AN ANALYSIS OF THE WHEELER-LEA ACT AND ITS
ADMINISTRATIVE AGENCY, THE FEDERAL TRADE COMMISSION

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By

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AN ANALYSIS OF THE WHEELER-LEA ACT AND ITS
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INTRODUCTION

American advertising throughout its entire history has been characterized by false and deceptive representations.

The following statement made in 1933 gives evidence of the existing condition:

In the magazines, in the newspapers, over the radio, a terrific verbal barrage has been laid down on a hundred million Americans, first, to set in motion a host of fears about their health, their bowels, their teeth, their throats, their looks; second, to persuade them that only by eating, drinking, gargling, brushing, or smearing with a certain product can they either postpone the onset of disease, of social ostracism, of business failure, or recover from ailments, physical or social, already contracted.

Many of these products including some of the most widely advertised and sold, have not been only worthless, but actually dangerous.

The extent to which these deceptions have harmed and inconvenienced the American public could not indefinitely be overlooked. The seriousness of the problem finally brought about federal legislation.

1 Arthur Kallet and F. J. Schlink, 100,000,000 Guinea Pigs. New York: The Vanguard Press, 1933, p. 3.
The most important legislation by the federal government dealing with advertising was the Wheeler-Lea Act of 1938 as an amendment to the Federal Trade Commission Act of 1914. The Federal Trade Commission Act dealt with false advertising but only as it could be proven injurious to a competitor. The Wheeler-Lea amendment broadened the authority of the Commission to cover false advertising where it could be proven injurious to the public.

Objectives and Method

The objective of this thesis is an analysis of the Wheeler-Lea Act and its enforcement agency, the Federal Trade Commission. The analysis is made with the purpose of appraisal in mind.

In order to get to the heart of the problem, a brief study has been made of the events and situations leading up to the passage of the Act. This study is followed by a discussion of the Act itself and the organization of as well as the functions performed by the Federal Trade Commission in carrying out its provisions. The activities and accomplishments of the Commission are then cited as a further means of developing an appraisal of the Act and its enforcement machinery.

Obviously the final meaning of the Wheeler-Lea Act and the powers of the Federal Trade Commission in carrying
out its provisions are subject to the review of the courts. Therefore, a study has been made of the major court decisions with regard to this legislation.
CHAPTER I
THE CONTROL OF FALSE ADVERTISING PRIOR TO
THE WHEELER-LEA ACT OF 1938

Government Attitude Prior to the Federal Trade
Commission Act of 1914.

Prior to the passage of the Federal Trade Commission
Act of 1914 the general attitude on the part of the Federal
Government had been one of laissez-faire. The only Federal
statute that could be used against the dissemination of
false advertising was the prohibition against the use of
the mails to defraud. This was of very limited applica-
tion. There was also little control over advertising by
the states. It was a period in which the chief restrain-
ing factor in force against misrepresentation in advertis-
ing was the character and conscience of the advertiser.
Generally speaking, the public bore the result of the lack
of legislative control.

The period prior to 1914 can be divided into two
parts. The first part precedes the passage of the Pure
Food and Drugs Act of 1906 and begins at approximately 1890.
The date 1890 was chosen because it represents the beginning
of any real periodical advertising which could affect a
large mass of people. The period prior to passage of the
1906 Pure Food and Drugs Act is characterized by an almost complete laissez-faire attitude on the part of the Federal Government and in general a considerable disregard by advertisers for truth in advertising.

Evidence of the type of advertising characteristic of this early period can be found by examining the periodicals of the day. The following excerpt was taken from Printers' Ink, July 28, 1938:

Throughout the period positive remedial or curative powers were claimed for preparations alleged to treat cancer, consumption, rheumatism and many other diseases, although the preparations were often useless for even the mildest ailments.

Here is another typical advertisement appearing in a leading magazine of the day:

Rheumatism relieved without medicine. New remedy discovered which absorbs acid impurities through the large foot pores.

Don't take medicine for Rheumatism, but send your name to the makers of Magic Foot Drafts which is relieving every kind of rheumatism without medicine. Magic Foot Draft possesses the remarkable quality of absorbing from the blood the impurities which cause rheumatism, relieving where everything else has failed.

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In 1906 the first specific step towards federal control of selling misrepresentations was taken. The Pure Food and Drug Act although it made no effort to control advertising appearing in periodicals, did prohibit the misbranding and adulteration of food and drugs. It marked the first specific attempt of the federal government to control selling misrepresentations. Although the advertising which followed the passage of this act was flavored with the same deception as before, the control of statements appearing on labels did tend to reduce some of the blatancy.

Control Under the Federal Trade Commission Act

In 1914, the federal government took legislative action against unfair and deceptive competition including unfair competition in advertising. Woodrow Wilson, President of the United States, urged upon the Congress the necessity for creating a commission which would be a means of inquiry into the practice of traders and manufactures, in order to promote fair competition in the public interest.

In the work of the House and Senate committees on proposals for prohibiting unfair competitive practices, general agreement was reached (1) that the principle of fair competition should stand as the basic economic policy of the nation, (2) that unfair competition should be prohibited in order to cut off monopoly in its incipiency. "The most certain way to stop monopoly at the threshold,"
said the House committee, "is to prevent unfair competition." 4

Several attempts were made to define the term "unfair competition" and to enumerate the practices which were deemed to be unfair. The prevailing view, however, was that there should be a blanket prohibition of unfair competition, and that the determination of acts falling within this category should be left to a special trade commission subject to review by the courts.

Section 5 of the Act gave the Federal Trade Commission power to prevent persons, partnerships, and corporations, excepting banks and common carriers subject to the Acts to regulate commerce from using unfair methods of competition. The Commission, as well as the courts, construed the prescription of "unfair methods of competition" contained in section 3 to include unfair competitive advertising. The rest of the Act specified procedure for the Commission and defined the extent of its powers to enforce its orders. 5

That the Federal Trade Commission was ineffective in preventing false and deceptive advertising can be seen by


an examination of advertisements characteristic of the period. For example, Liquid Arvon, an alleged dandruff cure, advertised that after one application:

By morning most, if not all, of your dandruff will be gone, and 2 or 3 more applications will completely dissolve and entirely destroy every single sign and trace of it, no matter how much dandruff you may have.

Even advertisements clearly injurious to a competitor were not eliminated. Evidence of this is apparent in the following advertisement which appeared in the Woman's Home Companion.

"Safe Ice Cream. Don't worry--It's Home Made. It won't hurt you . . . . I made the ice cream myself. The ice cream you buy may be safe."

The main explanation for the failure of the Federal Trade Commission to cope with such advertising was undoubtedly the limitations of the Act. Insufficient appropriations was also a factor.


There were three serious limitations in the Federal Trade Commission Act. (1) The scope of jurisdiction of


the Federal Trade Commission was limited to methods in
cOMPETITION. (2) The procedural powers which were granted
to the Commission in disposing of its cease-and-desist
cases were lacking in effectiveness. (3) The use of any
method unfair within the scope of this act was not an offense
until the user had been ordered or had agreed to discontinue
it. 

In defending the legality of its orders under this
legislation the Commission was required to show that the
business method complained of was unfair, that the method
was employed in interstate commerce, and that the method
was used in competition.

Proving damage to a competitor was frequently easy
for the Commission, but proving that competition existed
between the complainant or injured party and the respondent
was often extremely difficult if not impossible. Even when
such proof could be presented the time and expense of
securing it was often considerable. With limited appro-
priations, this reduced the number of cases that could be
investigated.

For complete written content of the Law see
Appendix, also United States Statutes at Large, Washington,
An outstanding case in the Commission's work with false advertising was theRaladam case of 1931. The facts of this case were that the Raladam Company manufactured and sold "an obesity cure," which it advertised as being safe, effective and convenient to use. The Commission found that the product contained a dangerous drug which could not be safely used except under medical direction and advice. A cease-and-desist order was issued, and the company appealed the case, claiming that unfair competition was not involved. The Supreme Court agreed with the Commission that the advertisements were "dangerously misleading," and that the public had an interest in preventing the use of such methods.

Nevertheless, the Court ruled against the Commission for the reason that the injurious methods had not injured a competitor. 9

The Supreme Court declared:

It is impossible to say whether, as a result of the respondent's advertisements, any business was diverted or was likely to be diverted, from others engaged in like trade, or whether competitors, identified or unidentified, were injured in their business, or were likely to be injured, or, indeed, whether any other anti-obesity remedies were sold or offered for sale in competition, or were of such a character as naturally to come into any real competition, with respondent's preparation in interstate market . . . . Something

9 For a complete review of the decisions in this case, see "Federal Trade Commission vs. Raladam," Business Week, (October 25, 1941), p. 50.
more substantial than that is required as a basis for the exercise of the authority of the Commission.

Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader power be desirable they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions.

This decision represented a milestone in the Commission's work for it afforded a dramatic example of the ineffectiveness of the Federal Trade Commission Act in dealing with false advertising. It was cited time and again by the Commission and other proponents of more effective legislation as the shining example of the existing weakness of having to prove injury to a competitor.

The second limitation was again a serious one. Under the Federal Trade Commission Act there was no penalty for the violation of the Commission's order unless it was violated after it had been affirmed by a circuit court of appeals of the United States. A cease-and-desist order could simply be ignored by an offender. This meant that the case had to be carried to court by the Commission. If the court upheld the cease-and-desist order, it ordered compliance.

