter from Chairman Dixon to Senator Magnuson, Nov. 28, 1967.

> Due to major manpower commitments to the packaging and cigarette programs, the District of Columbia Consumer Protection Project, the automobile warranty and softwood lumber inquiries, bait and switch practices in the sale of frozen food and other promotions, the insurance investigation, and many other efforts reflecting a high degree of public interest, I can give you no assurance that additional personnel can be assigned to attack this swelling workload promptly. Letter from Chairman Dixon to Senator Warren Magnuson, Nov. 28, 1967.

Bait and switch tactics in the sale of frozen foods?

Chairman Dixon's attitude is further amplified later in his response both to the problem and to the suggestions by Commissioner Jones and others that the FTC intensify its enforcement powers for cases of this sort involving personal fraud. Dixon wrote to Senator Magnuson:

> One important factor, constantly on my mind, is that while much of our effort is in the interest of the consumer, the great majority of honest, reliable home contractors in the country are equally deserving of this protection. Letter from Chairman Dixon to Senator Warren Magnuson, Nov. 28, 1967.

The Commission gives much lip service to the final factor in a rational priority system, the size of the company involved in the transgression (see section on misrepresentations). Yet in actual fact the FTC does very little when violations involve larger companies unless those violations are extremely trivial in nature.

The many examples of deceptive ads or at least marginal ads listed in the first section of this report primarily originate with larger companies. A cursory examination of FTC actions reveals the extent of its fear or friendship with big business.

Appendix 4 analyzes the size of all companies on the FTC docket for the first quarter of 1968 in terms of sales. 29 of the 33 companies involved are so small that they are not

listed in any major financial directory, which means that their total assets are below $500 thousand. Only one company had sales of over 500 million.

The reluctance to go after big companies is often caused by a fear of their vast staffs of brilliant legal manpower. This fear is particularly strong when formal action is envisaged. But there are, in addition, instances of outright pressure from various corporate or legal contacts, often exercised through the Congress.

In a letter dated October 25, 1968 to John Schulz, Chairman Dixon answered a question asking for the size of all deceptive practice respondents in terms of annual sales by admitting that "annual sales are not maintained as general information in deceptive practice matters. This is simply because sales volume is frequently only one of many considerations in assessing the impact of a particular practice." In other words, since this is only one of several elements in a rational priority system, it is not computed at all.

## 3. Failure to Enforce with Present Authority

The Federal Trade Commission's failure to perform its enforcement duties properly under existing law has several aspects. For one thing, there has been a general decline of formal enforcement activity and an unwise shift towards greater reliance on "voluntary" enforcement tools. Even worse, compliance practices have also become almost entirely voluntary. Finally, all enforcement programs are vitiated by excessive delays.

### A. Decline of Formal Enforcement Activity

The decline in formal FTC enforcement activity can be traced back to the early 1960's. Since that time, formal activity has not only declined relative to such indicators of need as the GNP, the growth of the advertising industry, and the increase in the number of applications for complaints received, but has declined in absolute numbers. Except for a brief resurgence in 1967, the number of complaints issued by the Bureau of Deceptive Practices has been steadily declining since 1963 (see chart below). This is in the face of unprecedented economic and advertising growth. Such decline is not indicative of increasing compliance with the Commission's laws, for the applications for complaint have been steadily rising.

COMPLAINTS ISSUED BY THE COMMISSION

| Fiscal Year: | 1963 | 1964 | 1965 | 1966 | 1967 | Through 3d qtr. 1968 |
|---|---|---|---|---|---|---|
| Restraint of Trade | 230 | 95 | 26 | 94 | 124 | 11 |
| Deceptive Practices | 129 | 129 | 66 | 48 | 108 | 27 |
| Textiles and Furs | 72 | 85 | 69 | 52 | 89 | 44 |
| TOTAL | 431 | 309 | 161 | 194 | 221 | 82 |

FTC Annual Reports, passim.

Another indication of the increasing passivity of the FTC

in the face of increasing consumer, ghetto and advertising problems, is the trend of investigative activity. The number of investigations completed has steadily and sharply declined from 1964 to the present. This is illustrated by the following chart:

COMPLETED INVESTIGATION CASE LOAD

| Fiscal Year: | 1964 | 1965 | 1966 | 1967 | Through 3d qtr. 1968 |
|---|---|---|---|---|---|
| Restraint of Trade | 467 | 729 | 492 | 321 | 139 |
| Deceptive Practices | 1090 | 981 | 981 | 737 | 422 |
| Total | 1557 | 1710 | 1473 | 1058 | 561 |

FTC Annual Reports, passim.

Finally, FTC passivity is reflected in the increasing scoping effect in its enforcement efforts. The intense and increasing scoping phenomenon can be seen in the chart below. The applications for complaint are now in the thousands in the deceptive practices area, (6,399 in 1966 and now approaching 9,000). Yet investigations now cover only one in every eight or nine applications for complaint. After subtracting Congressional applications which are rarely ignored, this leaves an even lower ratio for response to applications from the public. Note that this application figure does not include every crank letter but is pre-screened to include only those with apparent relevance and appropriate jurisdiction. After this elimination not even one in ten of the investigations results in a cease and desist order. One out of four, however, does result in an assurance of voluntary compliance (see next part of this section for description). Altogether then, about one of every thirty five applications for

complaint results in an assurance of voluntary compliance, and approximately one out of every one hundred twenty five applications for complaint results in formal action of any sort.