Again, the use of any method of unfair competition was not an offense under the Federal Trade Commission Act (and is not except for a very limited field under the Wheeler-Lea Act) until the user has been ordered or has agreed to discontinue it thus permitting a great deal of false and deceptive advertising to continue unhampered. The Federal Trade Commission, which was limited in its appropriations, could not get to all of the offenders.

Control Under the National Recovery Act.

The National Industrial Recovery Act which was enacted in June 1933 provided for some control over false advertising. The regulation of advertising practices within the industry was provided for in the individual codes.

In the retailing code Article IX, regulation was provided for in the following manner:

Section 1—Advertising and Selling Methods.

(a) No retailer shall use advertising, whether printed, radio, or display or of any other nature, which is inaccurate in any material particular or misrepresents merchandise (including its use, trademark, grade, quality, quantity, size, origin, material, content, preparation, or curative or therapeutic effect) or credit terms, values, policies, or services; and no retailer shall use advertising and selling methods which tend to deceive or mislead the customer.

(b) No retailer shall use advertising which refers inaccurately in any material particular to any competitor or his merchandise, prices, values, credit terms, policies,
or services.  

In a similar fashion the N.R.A. prohibited certain basic manufacturing industries and the Package Medicine Group from the use of inaccurate advertising. However, with the invalidation of the N.R.A. in 1935, these codes were no longer enforced.

Public Attitude From 1914-1938.

There were a few optimists in this period. Many of those associated with the advertising business were of the opinion that the advertisers would solve the problem themselves. There were those who felt confident that self-control would be exercised fully.

Many of those opposed to fraudulent advertisements within the advertising industry had attempted to counteract such abuses by self regulation. The advertising Federation of America sponsored a truth in advertising movement as early as 1911 in hopes of discouraging those within the industry from abusing their rights. They were earnestly attempting to manage the situation themselves without the need of government to force them to do it. The advertising industry was fearful of government control; this fear was

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There is a vast difference between voluntary action on the one hand, which means growth, and compulsion on the other, which weakens self-dependence and destroys freedom of choice without which cooperative and interdependent activity fail.  

However, the majority of opinion, especially on the part of those who were not associated with the advertising business, was not so optimistic concerning voluntary control. Ruth deForest Lamb in her book published in 1936, said, "The American public is being tragically mislead into false and harmful remedies all because the Government officials have no real power to prevent them."  

In the twenty-four years of its existence from 1914-1936, by far the largest number of the Commission's orders to cease-and-desist were directed against misrepresentations in the various advertising media by manufacturers or distributors of the prices, quality, origin, or characteristics of their merchandise. The attention of Congress was

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13 Ruth deForest Lamb, American Chamber of Horrors, New York: Grosset & Dunlap, 1936, p. 3.
called to this problem and bills were introduced as early as 1935, having for their purpose the broadening of the Federal Trade Commission Act to allow the Commission to protect the public against unfair practices, irrespective of their effect upon competitors. The social pressure brought to bear was met with the passage of the Wheeler-Lea Act on March 21, 1938.

Summary.

Until passage of the Wheeler-Lea Act there was no adequate means for dealing with false and deceptive advertising. The Federal Trade Commission Act was weak in that it limited the Commission's efforts only to cases that could be proved injurious to a competitor.

The fact that effective control was not being exercised was well presented by many of the writers of the day. The unscrupulous use of false and deceptive advertising continued on an increasingly large scale. The seriousness of this problem was finally recognized in the United States Congress.

The Wheeler-Lea Act was a necessary result in view of the needs of the day. The American public was entitled to Federal protection against the deceptions that so characterized the advertising of this period.
CHAPTER II

A DISCUSSION OF THE WHEELER-LEA ACT

An Historical Account of the Congressional Debates Leading Up To The Passage Of The Act

A brief outline is presented here of the congressional debates leading up to the passage of the Wheeler-Lea Act as a means of better understanding the Act and its intended purpose. It is felt that a greater insight into the nature and scope of the Act will result from knowledge of the arguments for and against it. Excerpts from these debates are cited below.

House Debate. Representative Lea, the co-author of the bill to amend the Federal Trade Commission Act, in presenting it before the House of Representatives had this to say in support of it:

Mr. Chairman, the Federal Trade Commission Act was passed in 1914 and has not since been amended. This is the first amendment proposed by our committee. The Federal Trade Commission Act was a new departure in established relations between business and Government. It was an attempt to eliminate unfair trade practices, unethical trade practices in business by a method outside of the criminal law.

The principal feature of the Federal Trade Commission Act is in Section 5, which proposed that 'unfair methods of competition' should be the subject of proceedings by the Commission.

The act as originally passed makes competition a necessary element to be established in order to proceed. It is not sufficient to show

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only unfair practice. It must also be shown that this unfair practice is injurious to a competitor. One thing we propose in the pending bill in this respect is that it is sufficient to establish the unfair practice without showing injury to a competitor in order to give the Commission jurisdiction. This will save unnecessary time and expense in showing that an act is injurious to a competitor.

We provide that 'unfair or deceptive acts and practices in commerce' are subject to the jurisdiction of the Federal Trade Commission.

We have a provision that greatly increases the effectiveness of the procedure of the Federal Trade Commission in disposing of its cases. We also have a provision relating to advertisements of drugs, foods, cosmetics, and devices. The main purpose of this is to strengthen the jurisdiction that the Federal Trade Commission already has over advertising.

A very large percentage of all the work of the Federal Trade Commission at the present time relates to advertising and over 50 percent of its advertising jurisdiction relates to food, drugs, cosmetics, and devices as embodied in the bill.\(^4\)

Since the definitions of terms, procedures, and penalties were almost unanimously agreed to discussion of them will be omitted here. The chief objection to the bill was raised with reference to the administration of the false advertising of foods, drugs, cosmetics, and

devices. Representative Mapes objected to the idea of
giving it to the Federal Trade Commission. The following
is an excerpt of his arguments:

Mr. Chairman. The Members of the House
ought to understand the real issue involved
in this legislation.
The bill proposes to amend the Federal
Trade Commission Act in two important respects.
One is a more or less procedural amendment
about which there is no controversy. The
other involves the issue which was raised in
the Copeland pure food and drug bill last
Congress of whether the Federal Trade Commis-
sion shall have jurisdiction over the adver-
tising of foods, drugs, cosmetics, and devices,
or whether the Pure Food and Drug Administra-
tion in the Department of Agriculture shall
be given such jurisdiction.
I think it ought to be said there is now
no legislation clothing either the Food and
Drug Administration or the Federal Trade
Commission with authority to control the
advertising of food, drugs, and cosmetics
except the power the Federal Trade Commission
has over advertising where the element of
competition is involved. It has the same
control over the advertising of those sub-
jects where the element of competition enters
in as it has over any other class of adver-
tising. The Food and Drug Administration of
the Department of Agriculture, on the other
hand, while it has power to prevent misbrand-
ing or the adulteration of food and drugs,
has no power to prevent the false advertis-
ing of them.

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15 Congressional Record, Proceedings and Debates
of the Third Session of the Seventy-Fifth Congress of the
United States of America, Volume 83, Part I, January 3,
1938, to January 27, 1938, United States Government Print-
In further support of this argument Representative Michener had this to say on the subject:

Am I correct in assuming that there is today within the Department of Agriculture an agency that can properly handle this matter, whereas if the matter is given to the Federal Trade Commission it will be necessary to set up under that Commission what would amount to another bureau, and the Federal Trade Commission today has more work than it can possibly do and is about to ask Congress for additional assistance to carry on the work already assigned.\textsuperscript{15}

In answer to these arguments Representative Lea said:

This bill takes nothing from the Food and Drug Administration. It simply reinforces the jurisdiction of the Federal Trade Commission, which it has exercised heretofore with respect to unfair practices. The bill itself makes such false advertising unfair practices and so far as the question of expense or ability to take care of the job is concerned both organizations claim they need money in order to carry out their present authority.\textsuperscript{17}

The majority of opinion was in favor of Mr. Lea’s proposal vesting authority over the false advertising of foods, drugs, cosmetics, and devices with the Federal Trade Commission and the bill passed the House of Representatives by a vote of 107 ayes to 10 noes on January 12,

\textsuperscript{16} Ibid.

\textsuperscript{17} Ibid.
1938.

When the bill reached the Senate floor on January 25, 1938, the Senate disagreed with the House on several of the details and requested a conference. The conference was agreed to by the House and a few minor changes in the bill were made.

The bill modified the Federal Trade Commission Act by adding sections 12 to 16 inclusive, and certain items to sections 1, 4, and 5. The new section 14 (A) provided penalties for the violation of the new section 12, if the use of the commodity advertised is found injurious to health because of results from such use. The conference agreement provided penalties for the violation of the new section 12 (A), instead of the new section 12. This was not a change in substance but simply made the reference more accurate.

The agreement restricted the penalties under this section to those cases where injury could result from the use of the commodity "under the conditions prescribed in the advertisement thereof or under such conditions as are customary or usual." These words clearly included cases where injury may result from the use of the commodity as recommended in the advertisement or where it is used under customary or usual conditions. The section did not contemplate penalization in those cases where the use was not as
recommended and was not under usual or customary conditions. It was not intended to extend to cases where there might be injurious results merely because of reactions of consumers due to their peculiar idiosyncrasies or allergic conditions. A similar modifying provision containing the same subject matter was added by the conference agreement to the definition of false advertisement in the new section 15 (A).

Section 14 (A), exempted from its provisions products duly marked and labeled in accordance with rules and regulations issued under the Meat Inspection Act, as amended. The conference agreement eliminated such exempting language and substituted in lieu thereof a provision that for the purposes of this section, meats and meat food products duly inspected, marked and labeled in accordance with rules and regulations issued under the Meat Inspection Act, shall be conclusively presumed not injurious to health at the time the same leave official establishments.

The new section 15 (A), relating to the definition of the term "false advertisement" contained a provision that if, at the time of the dissemination of an advertisement, there existed a substantial difference of opinion among experts as to the truth of a representation, the advertisement should not be considered misleading on account of such representation if it stated clearly and prominently the fact of such difference of opinion. The conference
agreement eliminated this provision from the House amendment.

The bill, as modified in committee, was finally passed by both houses and signed by the President, becoming law on March 21, 1938.

Major Provisions

(1) The basic provision added by this amendment was the one which declares unlawful "unfair and deceptive acts or practices in commerce." This provision enables the Commission to attack the problem of false advertising where it is harmful to the public without necessarily proving injury to a competitor.

(2) A desirable improvement in enforcement procedure was made. The Commission's order becomes final after 60 days and if violated subjects the offender to suit for civil penalties, unless the accused files a petition for review with a court of appeals within 60 days of the issuance of the order.

(3) Another important provision is the one that prohibits the dissemination of false advertising of foods, drugs, cosmetics, and devices. The dissemination of false advertising concerning these products by anyone is unlawful.

For further details on the conference agreement see "Lea Bill Passes House," Printers' Ink, February 17, 1938, p. 94.
if done—

(a) By U. S. mails, or in commerce by any means, for the purpose of inducing or which is likely to induce, directly, or indirectly, the purchase of food, drugs, devices or cosmetics; or

(b) By means for the purpose of inducing or which is likely to induce, directly, or indirectly, the purchase in commerce of food drugs, devices, or cosmetics. 19

In addition to the regular proceedings by way of complaint and order to cease-and-desist, the Commission may, in certain cases, bring suit in a United States district court to enjoin the dissemination of such false advertise-
ments, whenever it has reason to believe that such a pro-
ceeding would be to the interest of the public. These temporary injunctions remain in effect until an order to cease-and-desist has been issued and becomes final, or until the Commission’s complaint is dismissed by the Commission or set aside by the court on review.

Further, the dissemination of a false advertisement of a food, drug, device, or cosmetic, where the use of the commodity advertised may be injurious to health, or where the act of disseminating is with intent to defraud or mis-
lead, constitutes a misdemeanor, and conviction subjects

19 For complete content of the law, see Appendix, p. 107.
the offender to a fine of not more than $5,000, or imprisonment of not more than six months, or both. Succeeding convictions may result in a fine of not more than $10,000, or imprisonment of not more than one year, or both.

Definition of Terms Used in Act

The following definitions are to be found in the contents of the Act:

(a) False advertisement-

The term "false advertisement" means an advertisement other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and includes, or is accompanied in each instance by truthful disclosure of the formula showing quantitatively each ingredient of such drug.

(b) Food.

The term "food" means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.

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(c) Drug.
The term "drug" means (1) articles recognized in the official Homœopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and (2) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or the animals; and (3) articles (other than food) intended to affect the structure of any function of the body of man or other animals; and (4) articles intended for use as a component of any article specified in clauses (1), (2), or (3), but does not include devices or their components, parts, or accessories.

(d) Device.
The term "device" (except when used in sub-section (a) of this section) means instruments, apparatus, and contrivances, including their parts and accessories intended (1) for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or (2) to affect the structure or any function of the body of man or other animals.

(e) Cosmetics.
The term "cosmetic" means (1) articles to be rubbed, poured, sprinkled or sprayed on, introduced into, or otherwise applied to the human body or any part thereof intended for cleansing, beautifying, promoting attractiveness, or altering the appearance, and (2) articles intended for use as a component of any such article; except that such term shall not include soap.

The Intent and Purpose of the Provisions.
In order to understand the philosophy underlying these major provisions it is desirable to refer again to the Congressional debates in which the following explanations were set forth by Mr. Lea:

"In section 16 of the bill there is a definition of 'false advertising.' The principal feature of the definition of advertising that we place in this bill is
to declare a false advertisement to be one that is 'misleading in any material respect.' This definition is followed by language explaining things that may be considered in determining whether or not an advertisement is misleading in a material respect.

It will be observed this definition is far reaching because it does not require an intent to violate the law. It takes in all classes of misleading cases. This is intended to protect the consumer of foods, drugs, cosmetics, and so forth, rather than to search for the criminal intent. The primary object is to protect the consumer.

We have, therefore, the question of applying the remedies to a definition very broad in its terms. The procedure of the Federal Trade Commission, as I have attempted to describe it to you this morning, is well calculated to discriminate between the various classes of offense against this section without injustice. A large class of businessmen who have never been subjected to criminal procedure will have the opportunity to go to the Federal Trade Commission and conform to the requirements of the law without being brought into court or branded as criminals.

For those cases that involve a criminal purpose and a deliberate intent to defraud or mislead, or to foist articles injurious to health upon an unsuspecting public, we have provided severe penalties. The dissemination of a false advertisement under section 12 is provided for. Any false advertisement put out for the purpose of inducing the purchase of these articles is made unlawful and is declared to be an unfair or deceptive act in commerce.

In addition to that we have provided that the Commission may resort to the use of injunctions pending final determination of its procedure in order to stop the dissemination of false advertisements where injuries to the public are involved if in the meantime, the accused person persists in continuing his false advertisements notwithstanding the Federal Trades Commission has taken up the case when it comes to dividing the question whether or not the Commission should proceed, we give it the same discretion it has now to
proceed in those cases where it 'would be in public interest' to give this protection by a temporary injunction.

In section 14 (A) we provide criminal penalties for the violation of the act in reference to false advertisements. In the first case we provide for the punishment of a criminal misdemeanor in those cases where the false advertisement is put out for the purpose of inducing the sale of an article injurious to health. We give an immediate recourse to the criminal law through the Department of Justice to stop the circulation of advertisements that may be injurious to health. In the second place, we provide for a criminal procedure where the advertisement is put out with the intent to defraud or mislead.

The first offense would be punishable by a fine of not to exceed $5,000 or 6 months and the second, by a fine of $10,000 or 1 year. In case the Federal Trade Commission finds this law is being violated, it certifies the facts to the Attorney General. We do not give the Federal Trade Commission the power to say to the Attorney General, 'You must prosecute,' but we provide that the Federal Trade Commission may refer the facts to the Attorney General, and it is then left to him to proceed as in the case of other crimes.

With respect to the sufficiency of the penalties which are proposed in this bill, we propose to greatly strengthen the procedure of the Federal Trade Commission. In the first place, the order to cease and desist, if not opposed, becomes final and subject to court enforcement in 60 days. Then, if there is a violation of the order after that time, the party accused can immediately be summoned for contempt of court. If during the pending of such proceeding it becomes necessary, the court has authority by an ancillary process to protect the public against what might be done in the meantime before final action under the regular procedure.

Further, there is a provision that a civil penalty of $5,000 can be enforced in an action by the Attorney General in cases where the offenders persist in violating the court order. We have strengthened this procedure by providing
for making the order of the Federal Trade Commis-
sion automatically backed up by the court when
it becomes final. We provide for the immediate
punishment of a violation by contempt. We pro-
vide a $5,000 civil penalty for violation of
the order after the order is approved by the
court or becomes final. We provide for ancillary
procedure to take care of abuses pending the
final determination. We also provide, for an
injunction which can be used by the Federal Trade
Commission in every case of false advertisement
where it believes the public interest is injured.

An Appraisal of the Provisions.

The prohibition of "unfair and deceptive acts or
practices" has greatly enhanced the Commission's effective-
ness. In contrast with the older prohibition of "unfair
methods of competition" this new and broader provision
enables the Commission to attack false advertising where
it can be proven harmful to the public. This point is
well illustrated by the statement made by Representative
Lea on January 12, 1938 prior to passage of this bill.

If this bill becomes law, one of the
things it will do is to relieve the Federal
Trade Commission of the necessity of showing
injury to a competitor. This will save
necessary time and expense. We go further 22
in providing a protection for the consumer.

21 Congressional Record. Proceedings and Debates of
the Third Session of the Seventy-Fifth Congress of the United
States of America, Volume 83, Part I, January 3, 1938 to
January 27, 1938. United States Government Printing Office,

22 Charles Wesley Dunn, Wheeler-Lea Act, New York:
Clarence Frederick Lea, co-author of the Act and past member
of the House of Representatives.
The provision that requires the accused to petition the courts within sixty days or be subject to the cease-and-desist order of the Commission has greatly enhanced enforcement. It no longer places on the Commission the burden of obtaining court approval before its orders become effective. By this provision the burden of refutation is rightfully placed with the offender and the Commission's order, if not contested within sixty days, becomes final. Thus, a great deal of procedural complication with its wasted time has been eliminated.

The definition of false advertising in the amendment has two important aspects. (1) In the first place, it sets a lower limit on falseness by stating that the advertisement must be importantly false. This has undoubtedly saved waste motion on the part of the Commission for it clearly eliminates all advertising that is unimportantly false. Thus, it saves the Commission from wasting time in dealing with cases that the court might not approve. (2) It makes omission of warning of harm an unfair practice. By so doing it gives the Commission specific authority to prohibit such practices with an assurance that the courts will uphold its orders.  