The chart below also demonstrates the trend of this scoping pattern over time. The direction is self apparent.

DECEPTIVE PRACTICE CASES

| Fiscal Year: | 1961 | 1962 | 1963 | 1964 | 1965 | 1966 | 1967 |
|---|---|---|---|---|---|---|---|
| % of avowed applications for complaint that are investigated: | 30% | 19% | 25% | 23% | 19% | 14% | 11% |
| % of avowed applications for complaint that result in the issuance or approval of a complaint:* | 8% | 4% | 4% | 6% | 4% | 2% | 3% |

FTC Annual Reports, passim.

One qualifying point concerning the scoping trend deserves comment. For the existence of some scoping can indicate a coherent and rational screening system of priorities. Even the existence of such a system, however, would not alter the fact that less was being done relative to apparent need in terms of numbers. In any event, the section above on priorities demonstrates that this explanation is not available to the FTC.

It is true that the numbers referred to in the preceding charts are not in themselves conclusively condemnatory. It is only in combination with the rising need for action, the lack of a priority system, and other factors treated in this report that they reveal the FTC's administrative failure. Chairman Dixon's increasingly frequent criticisms of the "numbers game" are justified in so far as they apply to the fallacy that more prosecutions of insignificant

---

* . Not all of these complaints result in the issuance of formal orders.

cases represents significant activity. But this does not work in favor of the Commission in light of overall decreasing trends and in light of the other findings of this study.

The 1965 Civil Service Report's evaluation of the Commission's work load substantiates our findings.

> The traditional measure at the Federal Trade Commission has been casework expressed in such terms as numbers of 7 digit investigations initiated (this is a code identification of cases designated for formal investigation), complaints issued, and cases docketed for litigation. By all of these measures caseload has been declining. Several managers expressed the fear of running out of work.
>
> ...
>
> With the changing mission orientation since 1960 there has been a decline in formal cases from 1,931 that year to 1,421 in fiscal year 1964. During this same period, the number of cases docketed for litigation also decreased: from 503 to 49. (Using the same years, employment increased from approximately 700 to 1,150.)
>
> Despite these caseload and employment trends, the agency expresses itself in dire need of more employees while giving repeated assurances that the employees in the enforcement bureaus are fully occupied, if not with casework, with providing advice and counsel within the framework of the "new approach." Beyond these assurances of management we must also consider the following, in concert with the workload data above, in making a judgment as to whether the Federal Trade Commission has enough, or perhaps too many employees to accomplish its mission:
>
> (1) On the basis of widespread comments there appears to be less than full utilization of Hearing Examiners
>
> (2) High officials spoke openly of the rapidly approaching time when there would be no more case work to occupy the staff
>
> (3) Trial Attorneys, as a reflection of this, expressed concern that they would soon be out of work
>
> (4) It has been suggested, in consideration of the above, to abolish the Bureau of Industry Guidance. This suggestion is perhaps motivated by the apparent paradox that this Bureau was established to provide the kind of advice to industry that the Federal Trade Commission claims is accounting for that part of the time of the staff in the enforcement bureaus not devoted to cases.

(emphasis added) Civil Service Commission Report, p. 26 (1965).

Since 1965, when this Report was issued, the situation has deteriorated even more (see above and agency's own statistics in appendix 2), even though the strong language of the Report above indicated an already extreme limit had been reached. All of the suggestions of the CSC were ignored.

## B. Shift to Voluntary Enforcement

The general decline in formal enforcement activity at the FTC is matched by a shift in emphasis to greater reliance on "voluntary" enforcement tools. This shift is usually rationalized as being the most efficient means of enforcing the law. Nothing could be further from the truth.

The Commission's major induvidual voluntary enforcement tool, the assurance of voluntary compliance, lacks any sort of formal sanction. A businessman who gives an assurance merely promises (not even under oath) that he will not repeat the specific deceptive practice challenged by the Commission. A new violation generally brings about another assurance. . .

The so-called industry-wide approaches, guides and trade regulation rules, do to some extent reduce the incentive for a number of competing businessmen to engage in common in a particular deceptive practice. But guides and rules themselves are sanctionless, making their effectiveness seriously questionable. (For an unscrupulous businessman has to deceive consumers even when his competitors are dealing honestly.) In other words, the use of such methods of enforcement permits commercial wolves to take not only one "free bite" (as is the case even with normal cease and desist orders since even they do not inflict penalties for past offenses) but two or three.

As actually administered, the voluntary enforcement tools are even more inadequate. Trade regulation rules and assurances are often poorly drafted, the former sometimes being too broad (nothing more than restatements of the statutory provisions they are supposed to elucidate), the latter too narrow (forbidding only the specific deceptive activity found to have occurred, rather than other likely tactics as well). Advisory opinions

are frequently based on inadequate background information and tend to share with trade regulation rules the fault of being mere paraphrases of vague statutory language.