It is important to note that Congress did not list or define in the amendment the practices other than false advertising which the law considers to be unfair. That broad power was given to the Commission. This has been well stated by the Supreme Court of the United States as follows:

What shall constitute unfair methods of competition denounced by the Act is left without specific definition. Congress deemed it better to leave the subject without precise definition, and to have each case determined upon its own facts owing to the multifarious means by which it is sought to effectuate such schemes. The Commission, in the first instance, subject to the judicial review provided, has the determination of practices which come within the scope of the Act. 24


The basic federal law with respect to food, drugs, and cosmetics is the federal Food, Drug, and Cosmetic Act of 1938, entitled "An Act to prohibit the movement in interstate commerce of adulterated and misbranded food, drugs, devices, and cosmetics, and for other purposes." This regulatory legislation, which replaced the original

23 (Cont'd.)

Food and Drug Act of 1906, is administered by the Food and Drug Administration of the Federal Security Agency. The federal Food, Drug, and Cosmetic Act prohibits adulteration and misbranding, whereas the Federal Trade Commission Act prohibits false advertising. Strictly speaking, the sale of untruthfully labeled food and drugs, in many situations, is a form of unfair competition, and the Federal Trade Commission on occasion in the past, has exercised a concurrent jurisdiction with the Food and Drug Administration. On December 5, 1946, however, the Federal Trade Commission announced that henceforth it would not institute proceedings against false labeling or branding in cases falling within the direct responsibility of the Food and Drug Administration. This action was taken to avoid conflict and duplication of effort.

Conclusions.

It cannot be said that the amendment is not without a serious limitation. An advertiser is not guilty of committing an offense until he has been proven guilty and ordered to stop by the use of the cease and desist order or stipulation. As a result, the offender can and often does continue his deception until the Commission stops him.

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On the other hand, the improvements which this legislation made in the older act, the Federal Trade Commission Act, do represent basic steps forward. After 60 days, if the accused does not file petition with a court of appeals, the Commission's order becomes final and the offender is subject to civil penalties if he violates it. By eliminating the necessity on the part of the Commission to obtain court approval before penalizing an offender the amendment has greatly increased its procedural effectiveness. By defining a false advertisement as one which is materially false a definite limit has been set as to the degree of deception that the Commission can prohibit. As a result, it may have saved a great deal of wasted time and effort on the part of the Commission in attempting to prohibit unimportantly false advertising and failing to win approval by the courts. Perhaps the greatest step forward, however, lies in the change from protection of competition only to that of protection of the consumer whether or not competition is involved.
CHAPTER III
ORGANIZATION AND PROCEDURE OF THE FEDERAL TRADE
COMMISSION WITH REFERENCE TO FALSE ADVERTISING

Powers of the Commission

The Commission is authorized to issue complaints, gather evidence, hold hearings before a trial examiner (within the Commission), and decide the case, either by dismissal or by the issuance of a cease and desist order. In other words, the Commission has been given the authority to carry through a case against false advertising from beginning to end, with complete jurisdiction over the procedure.

Before the Commission is justified in taking positive action in any case it must have satisfactory evidence and there must have been a hearing before a trial examiner. The law requires the courts to accept as conclusive the Commission's findings of fact (if supported by evidence) and, if satisfied that the Commission had met the requirements, to make possible the enforcement of its order.

The conclusiveness of its fact finding and its operational procedure are administrative matters of great importance. They are the determining factors in judging the efficiency with which the Commission may operate.
The Wheeler-Lea Act gave to the Commission no greater scope with respect to the type of advertising against which it can proceed. It did, however, widen the Commission's authority by granting it the power to prosecute false advertising where it injured the public whether there is injury to a competitor or not.

Special Divisions Dealing With False Advertisements

Radio and Periodical Division. This division was created in October 1939 to take the place of the former Special Board of Investigations. It is the function of this division to make periodical checks of the advertisements appearing in various media. The checks cover newspapers, magazines and radio and television stations.

If a published or broadcast advertisement coming to its attention appears on its face to be misleading, the Radio and Periodical Division sends a questionnaire to the advertiser, requesting a sample of his product, if this is practicable, and a quantitative formula, if the product is a compound, and also requesting copies of all advertisements published or commercial continuities broadcast (if such continuities are not already on file during a specific period),

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together with copies of all booklets, folders, circulars, form letters, and other advertising literature used.

Upon receipt of data, the claims, sample and formula are referred to an appropriate technical agency of the Government for a scientific opinion. Then the advertisement is carefully scrutinized in the face of new evidence and if it still appears to be false or misleading, a copy is sent to the advertiser who is extended the privilege of submitting such evidence as he may desire in support of his position. If it appears that the advertising is false the division refers the matter to the Commission with recommendations that the advertisement be docketed.

In 1946 the Commission established an office of Legal Investigations to coordinate and broaden the legal investigational activities of the agency. In this office there has been consolidated and coordinated the functions of the Radio and Periodical Division which makes office investigations, and the functions of the Legal Investigation Division which handles matters requiring field investigations of a legal nature.

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Bureau of Industrial Cooperation. This Bureau comprises the Division of Trade Practice Conferences and the Division of Stipulations. The Bureau is under the direction of a Director and an Assistant Director.

The Division of Trade Practice Conferences is under the immediate supervision of the Assistant Director who is also Chief of the Division, and is comprised of a rule-making unit and a rule-administration unit, each in charge of an assistant chief of the division. The rule-making unit handles all matters regarding the holding of trade practice conferences and the drafting of rules to the point of final promulgation. The rule-administration unit handles all matters concerning interpretation of and compliance with established trade practice rules.

The Division of Stipulation consists of a chief, assistant chief, and a staff of attorney-conferees. All matters considered appropriate for settlement by the Commission's stipulation procedure are referred to this division for the negotiation of voluntary agreements to cease and desist from unlawful practices. The Division takes no part in the investigation or prosecution of any matter.\(^{29}\)

Medical Advisory Division. The Wheeler-Lea Act greatly enlarged the preexisting need for medical and other scientific and expert opinion and evidence. This was met in part with the establishment by the Commission of the Medical Advisory Board. This Board, which has since been made into a separate division, furnishes the Commission or any of its divisions with professional opinions in matters involving medical, chemical, or scientific questions relating to food, drug, cosmetics, and devices arising in connection with investigations or the trial of cases instituted under the provisions of the Act. 30

On February 19, 1946, President Truman approved an internal reorganization of the Federal Trade Commission, to improve and expedite its normal operations, which changed the status of the Medical Advisory Board. The Board was retained in the new setup as a separate division with instructions to avoid duplication of effort or conflicts with the scientific work of the Food and Drug Administration. 31

The Chief of the Division of Medical Opinions is the Commission's liaison officer with the Food and Drug Administration and with the Insecticide Division, Livestock


CHART I

Federal Trade Commission

Commissioners

Special Legal Asssts. to the Commission

Office of Information

Executive Office Sec'y.

Bureau of Administration
Division of Budgets & Planning
Division of Personnel
Div. of Research, Compiling & Publication
" Legals
" Economic & Administrative Records
" Library
" Service & Supplies

Bureau of Litigation
Div. of Antitrust Trails
Div. of Deceptive Practices Trials
Div. of Export Trades

General Counsel
Div. of Appellate Proceedings
Div. of Compliance
Div. of Trade Marks

Bureau of Stipulations

Bureau of Trial Examiners

Bureau of Legal Investigations
Div. of Field Investigations
Div. of Radio & Periodical Advertising

Bureau of Medical Opinions

Bureau of Industrial Economics
Div. of Accounting
Div. of Statistics
Div. of Financial Reports
Div. of Economics

Bureau of Trade Practice
Conferences & Wool Act Administration
Div. of Rule Making
Div. of Rule Administration
Div. of Wool Administration & Inspection

Organization Chart of Federal Trade Commission
Source: U.S. Gov't. Manual 1948,
Branch, Production and Marketing Administration of the Department of Agriculture. Cooperation with these agencies has brought to the Commission necessary information and other assistance in handling cases involving food, drugs, devices, cosmetics, and "economic poisons" such as insecticides, rodenticides, fungicides, and weed exterminators.

Informal Procedure

In its operations the Commission utilizes three different procedures - namely,
(a) Arranging stipulations with proposed defendants providing for the abandoning of objectionable business practices,
(b) Industry conferences to secure voluntary compliance with rules of fair competition, and
(c) Issuance of formal complaints.

The Complaint. The most common way for a case to originate before the Federal Trade Commission is through a consumer's or competitor's complaint, or from public sources other than the Commission itself. However, the Commission may initiate an investigation to determine whether the laws administered by it are being violated.

There is no definite procedure necessary in an application for complaint. A letter setting forth the detailed facts is sufficient as long as it is accompanied
by all the supporting evidence.\textsuperscript{32}

The Investigation. When an application for complaint is received, the essential jurisdictional elements are considered. If the information furnished by the applicant is insufficient, it is necessary to obtain additional data by further correspondence or by a preliminary field investigation before deciding whether an application for complaint should be docketed for investigation.

When an application for complaint has been docketed, it is assigned by the Chief Examiner to an attorney for investigation, in which the facts regarding the matter are developed. In the course of the investigation the attorney to whom the application is assigned interviews the party complained against, advising him of the nature of the charge and requesting the submission of such evidence in defense or justification as he may desire.

After developing the facts from all available sources, the examining attorney summarizes the evidence in a report, reviews the law applicable thereto, and makes recommendations as to what action the Commission shall take.

The record is then reviewed by the Chief Examiner or the Special Board of Investigation, as the case may be,

and, if found to be complete, it is submitted, with a brief statement of facts, and with conclusions and recommendations to the Commission for its consideration.\textsuperscript{33}

The Chief Examiner or the Special Board of Investigation may recommend:

1. That the case be closed without further action because of lack of evidence in support of the charge or for the reason that the practice does not violate any law which the Commission is charged with administering, or

2. The closing of the application upon the signing by the respondent of a stipulation of the facts and agreement to cease and desist from the unlawful practices as charged, or

3. Issuance of a formal complaint.\textsuperscript{34}

If, after consideration of the entire file, including the Chief Examiner's or the Special Board of Investigation's recommendation, the Commission decides that formal complaint should be issued, the case is referred to the chief counsel for preparation of the complaint and trial of the case. Or, if the Commission should permit a stipulation, the case is referred to the Chief Trial Examiner or the special Board of Investigation for its negotiation.

All proceedings prior to issuance of formal complaint

\textsuperscript{33} \textit{Ibid.}, p. 22.

\textsuperscript{34} \textit{Loc. cit.}
or publication of a stipulation are confidential.  

Formal Procedure

The Complaint. Only after careful consideration of the facts developed by the investigation does the Commission issue a complaint. The complaint and the answer of the respondent thereto and subsequent proceedings are a public record.

A complaint is issued in the name of the Commission acting in the public interest. It names a respondent and charges a violation of law, with a statement of the charges. The party complaining to the Commission is not a party to the formal complaint issued by the Commission, nor does the complaint seek to adjust matters between parties.

The Commission's rules of practice and procedure provide that in case the respondent desires to contest the proceedings he shall, within twenty days from the service of the complaint, file answer thereto with the Commission. The rules of procedure also specify a form of answer for use should the respondent decide to admit the facts alleged and not contest the proceeding.


36 Loc. cit.
Under the rules of practice, failure of the respondent to file an answer within the time and place fixed for hearing shall be deemed to authorize the Commission, without further hearing or notice to respondent, to proceed in regular course on the charges set forth in the complaint, and to make, enter, issue, and serve upon respondent findings of fact and an order to cease and desist.37

**The Examination.** In a contested case the matter is assigned to a trial examiner for hearing. The trial examiner, after the submission of evidence in support of the complaint, and on behalf of the respondent, prepares a report of the evidence. Within a stated time after the trial examiner's report is made briefs are filed, and the case is set for final argument before the Commission. Thereafter the Commission reaches a decision either sustaining the charges made in the complaint, or dismissing and closing the case.

If the complaint is sustained, the Commission makes its findings as to the facts and states its conclusion that the law has been violated, and thereupon an order is issued requiring the respondent to cease and desist from such violation. If the complaint is dismissed, an appropriate order is entered.

Trade Practice Rules

Industry Conferences. Trade practice conference proceedings are authorized by the Commission upon application of an industry group or upon the Commission's own motion. When such proceedings are directed to be undertaken, a trade practice conference of the industry is called by the Commission to consider and submit proposed rules for the elimination of unfair practices and improvement of competitive conditions in the industry. Public notice of the time and place of such conference is issued and all members of the industry are invited to attend and are encouraged to contribute their views and best thought on the subject, in joint effort to arrive at constructive results on the basis of voluntary participation. Parties in interest are at all times free to advise and consult with the Commission's representatives for the purpose of mutual exchange of ideas and the bringing about of a clearer understanding of the problem involved and the assistance which the Commission can render in their solution.

Public Hearing On Proposed Rules. Prior to final Commission action on rules for an industry, drafts of proposed rules in appropriate form are made available for public hearing and opportunity is afforded members of the industry and other interested or affected parties, including
consumers, to present such pertinent views, suggestions, objections, or amendments as they desire to offer. These may be communicated to the Commission in writing or presented at the public hearing on the rules.

**Promulgation and Issuance of Rules.** After final hearing, and upon full consideration, certain groups of rules are approved and are received by the Commission in the form deemed proper and satisfactory. Such rules are thereupon officially promulgated, if agreed to by a majority of the industry, as trade practice rules, for the industry, the promulgation being made through the Federal Register.

Copies of the rules are also distributed to all industry members and each is afforded opportunity to record in writing his intention or willingness to observe the provisions in the conduct of his business. The rules are thus placed in effect simultaneously as to all members throughout the industry.

**Classification of Rules.** The rules of the respective industries are divided into two groups. Those of Group I define and specify practices which are unfair and which are to be prevented as unlawful. The Group II rules cover only recommended or permissive practices. The distinction between the two groups of rules is explained in the respective headnotes which appear with the rules as
officially promulgated, and which read as follows: 38

Group I

The unfair trade practices embraced in the Group I rules herein are considered to be unfair methods of competition, unfair or deceptive acts or practices, or other illegal practices, prohibited under laws administered by the Federal Trade Commission; and appropriate proceedings in the public interest will be taken by the Commission to prevent the use, by any person, partnership, corporation, or other organization subject to its jurisdiction, of such unlawful practices in commerce.

Group II

Compliance with trade practice provisions embraced in Group II rules is considered to be conducive to sound business methods and is to be encouraged and promoted individually or through voluntary cooperation exercised in accordance with existing law. Nonobservance of such rules does not per se constitute violation of law. Where, however, the practice of not complying with any such Group II rules is followed in such a manner as to result in unfair methods of competition, or unfair or deceptive acts or practices, corrective proceedings may be instituted by the Commission as in the case of violation of Group I rules.

The rules as promulgated by the Commission are designed to foster and promote the maintenance of fair competitive conditions in the interest of protecting industry, trade, and the public.

An example of this type of activity can be found in the trade practice conferences held with the Musical Instrument and Accessories Industry in 1944. With the cooperation of industry members, conferences under the auspices of the Commission were held at Cincinnati, Ohio. The following rules, among others, with reference to misrepresentation, were agreed upon:

Rule 1. Misrepresentation and Misbranding.

In the course of or in connection with selling, distributing, or promoting the sale or distribution of any industry product, it is an unfair trade practice to use or cause to be used any trade promotional literature advertising matter, guarantee, warranty, mark, brand, label, designation or representation, however disseminated or published, which directly, or by implication or otherwise, has the capacity and tendency or effect of misleading or deceiving purchasers or prospective purchasers in respect to the grade, quality, quantity, substance, character, make, type, price, nature, size, tone, origin, use, endorsement, appearance, performance, construction, specifications, finish, material content, or preparation of such product, or in any other material respect.

39 Ibid., p. 389.
Rule 5. Use of "Bait" Advertising.

In the course of or in connection with selling, distributing, or promoting the sale or distribution of any industry product, it is an unfair trade practice to publish or use advertising, or other representations written or oral, which have the capacity and tendency or effect of misleading or deceiving purchasers or prospective purchasers into the belief that a larger supply of such products is available to purchasers at the advertised or stated price or prices than is in fact so available, or that industry products so offered for sale or sold under such representation or conditions are of high grade or quality when such is not true in fact.

Disposition of Cases by Stipulation.

Stipulation Procedure. The Commission settles many problems of unfair competition through the Bureau of Stipulations. This Bureau gives a proposed defendant an opportunity to agree with the Commission that the objectionable practice should be abandoned. If the defendant does so, an agreement is signed to discontinue the abuse and thus no formal complaint need be issued. The agreement is made a matter of public record and the respondent is required to submit a report within sixty days on the manner in which he is abiding by it. If the stipulation is subsequently violated the Commission proceeds in the formal
manner by complaint and order, and if necessary, the order is carried to a Court of Appeals for enforcement.

This procedure accomplishes economically and expeditiously the same result as a complaint and order to cease and desist. It simplifies the Commission's court procedure and saves both the government and the respondent the expense incident to trial of the complaint.

Major Policies of the Commission.

Before examining the accomplishments of the Federal Trade Commission in dealing with false advertising, attention should be given to the major policies or attitudes which the Commission has adopted in keeping with the provisions of the Act and its interpretation thereof.

The Public Interest. The Commission's operation is basically in the public interest as the following quotation shows:

It is the policy of the Commission not to institute proceedings against alleged unfair methods of competition or unfair or deceptive acts or practices where the alleged violation of law is a private controversy redressable in the courts, except when said practices tend to affect the public. In cases where the alleged injury is one to a competitor only and is redressable in the court by an action of the aggrieved competitor, and the interest of the public is not involved, the proceeding will not be entertained.40

Status of Applicant or Complainant. The so-called "applicant" or complaining party has never been regarded as a party in the strict sense. The Commission acts, as has just been stated, only in the public interest. 41

Policy of Prevention. The only objective of the Commission's continuous survey of advertising is to prevent false and misleading advertisements. It does not undertake to dictate what an advertiser shall say, but merely indicates what he may not say under the law. 42

Attitude Towards False Advertisements. The Commission has adopted an attitude towards "false advertising" that is consistent with the fundamental purpose of the Federal Trade Commission Act, which is to prevent rather than to penalize. It has endeavored to protect the consumer of food, drugs, and cosmetics rather than to search for the criminal intent. Its actions have been directed against deceptive concealment as well as actionable non-disclosure. The advertisements have not been limited as to the form in which disseminated, whether written, printed, oral, or electric. They include advertisement by radio, telephone, word of mouth, pamphlets, letters, telegrams,

41     Ibid., p. 22.

and other forms of advertising. 43

Summary

In carrying out its powers the Commission may proceed in a formal or informal manner. In the informal procedure the application for complaint is followed by an investigation as a means of verifying the charges made. The Chief Examiner or the Special Board thereupon recommends closing the case because of lack of evidence, or by stipulation, or the issuing of a formal complaint. If the formal complaint is issued a court procedure is followed in the investigation and examination of evidence allowing the accused full opportunity to present his case. If the complaint is sustained, the Commission then orders a cease and desist against the violation.