The Commission's methods of checking compliance with outstanding guides, rules, assurances and advisory opinions are abysmal. Under the latter (individual) methods, compliance checks are done by requiring compliance reports, thus sharing the flaws of the cease and desist order compliance program to be discussed later in this section.

Compliance with guides and trade regulation rules is policed by broad-gauged (industry-wide) compliance surveys conducted by the smallish staff of the Bureau of Industry Guidance. The problem is that these surveys tend to be interminable and nothing is done about individual violations discovered until a survey is completed.

For example, the Commission promulgated Tire Advertising and Labeling Guides which became effective in July, 1967. Ever since, according to Mr. Thomas Egan, the (single?) FTC staffman handling it, a broad survey has been going on into the advertising claims of some 200 tire brands. Interview, August, 1968. Said Mr. Egan, "no efforts to secure compliance with these Guides will be made until the survey is complete," and he would not dare to venture a guess as to that far distant date.

Mr. Egan made this statement, surprisingly, in response to a project member's queries about a recent Firestone ad claiming that Wide Oval Tires stop "25% quicker." Mr. Egan himself had strongly suggested (although he wouldn't say it explicitly) that such an incomplete comparison is a clear violation of Section 5(b) of the Tire Advertising Guides, which reads in

part "Dangling comparatives should not be used."

The FTC's inadequate handling even of its favored voluntary enforcement tools suggests that the Commission's major reason for adopting them was to enable the Commission to take some action in areas in which spiralling demands have made it impossible to hold the fire under the relatively more vigorous cease and desist order procedure. It probably also reflects the sort of solicitude towards business interests discovered throughout this study.

C. Inadequate Use of Formal Enforcement Tools

Even Chairman Dixon realizes that a voluntary enforcement program will not work unless backed up by some strict, binding enforcement techniques, for he stated in the 1967 Senate Appropriation Hearings:

> Now the follow-through comes. If most accept this (rule or guide), but if one, two or three or four (or. . .?) do not, we must get tough here, because there is no reason to expect the majority to stay in line long if others do not comply.
>
> -- 1967 Senate Appropriations Hearings, p. 476.

The problem is, the Commission does not get tough with those who violate rules and guides. For example, the normal way of dealing with these violations is to ask their perpetrators to submit assurances of voluntary compliance (not even simple cease and desist orders)! Interview with Chief of Compliance Division, Bureau of Industry Guidance, July, 1968. This is completely unjustifiable, since even on the Commission's own terms one major reason for using voluntary enforcement tools is that they inform otherwise innocently ignorant businessmen about the requirements of law. If a businessman is on notice about the law, his violation should not be dealt with as though it were essentially innocent (which is what the

More important is the fact that the Commission's relatively powerful enforcement tools and sanctions are under-used and ill-applied. The remainder of this section will show (1) that the FTC's program of insuring compliance with outstanding cease and desist orders is grossly inadequate; (2) that the Commission makes insufficient use of its maximum enforcement powers -- to seek preliminary injunctions and criminal penalties; and (3) that the Commission's explicit enforcement philosophy, exemplified by the above-named patterns of regulation, is erroneous.

The Federal Trade Commission does not have a viable program of checking compliance with cease and desist orders. To begin with, compliance checks are made only of a relatively small number of recent orders. Yet, since cease and desist orders remain valid permanently, they could provide the basis for growing enforcement effectiveness at the FTC. All that would be for the Commission to decide to expand its compliance check program to cover all outstanding orders.

As a matter of fact, the FTC recently considered doing just this -- and decided against it. In its Budget Justifications for Fiscal 1969, it states that:

> The initiation of a continuing and comprehensive survey of existing orders is essential to the effective operation of the Commission's compliance program (!). . .
>
> (But) despite the value of such a program, funds to initiate it are not being requested at this time, and it will be deferred in favor of projects considered of higher priority (!) (Emphasis supplied)
>
> -- FTC Justification of Estimates of Appropriations, Fiscal Year 1969, pp. 95-96

The second problem with the compliance program is the method of checking compliance with outstanding orders, which relies exclusively on requiring respondents to file "compliance reports," reciting that their objectionable practices have been abandoned

and that effective steps have been taken to preclude recurrence. Since the accuracy of reports is not independently verified by the FTC and no penalty is threatened or imposed for false reports per se, this policing device is so inadequate as to be a sham.

The FTC's methods of deaing with cases of non-compliance are also grossly inadequate, as revealed by analysis of available statistics and by a candid interview with Mr. Barry W. Stanley, Chief of the Division of Compliance of the Bureau of Deceptive Practices. The statutory penalty provided for non-compliance with cease and desist orders is the exaction of "civil penalties" of up to $5,000 per day. FTC Act Sec. 5(l). The Commission invokes this sanction so seldom, however, that it has negligable impact, as the following chart indicates; it also shows that most penalties exacted in the few suits that are brought are relatively small and that there is a strong trend over the last two years against bringing them in any but the textile and fur area.

Total Civil Penalties -- July 1964 - July 1968

| News Release Reference | Area or Company | Money Damages |
|---|---|---|
| 10-1-64 | Vitasafe | $18,000. |
| 10-9-64 | Davidson Vending | 5,000. |
| 10-14-64 | Time, Inc. | 30,030. |
| 2-23-65 | W.B. Saunders | $20,000. |
| 4-5-65 | American Candle Co. | $1,500. |
| 4-28-65 | McFadden-Bartell | $35,500. |
| 11-4-65 | Chun King | $70,000. |
| 12-14-65 | Americana | $100,000. |
| 3-2-66 | wool | $30,000. |
| 6-4-66 | fur | $5,000. |
| 8-8-66 | wool | $20,000. |
| 8-8-66 | flammable fabrics | $35,000. |
| 12-16-66 | flammable fabrics | $10,000. |
| 2-2-67 | flammable fabrics | $12,000. |
| 5-6-67 | wool | $,500. |
| 5-22-68 | wool | $15,000. |
| TOTALS: | 16 cases | $416,530 |

This record must be evaluated in the context of a large number of violations (more or less serious)--Mr. Stanley stated that "hundreds of notations each year" were detected (usually by complaints from the public or competitors) but dealt with "informally." Informal handling, he explained, means approximately, "Go and sin no more"--thus giving the commercial wolf another free bite.

The most blatant current example of this general sort of compliance activity is the much-publicized Geritol case. In 1967 after years of "investigation" and litigation, the FTC had ordered the manufacturer of Geritol to stop misrepresenting the product as a generally effective remedy for tiredness. In spite of this order, later affirmed by the Court of Appeals, Geritol's T.V. advertiements have changed little in emphasis, as most viewers will attest. In an unusual departure from normal procedure--based possibly on impatience with the lethargy of compliance division staff, the Commission itself recently held "a public hearing to hear oral argument to determine whether T.V. commercials for Geritol violate its order to 'cease and desist.'" FTC News Release, Oct. 29, 1968. After the hearings, the Commission issued a finding that the Geritol commercials since the order

> not only failed to comply with the order, but . . . are no less objectionable than the commercials denounced by the Commission when it issued its original order herein. (Emphasis supplied.) FTC News Release, Dec. 13, 1968.

Having discovered a clear violation of an outstanding cease and desist order, did the Commission announce that it would seek "civil penalties" against Geritol's makers? No, it merely warned

them to stop "flouting" the order and to file by Jan. 31, 1969 a report showing what steps were being taken to tone down the commercials; the Commission also threatened [sic] to take steps to assure that its orders "do not continue to be flouted by respondents" in case the report is inadequate. One may well ask what lesson other concerns under FTC orders will learn from the highly visible Geritol case--no doubt, that they can feel relatively free to violate those orders without fear of strict FTC response.

The administrative picture shows that the enforcement philosophy of the staff chief in charge of compliance with cease and desist orders is seriously misguided. In fact, in interview, Mr. Stanley gave the impression that he conceives of cease and desist orders merely as administrative directives: violations are not a serious matter in themselves; rather all that has to be done is to seek to secure future compliance by gentle persuasion through time.

This view is just plain wrong, for at least two reasons. For one thing, cease and desist orders represent authoritative judgments of the Commission (and often the courts) that a particular practice constitutes a violation of law. As such, they must be viewed as binding proscriptions on repetitions of the same sorts of conduct. To permit respondents to play fast and loose with such orders is to dissipate whatever authority and integrity the Commission possesses as a Governmental agency.

Even more important is the fact that cease and desist orders presently represent the FTC's most potent generally available enforcement tool. For this weapon to be at all effective, however, a belief in respondents and potential respondents that

violations will be severely dealt with. The permissive philosophy and practices of the compliance staff produce the opposite belief, and as a result render the Commission's overall enforcement program even more impotent than it might otherwise be.

It is difficult to avoid drawing a pessimistic conclusion from the enforcement attitudes expressed and implied by the actions of the staff leadership in the compliance division--to wit, that these personnel are overly solicitous of the interest of the businessmen at the expense of those of the consumer. This sort of attitude is found elsewhere in Commission enforcement programs, as is discussed in detail above. It suggests that changes in top staff personnel will have to be made if the Commission is to begin to perform its consumer protection tasks properly.

The second flaw in the FTC's formal enforcement program is its serious underutilization of the strongest enforcement weapons it does possess in the especially important areas of food and drug products and flammable fabrics. First, its record is abysmal as far as seeking criminal penalties is concerned: it makes use of this weapon about as frequently as it seeks civil penalties. Thus in fiscal 1967, no criminal cases were brought, one (involving the fur act!) was filed in fiscal 1966 and none in 1965. FTC Annual Reports, 1967, p. 91, 1966, p. 81, 1965, p.63.

Second, it almost never seeks preliminary injunctions, although empowered to do so under all textile and fur acts as well as the food and drug provisions of the FTC Act.

Section 5(c) of the latter law gives the Commission an additional power analogous to that of seeking preliminary injunctions, which can be invoked when respondent seeks court reviews of cease and disist orders, to terminate its challenged activities pending the outcome of judicial review. To our knowledge, the Commission has not invoked this power at all in the last several years.

An earlier part of this section suggests that at least one high FTC staff man (the Chief of the Division of Compliance, Bureau of Deceptive Practices) has a seriously misguided enforcement philosophy. Interviews with other Division and Bureau Chiefs reveal that this philosophy positively permeates the top echelons of the Bureaus of Deceptive Practices, Industry Guidance and Textiles and Furs. This poses a serious threat to reform within the agency, and is thus a grave matter.