The Medical Division was established as a means of examining the claims made by the advertisers. This division provides the Commission with the means of proof in declaring an advertisement to be untruthful.

As a means of discovering advertisements that might contain false and deceptive representations, the Commission created the Radio and Periodical Division. This division,

by means of periodical checks on the various advertising media, maintains a constant vigilance over all advertising appearing in newspapers, magazines, on the radio, or on television.
CHAPTER IV
THE ACCOMPLISHMENTS AND ACTIVITIES OF
THE FEDERAL TRADE COMMISSION

Investigations and Complaints Involving Food, Drugs, and Cosmetics.

Nature and Scope of Investigations. From the enactment of the Wheeler-Lea Act in 1938 to the end of the Commission's fiscal year, June 30, 1946, the Commission had completed some 2,331 field investigations of alleged violations of section 12 of the Act which relates to false advertising of food, drugs, devices and cosmetics.\(^{44}\) This number includes new cases as well as old cases reinvestigated to determine whether the Commission cease and desist orders, and stipulations executed by advertisers and accepted by the Commission, were being violated and whether additional practices not previously prohibited were being carried on in contravention of the law. The Commission's activities in regard to violations of section 5 are not broken down into separate categories in its annual reports.

\(^{44}\) Annual Report of the Federal Trade Commission, Washington, D. C.: United States Government Printing Office, 1946, p. 27. Since 1946 is the latest year in which the Commission published an accumulative total on the number of cease and desist orders under section 12, the year 1946 has been used for the totals of investigations and complaints for comparison purposes.
Investigations by the Commission have covered practically the entire range of prepared food products, dietary supplements, vitamin and mineral preparations, drugs, home remedies, cosmetics, hearing aids, eye glasses, sun lamps, arch and foot supports, short wave diathermy machines, arthritic remedies, hormone preparations, and colonic treatments.

In its investigations special attention has been given to the representations concerning medical preparations and therapeutic devices, the use of which might be injurious to health.

Nature and Scope of the Complaints. From the beginning of the year 1938 until the end of the fiscal year 1950, the Commission has issued 1680 complaints against alleged violators of sections 5 and 12 with respect to false advertising. To give a general indication of the nature of these complaints, the following table is presented for the years 1938 through 1950 inclusive.

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## Table 1
### A Table of the Number and Kinds of Advertising Complaints Initiated by the Federal Trade Commission 1938-1950 Inclusive

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Number of Complaints</th>
<th>False Representation of Facts and Omissions</th>
<th>Misrepresentations Obtained from the Use of a Product</th>
<th>Misrepresentations as to Quality of Product</th>
<th>Misrepresentations as to Quantity of Product</th>
<th>Misrepresentations as to the Value of the Product</th>
<th>Misrepresentations as to the Quality, Size, Quantity, or Value of Ancillary Goods and Services</th>
<th>Misrepresentations as to the Quality of Competitor's Product or Practice</th>
<th>Misrepresentations as to the Competence, Integrity, or Standing of a Competitor</th>
<th>Misrepresentations as to the Effectiveness of Goods, Services, or Competitor's Ability to Deliver Results as Represented</th>
<th>Misrepresentations as to the Credibility of Endorsements, Testimonials, or Usual or Secured by a Competitor</th>
<th>Total of Complaints</th>
<th>Use of Sample Vouchers</th>
<th>Article</th>
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<td>45</td>
<td>16</td>
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<td>23</td>
<td>4</td>
<td>6</td>
<td>18</td>
<td>7</td>
<td>9</td>
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<td>1939</td>
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<tr>
<td>1944</td>
<td>148</td>
<td>35</td>
<td>10</td>
<td>5</td>
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<td>6</td>
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<td>3</td>
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<td>19</td>
<td>3</td>
<td>19</td>
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<tr>
<td>1945</td>
<td>149</td>
<td>30</td>
<td>16</td>
<td>7</td>
<td>9</td>
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<td>1946</td>
<td>147</td>
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<td>12</td>
<td>3</td>
<td>1</td>
<td>7</td>
<td>2</td>
<td>4</td>
<td>1</td>
<td>1</td>
<td>4</td>
<td>1</td>
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<td></td>
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<tr>
<td>1947</td>
<td>147</td>
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<td>12</td>
<td>3</td>
<td>1</td>
<td>7</td>
<td>2</td>
<td>4</td>
<td>1</td>
<td>1</td>
<td>4</td>
<td>1</td>
<td>4</td>
<td></td>
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<tr>
<td>1948</td>
<td>139</td>
<td>7</td>
<td>5</td>
<td>2</td>
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<td>4</td>
<td>1</td>
<td>1</td>
<td>4</td>
<td>1</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>1949</td>
<td>10</td>
<td>12</td>
<td>9</td>
<td>12</td>
<td>2</td>
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<td>4</td>
<td>1</td>
<td>4</td>
<td>1</td>
<td>4</td>
<td>1</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>1950</td>
<td>10</td>
<td>12</td>
<td>9</td>
<td>12</td>
<td>2</td>
<td>2</td>
<td>4</td>
<td>1</td>
<td>4</td>
<td>1</td>
<td>4</td>
<td>1</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>1680</td>
<td>441</td>
<td>209</td>
<td>415</td>
<td>71</td>
<td>8</td>
<td>13</td>
<td>42</td>
<td>20</td>
<td>16</td>
<td>5</td>
<td>50</td>
<td>89</td>
<td></td>
</tr>
</tbody>
</table>

Use of Sample Vouchers: 125

Artic...
An Analysis of The Complaints.

There are two or three points to be noted in this table. In the first place, the table indicates a large number of complaints in the first few years with a gradual reduction in the number which the Commission has issued in the succeeding years. Although this could be in part caused by a slackening of the Commission's efforts in this activity, it would seem more likely that the cause for this reduction is due to a gradual self-conforming process on the part of advertisers in line with the restrictions laid down by the Wheeler-Lea Act.

It will also be noted that the majority of the cases falls into three main types of complaints. The first classification involves false representations of the therapeutic properties of medicinal preparations and devices. As stated earlier, the Commission has given special attention to this type of offense in its field investigations.

A good explanation for such attention is the fact that it is within this range of misrepresentation that the greatest amount of injury to public health will occur. The second hardest hit misrepresentations are those which fall into the category of misrepresentations as to origin, composition, condition, quality, price, special offers, or limited supply of a product. This category covers the
wide range of deceptions pertaining to the product being advertised. Action on these misrepresentations has the objective of preventing financial loss to the consumer.

The third most complained of offenses lie in the field of misrepresentations of business status and the advantages to be gained in dealing with the respondent. These are mainly unfair acts in competition and probably in most instances the prohibitions of the Wheeler-Lea Act would not be required to cope with them.

Other important classifications of complaints are misrepresentations of results obtained from the use of a product, misrepresentations of the properties of cosmetics, disparagement of competitors' products and false branding or trade marks to give a product an appearance of higher quality. It will be noticed that after 1947 false branding, disparagement of competitors' products and misrepresentations of the place of origin, which means the representing of imported articles as being of domestic manufacture and visa versa, have disappeared from the list of complaints. Further, it will be noted that many other forms of deception have not reoccurred in the later years, such as the passing off of renovated or used products as new, the use of samples superior to the actual article for sale, failure to disclose harmful potentialities of drug products, misrepresentation of financial returns to agents, and misrepresentations
as to the giving of so called free deals. Although this evidence is far from conclusive in itself, it would tend to indicate that the more harmful and obviously false representations have been largely eliminated by the efforts of the Federal Trade Commission.

Disposition of Formal Complaints.

Settlement by Cease and Desist Orders. Under section 12 of the Act, a total of 204 orders to cease and desist had been entered by the end of June, 1946. Of this total, 31 dealt with food, 108 with drugs, 19 with devices and 46 with cosmetics.

Settlements by Stipulation. Since 1500 formal complaints of violations of sections 5 and 12 were initiated by the Commission between the enactment of the Act and the end of June 1946 and 2331 field investigations of claimed violations of section 12 alone were undertaken during this same period (and there must also have been many investigations under section 5), it must be assumed that a large part of these investigations were either closed by stipula-
tion or dismissed because of insufficient evidence.\footnote{The total of 1500 was reached by adding together all the individual figures on complaints issued in each of the years from 1938 up to and including 1946. See, Annual Reports of the Federal Trade Commission, Washington, D.C.: United States Government Printing Office, sections involving complaints of false advertising.}

Again, since only 204 orders to cease and desist had been issued for violation of section 12 in this same period of time and since violations of section 12 constitute over 50\% of the Commission's work with false advertising it can safely be assumed that even a very large proportion of the formal complaints were either closed for lack of evidence or settled by stipulation.