Even more grave is the fact that a similar view is shared by a majority of the Commissioners themselves. This is indicated by their interview statements, and by innumerable speeches (especially those of the Chairman).

It is further expressed in the following exchange between the majority and Commissioner Elman over his recommendation that the Commission make a legislative proposal to the 90th Congress to centralize the prosecution of consumer fraud in a single federal agency (not the FTC).

Mr. Elman had been concerned with the fact that presently a particular fraud might simultaneously be susceptible to prosecution by the Justice Department, administrative proceedings by the FTC, action by the Post Office, etc. The majority, in purported response (their discussion was actually mostly beside the point), engaged in a general discussion of the relative effectiveness of criminal penalties and Commission's industry-wide and "voluntary" approaches as enforcement tools. In that discussion, the following amazing statement appears:

> One of the great advantages of the FTC's administrative responsibilities to protect the consumer is that the Commission is not limited to action involving "prosecution for consumer frauds" as Commissioner Elman proposes. The needs of consumers go far beyond protection from fraud. Thus the Commission has power to investigate, hold public hearings, issue guides, prepare informational material and take other informal measures to solve a problem confronting consumers. These powers are far more efficacious than the single power to prosecute after the problem has taken its toll of consumers even though this power is also an essential element of law enforcement.

(Emphasis supplied.) Commission Statement at 3.

This statement contains a tangled mass of misstatements, distortions and half-truths which cannot all be discussed here. What can and must be commented on is the Commission majority's apparent belief that such enforcement efforts as issuing industry guides are more effective than criminal penalties in protecting consumers.

This is simply not true. Properly viewed, the problem is one of general deterrence, that is, of keeping businessmen from perpetrating their first set of frauds. In discussing general deterrence, it is irrelevant to focus on those who have already broken the law at a specific point in time; a regulator's major concern must be to hold the line against those who have not yet broken the rules. It thus misses the point for the Commission to criticize criminal prosecutions because they always take place <u>after</u> someone has broken the law. Rather, it should focus on the extent to which such a prosecution will keep other potential violators in line.

This is best demonstrated by a hypothetical example. Assume that businessman A violates the FTC Act. In case I, he is prosecuted and convicted of consumer deception (under an as-yet unwritten amendment to the Act). In case II, the FTC tells him to stop, requiring him only to write a letter saying "I've stopped and won't do it again (= an assurance of voluntary compliance)." Now compare the likely impact of these differential ways of treating A on businessmen B, C, D, etc., who all may be considering a little consumer deception themselves. There is little doubt that the enforcement method used in case I is more effective in keeping the maximum number of businessmen in line.

It thus seems clear that since tough enforcement is much more efficient in its broad impact than a mild, voluntary approach, it is highly irresponsible of the Commission to neglect the former in favor of the latter, while at the same time complaining of inadequate resources. This is especially true since all criminal prosecutions sough by the FTC would actually be carried out by the Justice Department, thus permitting the Commission to tap some of the Justice Department's resources.

In addition to all this, the Commission majority's above statement seems to imply that FTC voluntary enforcement methods, unlike criminal prosecutions, are able to stop deceptive practices before they have a chance to harm consumers.* This entire report demonstrates how far such an implication would be from the truth, because of the prevalence of inadequate means of detecting violations and compliance, inordinate delays in acting and lack of publicity.

---

* To the extent that the statement intends rather to make the different point that fraud laws do not cover all harmful anti-consumer practices, it is of course correct. The answer, however, is not to oppose criminal penalties, but to advocate expanded categories of consumer crime.

D. Failure to Enforce Promptly

In deceptive practice cases it is absolutely necessary, due to the enforcement mechanisms of the FTC, to process claims with the utmost speed. The FTC is empowered to enforce its mandate through the issuance of cease and desist orders. The cease and desist orders are not of themselves punitive measures. They are merely notices to advertisers to cease and desist from stated practices. Thus, the FTC enforces its mandate by bringing civil suit against violations of standing cease and desist orders for penalties as specified in the FTC Act. What this means is that if an advertiser engages in a given practice he is subject to FTC action through procedures which give him adequate notice of imminent punitive measures. If the process of seeking cease and desist orders and checking compliance with them is delayed for several years it becomes seriously ineffective. A cease and desist order accompanied by enforcement which takes 3 or 4 years to effect is not going to deter in the slightest a typical ad campaign which by that time has been over for two or three years. Only longstanding practices like the perennial Geritol ad are subject to effective enforcement by this method. Geritol's maker is now flaunting a standing cease and desist order and is not being sued under the penalty provisions (see sections of Business Collusion and voluntary assurances).

Following is a chart revealing the average delay factor for deceptive practice cases on the docket in the first quarter of 1968. Note that these cases are minimally contested by the companies. The average number of years from investigation to complaint issuance in deceptive practice cases appears below. This figure alone is over two years. And these are not cases which involve the kind of research and preparation demanded in, say, a restraint of trade case.

The total delay factor averages over 4 years, and this includes only the time from the investigation to the initial decision of the Commission on the issuance of a cease and desist order. There are still

(Text continues on page 57.)

## DECEPTIVE PRACTICES TIME ANALYSIS

Code: violation 1 = general

" 2 = insecticide

" 3 = trade mark

" 4 = wool act

" 6 = fur act

" 7 = flammable fabrics act

" 8 = insurance

" 9 = section 12 of FTC act

" 10 = textile act

Time Code: A = average in years from investigation to complaint issuance

B = average in years from the complaint to the start of hearings

C = average in years from the start of hearings to the conclusion of evidence

D = average in years from the conclusion of evidence to the initial decision

TOTAL = average time in years from the investigation to the initial decision

Chart includes all cases in process during the first four months of 1968

| Violation | Number | No. Dismissed | A | B | C | D | TOTAL |
|---|---|---|---|---|---|---|---|
| 1 | 38 | 7 | 2.26 | 1.56 | 0.14 | 0.31 | 4.37 * |
| 2 | -- | -- | -- | -- | -- | -- | -- |
| 3 | -- | -- | -- | -- | -- | -- | -- |
| 4 | -- | -- | -- | -- | -- | -- | -- |
| 5 | -- | -- | -- | -- | -- | -- | -- |
| 6 | -- | -- | -- | -- | -- | -- | -- |
| 7 | -- | -- | -- | -- | -- | -- | -- |
| 8 | -- | -- | -- | -- | -- | -- | -- |
| 9 | 5 | 0 | 3.5 | 1.3 | 0.17 | 0.33 | 5.20 |
| 10 | 1 | 0 | 4.1 | -- | -- | -- | -- |
| Total | 38** | 7 | 2.26 | 1.56 | 0.14 | 0.31 | 4.37 |

* Not sum because some are in stages A, B, C, or D now

** 9's and 10's are also classed as 1's

further measures available to the company, and some have stretched out litigation over 20 years and more.* Until the end of that four year or more stretch, the company can flaunt the FTC. There is no punitive power until after the establishment of the order and very few are going to take seriously the enforcement power of the agency until actual sanctions are imminent.

Even in those areas where deceptive practices are of long standing or where companies are too small to oppose the Commission legally, there are other delay factors built into the Commission's present operation which dull enforcement effectiveness. For after the cease and desist order is established, or the consent order, etc., there is a need to check compliance. Failure to comply beyond this point should result in a civil suit by the Justice Department for statutory penalties. (See section on civil penalties , p. 118, for failure to act in this area.) But here too there are delays in the process of seeking and verifying compliance. Technically, there is a requirement that compliance reports be filed within sixty days by the company demonstrating adherance to the order. But many cases in FTC docket files indicate that long periods of time - - often a year or more - - elapse between the effective date of cease and desist orders and the date of acceptance of a "satisfactory" compliance report. In a substantial fraction of the cases studied, no compliance report is apparently ever filed.

One of the Commission's indirect enforcement weapons is the power to inquire and investigate. To this end, Congress has granted the Commission broader investigatory powers (See Section 6(b) of the FTC Act) than any other regulatory agency. But here, as with the direct enforcement means, delay minimizes much of this power. The reasons behind

---

* Section 5(c) of the FTC Act gives the court power to: "make and enter a decree affirming, modifying or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, and to issue such writing as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite." Thus, the Commission has the power to petition for an ameliorative order to take effect immediately pending further long drawn appeals. To our knowledge it has made no use of this power in recent years.

this delay are less likely to be sloth, inefficiency or bad law than the delay problems above. They are more likely to involve direct business collusion, with delay serving as a weapon to cloak an issue or problem in secrecy and to avoid action on it. The use of the excuse that something is "under study" for years and years allows the Commission to keep the matter from public scrutiny under an exemption in the Freedom of Information Act while at the same time giving the impression that something is being done or will shortly be done.

The Commission's behavior with regard to automobile advertising, drugs, auto warranties, food and gasoline games, tires, medical devices, and many other problem areas can be traced to purposeful delay to protect certain interests. Some of the delays are necessary, but a clear pattern emerges from an overall examination of the data in conjunction with other findings to be discussed in the section on personnel. There is an announcement of a study into a given area with a target date specified. This is all accompanied by great fan-fare and solemn expression of concern. When the due date approaches it is quietly extended and extended again.

An investigation of the deceptive claims of analgesic companies commenced over a decade ago. Appendix 9 traces the history and disposition of the various investigations which have resulted, primarily, in four dismissed complaints after years of tests and years of still continuing deceptive ads. (see FTC News Summary of 4-13-65).*

The deliberate suppression of the report on auto warranties (see sections on secrecy and on personnel) is another example of delay for political purposes. The report was initiated in 1965 and was only released in late 1968 because Ralph Nader acquired a copy and pre-released it at that time. No one can or would dispute that a report should be divulged to everyone only after it has been completed. But the FTC first submitted the report, confidentially, to industry interests so that they

---

* For other maneuvering, see FTC News Summaries of 7-7-67 and 11-30-67 as well as appendix 9.

could check the accuracy of certain data without giving consumer groups (eg the Consumer's Union) the same opportunity, and then delayed release although the report was in fact in final form.* The real reason for the proposed plan for suppression lay in the contents of the report, which was highly critical of GM, Ford and Chrysler. Whether release would have eventually occurred is academic now, but there is little doubt based upon our interviews that Chairman Dixon was determined to suppress the report at least until after the election to avoid alienating Henry Ford II and other business interests who were contributing heavily to Hubert Humphrey's campaign.