\textbf{Use of Injunctive Procedure.} The Commission generally has employed the injunctive procedure against the advertising of drugs, or devices whose use is potentially injurious to health. Obesity cures, abortifacients, and home diathermy devices are among the products whose advertising has been enjoined most frequently. Although almost all instances of the employment of the injunctive process have involved drugs or devices whose use may be harmful to health, there have been a few cases in which the injunction was issued to prevent economic injury to the public.\footnote{See William F. Brown, "The Federal Trade Commission and False Advertising." II, The Journal of Marketing, Vol. XII (October, 1947), p. 193.}
Federal Trade Commission: Summary of All Legal Activities Under the Various Laws Administered By It.

Table 2

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of Stipulations</th>
<th>No. of Cease and Desist Orders</th>
</tr>
</thead>
<tbody>
<tr>
<td>1938</td>
<td>246</td>
<td>576</td>
</tr>
<tr>
<td>1939</td>
<td>288</td>
<td>600</td>
</tr>
<tr>
<td>1940</td>
<td>281</td>
<td>575</td>
</tr>
<tr>
<td>1941</td>
<td>348</td>
<td>532</td>
</tr>
<tr>
<td>1942</td>
<td>250</td>
<td>560</td>
</tr>
<tr>
<td>1943</td>
<td>165</td>
<td>280</td>
</tr>
<tr>
<td>1944</td>
<td>124</td>
<td>303</td>
</tr>
<tr>
<td>1945</td>
<td>140</td>
<td>286</td>
</tr>
<tr>
<td>1946</td>
<td>89</td>
<td>96</td>
</tr>
<tr>
<td>1947</td>
<td>56</td>
<td>145</td>
</tr>
<tr>
<td>1948</td>
<td>73</td>
<td>99</td>
</tr>
<tr>
<td>1949</td>
<td>139</td>
<td>47</td>
</tr>
<tr>
<td>1950</td>
<td>164</td>
<td>79</td>
</tr>
</tbody>
</table>

Although the above figures apply only partly to cease and desist order and stipulations dealing with false advertising, they do serve to indicate significant trends. It is interesting to note the gradual reduction in the number of both stipulations and cease and desist orders after the years 1941 and 1942. Since a large part of these legal activities involved the curtailment of false and deceptive advertising it is only logical to conclude that not long after the passage of the Wheeler-Lea Act and with the display of enforcement by the Commission, the quantity of misrepresentations was automatically retarded. Another significant point in the table is the difference
between the number of cases settled by cease and desist orders and those settled by stipulations. It will be noted that in the earlier years for approximately every two cases settled by cease and desist, only one was settled by stipulation. In the latter years the relation between the two has been much closer, with the last two years showing a reverse relationship. This would suggest a growing spirit of cooperation on the part of advertisers in the later years.

Survey of Media Advertising

It is of interest to note the work which is being done by the Commission on a self-initiated basis with regard to the survey of various advertising media. The most recent year, ending June 30, 1950, is used here to indicate the nature and extent of these activities.

Through its Division of Radio and Periodical Advertising, the Commission conducts a continuing survey of published and broadcast advertising. The purpose of the survey is to detect false and misleading advertising in violation of the Federal Trade Commission Act and to bring about its discontinuance.

The staff of this Division examines and appraises from a consumer viewpoint advertisements appearing in current issues of magazines, newspapers, farm and trade
journals, mail-order catalogs, and radio and television commercial continuities. In this way, advertisements which appear to be false, misleading, or deceptive are discovered and referred for further study and checking by attorney-examiners of the Division. 49

Method and Scope of Survey. The Commission found it advisable to call for some newspapers and magazines on a continuing basis because of the persistently questionable character of the advertisements published, but for most of the 20,000 or more publications circulated in this country, copies of current issues are generally procured on a staggered monthly basis at an average rate of three times yearly. The frequency of the calls for each publication depends upon its circulation and the character of its advertisements.

The Division received mail-order catalogs and circulars from 50 mail-order houses, five of which had combined annual sales of $3,488,756,473.

The frequency of calls for commercial continuities from individual radio stations is proportioned to the population of the communities in which the stations are located. Commercial script broadcast by radio stations

in small cities is sampled once yearly; stations in cities of intermediate size, twice yearly; and stations in cities with a population of 200,000 or more, three times yearly on a systematically staggered schedule. The national and regional networks respond on a continuous weekly basis and producers of electrical transcription recordings submit texts of commercial portions of all recordings once each month.

Requests for samplings of commercial script were issued to 97 television stations by the Commission during the year ending June 30, 1950 and commercial continuities were received also from television networks and producers of television advertising film. 50

The following table summarizes the extent and results of the 1950 survey.

50 Ibid., p. 43
Survey of Advertising—Summary, Fiscal Year 1950

Table 3

<table>
<thead>
<tr>
<th>Source</th>
<th>Material Received</th>
<th>No. of Advertisements Examined</th>
<th>No. of Ads. Set Aside as Questionable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mail-order Catalogs</td>
<td>11,095 pages</td>
<td>11,095 pages</td>
<td>284</td>
</tr>
<tr>
<td>Periodicals</td>
<td>1,627 newspapers. 1,225 mag., etc.</td>
<td>336,150 pages</td>
<td>14,998</td>
</tr>
<tr>
<td>Radio</td>
<td>839,091 continuities*</td>
<td>759,729**</td>
<td>13,384</td>
</tr>
<tr>
<td>Television</td>
<td>36,787</td>
<td>34,422</td>
<td>714</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td></td>
<td>29,390</td>
</tr>
</tbody>
</table>

* Aggregating 1,847,500 typewritten pages.

** Aggregating 1,725,072 typewritten pages.

A brief analysis of these figures would indicate that less than 2 per cent of all the advertisements that the Commission surveys are found to be questionable. This fact in itself is far from conclusive since it leaves two possible explanations. It may be that only a small fraction of the advertisements are harmful which the data...

Ibid.
seems to indicate or it could very well be that the Commission is being very lenient in its interpretation of "false and deceptive advertising." Conclusions as to this matter will be left to a later discussion when more evidence is presented.

In addition to providing the basis for docketing of applications for complaint and for determining compliance with cease and desist orders and stipulations, the survey also is useful in determining whether a trade practice conference may be warranted in a particular industry and in checking observance of promulgated trade practice rules.\(^{52}\)

As a special project, all advertisements of alcoholic beverages are assembled for study and appraisal, with a view to proceeding in all instances where the Wheeler-Lea Act appears to be violated, and to assist the Alcohol Tax Unit, Bureau of Internal Revenue, in its administration of the Federal Alcohol Administration Act. By special arrangement, all radio advertisements of alcoholic beverages are set aside for examination and use by representatives of that agency.

\(^{52}\) *Ibid.*, p. 44.
As another project, all radio and periodical advertisements of cigarettes are assembled, processed, and given special study looking to the docketing of applications for complaint where warranted.\footnote{53}

New legislation during the year led to a third special project. In connection with Public Law 459, Eighty-first Congress (an act to regulate oleomargarine, etc.), all advertisements of oleomargarine are assembled, processed, and given special study looking to the docketing of applications for complaint where warranted.

\textbf{Other Investigative Activities.} The Division of Radio and Periodical Advertising also conducts investigations by correspondence, conference, and research of docketed individual applications for complaint, as well as industry-wide investigations and surveys.

\textbf{Cases Handled.} At the close of the fiscal year 1949, a total of 304 individual cases were pending in the Division of Radio and Periodical Advertising, as compared with 458 at the close of the previous fiscal year.\footnote{54} During the


fiscal year 1949, 377 investigations were completed, and 223 new investigations were initiated, 133 of which originated through the Division's survey of advertising; 76 through complaints from consumers and competitors; and 14 by reference from the Commission. Settlement by stipulation was recommended in 81 cases. Formal complaints were issued in 26 cases. Fifty-three cases were closed after a proper showing of voluntary correction by the advertisers.

During the fiscal year 1949, the Division completed an investigation of the manufacturers and large distributors of crib mattresses, carriage mattresses, play-pen pads, and similar products on an industry-wide basis, involving the advertising and promotional practices of 20 companies.

As the year ended the Division was conducting industry-wide investigations with respect to the advertising of 161 manufacturers of so-called orthopedic and "health" shoes and 20 companies manufacturing and distributing arch supports and other chiropodist appliances. Also, during the year the Division initiated and completed an investigation of the promotional practices of all manufacturers and large distributors of antihistaminic drug preparations advertised for the cure or relief of colds. This investigation covered the practices of 30 companies. Special project investigations were conducted with respect to the promotional practices of manufacturers of radio and
television receiving sets, cigarettes, alcoholic beverages, and liquid starches.

Correspondence handled by the Division during the year totaled 3,544 incoming pieces of mail and 10,707 outgoing pieces.

Conclusions.

It can readily be seen from a study of what the Commission has done that much has been accomplished towards the control of false advertising. The Commission has endeavored to keep a constant watch over all the advertising that appears in the various media. It surveys some 20,000 publications, keeping close watch on those that give evidence of undue tendency to publish false advertising and requires copies of commercials from the various radio and television stations.