The delay and secrecy manipulations with regard to Firestone, in the face of blatant deceptions, are revealed in an exchange of letters concerning two specific ad campaigns.

The first ad campaign by Firestone commenced in the fourth quarter of 1967. It was composed of massive circulation media advertisements headlined by the message: "Raymond C. Firestone Talks About the Safe Tire." The copy went on to say that "On November 10, 1967, the Federal Department of Transportation issued a new set of tire safety standards. Firestone tires already meet or exceed these new tire testing requirements and they have for some time. . . . All Firestone tires have met or exceeded the new testing requirements for years."

A request to Mr. Firestone for substantiation of this statement went unanswered. Letter from Ralph Nader to Raymond C. Firestone, January 1, 1968. Since the advertisement appeared first in most major news magazines in the latter part of 1967, the FTC must have known about it. In case its surveillance was wanting, the Commission was notified and a request was made of the Commission to obtain substantiating data from Firestone. Letter from Ralph Nader to Mr. Paul Rand Dixon, February 13, 1968. The argument was made that any company soliciting a customer's trust with such safety claims ought to be ready to back

---

* The report, in complete form, was pre-released by Mr. Ralph Nader in an action unrelated to the activities of this investigative group.

these claims up, especially since a reference to surpassing a specific government standard of safety increases the credibility of the claim. Refusal to produce documentation makes such an ad presumptively deceptive. In reply the FTC asked the writer for information showing the ad to be deceptive, instead of using its unique legal powers to obtain substantiation directly from Firestone. Letter from Mr. Paul Rand Dixon to Ralph Nader, February 19, 1968. This is a typical illustration of passivity by the Commission when it is asked to confront a large corporation. Chairman Dixon did say that the Commission had opened an investigational file, but not an inquiry under Sec. 6B; the question of an inquiry could not be decided "until an investigation is completed," according to Mr. Dixon. Letter from Mr. Paul Rand Dixon to Ralph Nader, March 26, 1968. An investigational file is automatically opened on receiving a letter of complaint -- a classification that permits all such materials to be confidential under the FTC's interpretation of the Freedom of Information Act. The nominalism here is shown conclusively by the total lack of interest by the Commission in pursuing three highly promising avenues: (a) a large number of complaints, regarding Wide Oval Tires, in the possession of Senator Gaylord Nelson; (b) failure of tests by Firestone tires conducted by Electrical Testing Laboratories for the National Bureau of Standards in January 1966; and (c) disclosure that the National Highway Safety Bureau had received results of its safety testing program that showed 8 Firestone tires failing one or more federal safety standards. (New York Times, November 30, 1968). Although knowing of these developments, the FTC did not even make an inquiry of any of these sources. The investigation was a fraud.

The second Firestone advertising campaign of deception also began in 1967 and continues to the present time. The ad touts the Wide Oval tire by saying that it "grips better. Starts faster. Corners easier. Runs cooler. Stops 25% quicker."* This is a deceptive advertising practice per se according to § 5(b) of the FTC's own Tire Advertising

---

* See Appendix 8 for illustrative advertising copy placed in the September 2, 1968 issue of Newsweek and many other national news and business magazines over a two-year period.

Guides, discussed on p. [illegible].

No investigation is necessary; no substantial allocation of time or funds are required. These ads comprise a national campaign on the part of a very large tire manufacturer via the mass media. The deception is serious, simple and clearly communicated to millions of readers and is effective in inducing purchases of this type of tire. The Commission, therefore, did nothing.

In August, the Commission was urged to act, however belatedly, against this deceptive advertising. Letter from Ralph Nader to Chairman Paul Rand Dixon, August 6, 1968. On August 15, 1968, Chairman Paul Rand Dixon replied that the matter "is receiving consideration. You may be assured that such action as may be found warranted by the facts will be taken in the public interest." Letter from Chairman Paul Rand Dixon to Ralph Nader, August 15, 1968. On September 20, 1968, Mr. Nader wrote to Chairman Dixon notifying him that a Ford Motor Co. representative had told the National Highway Safety Bureau (recorded in a transcript) that "The braking capability of the Wide Oval Tire is no greater than that of the standard tire."

Despite years of investigations and industry guides, stretching back to 1936 and extending up to 1966, the Chairman's response to a literal and specified violation is to refer to yet another investigation, thereby excusing the concealment of Firestone's answer to a legitimate citizen inquiry.

It is common to discover that a still pending investigation was used five or six years ago to justify inaction then. For instance, there is much activity now about food and gas station gimmick games. They are rather commonly deceptive in several respects, and there are often restraint of trade questions involved as well. Pressure has been building up recently and earlier this year, Rufus Wilson, Chief of the Division of General Trade Restraints, found it necessary to make the standard cooing about another investigation of promotional games in the food and oil industries. Rufus Wilson, memo. on non-agenda matter (Petroleum Report) Feb. 20, 1968. Now, in December, 1968, it appears that a staff report on this subject will finally be made public--a member of the press having secured a copy and reported on it. Advertising Age, Dec. 30, 1968, p. 1. That article reports that the Commission is also finally

considering promulgating a trade regulation rule covering these games. Of course, this means it will hold additional hearings, delaying regulation for another substantial period of time. But this is not the first time this has happened. Back in 1963 Joseph Shea, Secretary to the Commission, wrote with regard to file no. 643 7007:

> By letter to William J. Jeffrey, President, Merchanidising Marketeers, dated Nov. 15, 1963, the Commission granted an advisory opinion concerning a retail food promotion scheme.
>
> "This is to advise that that advisory opinion is rescinded. This course is required in the public interest because the subject matter of that advisory opinion is currently under investigation by the Commission."

The Federal Trade Commssion has always considered lottery type inducements, particularly when deception was involved, as violative of the deceptive practice laws. Michael J. Vitale, Chief of the Division of Gneral Practices of the Bureau of Deceptive Practices has written "...the element of consideration need not be present in order for a scheme to be illegal." "The Commission found it sufficient to establish the illegality of the scheme that '(the participant's) return would vary greatly with his willingness to take a chance.'* How then does the Commission rationalize the need to launch continuous and never-ending investigations when the only meaningful obstacle to enforcement (the legal argument that consideration is lacking or that people have to pay directly for a chance) is not at issue? Perhaps the answer can be found in the size of the companies involved in these deceptions. Some of the corporations deceiving via this means include Texas and Esso Oil and large supermarket chains.

Not only have investigations been launched in 1963 and 1968, but when pressure contined to mount from complaining consumers after the 1963 effort faded into an empty void, another investigation was launched in 1966 to fill the gap. (See FTC News Release of Oct. 29, 1966). In 1967 the Bureau of Economics requested and received authority to use § 6(b) subpoena power to gather information from the game operations. In March of 1968 the Bureau issued a preliminary report which in itself contains enough information to bring immediate action against a dozen game operators.

---

* The source is a memorandum written October 11, 1967 to the Commissioners. The full statement of the Commission's view can be found in Advisory Opinion Digest No. 45, May 18, 1966, in File No. 663 7049.

For quite apart from the [illegible] that [illegible] ust the game [illegible]m to be deceptive, there are spe[illegible] gam[illegible] ni[illegible] patently [illegible]otive even given the legality of a[illegible] al[illegible] ol[illegible] big pr[illegible]ion "Let's Go to the Races" is a ty[illegible] ex[illegible]. Qun[illegible] from a [illegible]onsumer's letter in the Bureau of Economi[illegible] yet [illegible]lea[illegible]d r[illegible]rt [illegible]arch 1968:

> ... which is broadc[illegible]over [illegible]i[illegible]n th[illegible]gh [illegible] States and in our opinion is a [illegible]d an[illegible]:ep[illegible] sc[illegible]me [illegible] hich the main factor of succe[illegible]:clus[illegible] / G[illegible] [illegible] upor [illegible]ion of atomosphere of a fals[illegible]lusio[illegible]. 'L[illegible] Go t[illegible] Races' were filmed long time [illegible] in S[illegible]ine Track[illegible] orida (which is not even now [illegible]xiste[illegible]) blic[illegible] are also that on tickets wh[illegible] they a[illegible]r[illegible], th[illegible] g horses were already pre[illegible]nged by t[illegible] ters chance to win five dolla[illegible]being abr[illegible] to ]

The facts in this letter have [illegible] substa[illegible]iat[illegible]hro[illegible] investigation of this group and the report[illegible]ins lit[illegible]y hund[illegible]:omplaining letters which outline blata[illegible]d fraudule[illegible]:ceptio[illegible] nearly every part of the country.

A final note is that [illegible]ress has help[illegible] the C[illegible]ssion to investigate this problem [illegible]ep. Dingell h[illegible]eld h[illegible]gs on the use of gasoline promotional [illegible]s, and in the [illegible]cy's [illegible]able forthcoming staff report, most of t[illegible] discussion o[illegible] e game[illegible] opposed to retail grocery store pr[illegible]ions) is h[illegible] on FT[illegible] a but on Rep. Dingell's hearings. [illegible]vertis[illegible]. 30, p. 8, col.1.

The story behind t[illegible] suance [illegible]ear[illegible] FTC report on the misgrading of so[illegible]d lumber [illegible]nothe[illegible]cation of the typical delay factors. Commiss[illegible]ts in [illegible]troduction:

> "The question of po[illegible]e misgrad[illegible]'softw[illegible]ber has confronted the Com[illegible]n almost [illegible]ously[illegible] July of 1962. On Marc[illegible], 1967 (e[illegible] adde[illegible] hearing was held on th[illegible]efore the Commi[illegible]"
> [illegible] Report o[illegible] radin[illegible] oftwood [illegible]ber, May [illegible]8, p.

The report here referr[illegible] tails the [illegible]istrat[illegible] story and is a revealing picture of th[illegible]nd and e[illegible] paper[illegible] ling which must precede even the m[illegible]entary r[illegible]:

*From a letter which was substantiated by the Bureau's other evidence and published in the "Preliminary Economic Report on the Use of Games of Chance," by the Division of Economic Evidence of the Bureau of Economics, March 1968, p. 20.