The greatest number of complaints have been issued against the advertising of food, drugs, cosmetics, and devices with special emphasis on advertisements of the therapeutic properties of medicinal preparations and devices. Misrepresentations which cause financial loss to the consumer as well as misrepresentations of business status are also very frequently attacked by the Commission. An analysis of the nature of the Commission's complaints would tend to indicate, in general, a gradual elimination
of the more harmful and obviously false representations.

It appears that the number of stipulations and cease and desist orders, although large in the first few years of Wheeler-Lea enforcement, have been gradually decreasing since the years 1941 and 1942. Another significant point is that the number of stipulations in relation to cease and desist orders has increased in the last few years and has been in a ratio of two to one or better in the last two years, indicating a more cooperative spirit on the part of the advertiser.

In those cases where clear and undesirable abuse has occurred, the Commission has dealt quickly and effectively. It is significant to note that the overwhelming majority of advertising has been found to be truthful. Less than two per cent of all the advertisements that the Commission surveys is found to be questionable.
CHAPTER V
AN ANALYSIS OF THE JUDICIAL
INTERPRETATIONS OF THE LAW.

In this chapter a study is made of the interpretation by the courts of the Act and their rulings on actions of the Commission. Cases are presented here that represent the major points of interpretation of the law. They have been taken from the United States Code Annotated Title 15, Commerce and Trade, sections 16-80, 1950, and represent the backbone of the court decisions involved in the enforcement of the Wheeler-Lea Amendment. They are grouped in accordance with the rulings that have been established by the courts with respect to false advertising.

Scope of the Phrase "Misleading in a Material Respect."

Whether an advertisement is to be construed as being "false" or as making representations which are "deceptive" depends upon whether the advertisement is "misleading in a material respect." In the interpretation of the word "material," non-important matters including mere "puffing" have been excluded. The application of this concept in any given case of misrepresentation involves careful judgment as to the nature of the misrepresentation.

69
In certain cases it was ruled that "misleading in a material respect" does not cover the age-old practice of "puffing" in the sale of wares. The courts have accepted the use of such words as "best," "perfect," "excellent," "wonderful" and "amazing" as being legitimate words to use in the sale of products, whether or not the evidence indicates the words to be appropriate. In several instances where the Commission had issued a cease and desist order against advertisements that contained "puffing" the court of appeals set them aside on the grounds that the use of such words was not illegal. The following case is a good example of this point.

**Kidder Oil Co. v. Federal Trade Commission,**

117 F.(2d) 892, 901 (1941)

The Kidder Oil Company sold a lubricating oil containing graphite. The advertisements for the product claimed that it was a "perfect" lubricant which would actually enable one to operate a motor car an "amazing distance" after the oil was finally used up. The Commission charged that the advertisements were extravagant, deceptive, misleading, and false, and issued a cease and desist order.

* * * *

Upon appeal, the Court of Appeals set aside the significant part of the Commission's order on the ground that the extravagant language was only "innocent puffing."
In the words of the Court,

What might be an 'amazing distance' to one person might cause no surprise to another. So far as we know, there is nothing 'perfect' in this world, but still it is a common term, which undoubtedly means nothing more than that the product is good or of high quality. We can conceive of situations where the use of such words might be deceptive and even fraudulent. As used by petitioner, however, we are of the opinion that they are nothing more than a form of ' puffing' not calculated to deceive.

Failure to Warn of Harm.

The Act, as has been noted, provides that "misleading in a material respect" includes failure to warn of harm that might result from the use of a product. The courts have been willing usually to validate the cease and desist orders issued by the Commission on the basis of this aspect of the definition of false advertising.

The following cases are examples of this point.

American Medicinal Products v. Federal Trade Commission,

136 F. (2d) 426, 427 (1943).

The Commission directed the company to cease advertising a preparation recommended as a cure for obesity without revealing to the buyers that it should be used only under competent medical supervision. It was found by the Commission that the product contained chemicals which were definitely injurious to persons having diabetes, goiter,
tuberculosis, arteriosclerosis, or coronary diseases. The company contended that the Commission was not empowered to require it to reveal such a statement.

* * * *

The Court of Appeals upheld the Commission, stating that if the company wanted to advertise, it had to do so truthfully and in accordance with the order of the Commission.

Gelb v. Federal Trade Commission, C.C.A. 2, 1944, 144 F. 2d 580

The petitioner was advertising a cosmetic preparation for shampooing and coloring the hair that was capable of causing injury if not used according to instructions printed on the package. The Federal Trade Commission ordered the petitioners to cease advertising the preparation as harmless without suggesting in the advertisement itself the warning contained in the instructions. The use of such terms as the preparation is harmless "if used in accordance with instructions on the package" would have made it acceptable.

* * * *

The Federal Trade Commission Act was intended for protection of the trusting as well as the suspicious. The Courts held that in determining whether an advertisement is
misleading consideration must be given to the use of the article under conditions prescribed in the advertisement or under customary or usual conditions. It obligates the advertisement to state clearly such conditions for safe use if other usage induces harmful results.


The appellant in this case was an Indiana Corporation engaged in the sale and distribution in interstate commerce of certain preparations described as "Dr. Miles' Nervine," "Dr. Miles' Nervine Tablets" and "Dr. Miles' Anti-Pain Pills." The controversy arose out of the fact that the Federal Trade Commission had reached the tentative conclusion that the appellant's advertising material failed fully to reveal that these preparations, if used by individuals in excess of the dosage recommended, might result in harm to the users. The Miles Laboratories refused to abide by this decision to include in its advertisements a warning against the excess dosage. The company's contention was that its advertisements were lawful and hence did not offend the Wheeler-Lea Act, and that its labels were matters not within the scope of the Act, as the result
of which the Commission had no lawful right to issue its complaint in the one case or the other. In contesting the jurisdiction of the Commission over its advertising and labeling, the company brought the case into a federal District Court under the Federal Declaratory Judgment Act.

* * * *

The lower court approved of the Commission's jurisdiction saying in effect "that the administrative remedy which Congress has provided must first be exhausted." To hold, otherwise, the Supreme Court has recently and explicitly said,

...would in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance.

It further claimed that the Commission was not attempting to regulate the appellant's labels. All that was said on the subject was to offer that means of correction as a choice which the appellant could take or leave as it pleased. The Supreme Court thus denied certiorari and affirmed the lower court's decision.

Non-Disclosure

Although the Wheeler-Lea Act specifically forbids non-disclosure only where it has the effect of producing harmful results to the public health the Commission has
prohibited other types of non-disclosure. In many instances it has ruled that even though no false representation is affirmatively made, an advertiser is guilty of violating the Act if he fails to disclose information the concealment of which would have the capacity, tendency or effect of misleading or deceiving the purchasing public. The Commission has held that such concealment is "unfair" on the ground that the commodity concerned simulated some other commodity with which the public was familiar; that it had been sold without any positive identification of its true nature or content; and that, unless it was unmistakably identified, the public might readily mistake it for the commodity with which it was familiar.

Once having determined that failure to disclose material facts is "unfair" the only remaining question is: "What steps can or should the Commission take to prevent the alleged practice?"

The courts have said that the orders of the Commission must be appropriate to remedy the evil which they seek to prevent. The requirements of labeling, tagging, stamping or otherwise identifying merchandise is not unique or novel in the field of unfair competition. For example, in cases where an injunction has been sought to prevent the sale of merchandise which simulated or imitated the merchandise of a manufacturer already in the field, "where
no disclosure was made as to its true nature or content," the courts have invariably required, as a condition to the continued sale of such merchandise, that the defendant clearly and distinctly mark his goods so as to indicate unmistakably that they are his goods and not those of his competitor. 55

It would thus seem clear that if the Commission makes a finding that the failure to disclose material facts has the tendency and capacity to deceive the public and the only appropriate remedy to prevent such deception is a requirement that disclosure of such material facts be made, the Commission, in exercising its power to prevent such practice, has ample authority to require the labeling, tagging, advertising, stamping or marking of such merchandise in such clear and unmistakable manner that an ordinary purchaser exercising reasonable care will not be misled, deceived or beguiled into buying something he has reason to believe is something else. It seems equally clear that the courts will sustain such action.

In the trade practice rules promulgated by the Federal Trade Commission many provisions on non-disclosure are found. To mention a few of them, briefly, the Tomato

55 "Non-disclosure as an Unfair Practice in Advertising and Selling," a research bulletin published by the National Better Business Bureau, Inc., 1941.
Paste Manufacturing Industry Rules (September 3, 1938), for example, require in effect, that full and non-deceptive disclosure must be made of the presence of added artificial color.

The Ribbon Industry Rules (June 28, 1939) require the non-deceptive disclosure of country of origin (Rule 10); the non-deceptive disclosure of yardage marked on the spools, bolts, cards or packages, etc., (Rule 11); the non-deceptive disclosure of "cut-edge" or "pasted-back" construction.

The non-disclosure provisions of the Trade Practice Rules for the Tuna Fish Industry and Ripe Olive Industry merit particular study because of what seem to be their far reaching implications.

After defining grades of tuna, such as "Fancy Tuna," "Fancy White Meat Tuna," "Standard Tuna," "Standard White Meat Tuna," "Tuna Flakes" and "White Meat Flakes," the Tuna Fish Industry Trade Practice Rules (August 27, 1940) state (Rule 3):

In advertising, describing, representing, offering for sale or selling canned tuna or canned tuna products, it is an unfair trade practice to deceptively conceal or fail or refuse to disclose the species of tuna used in the product and the grade or quality thereof, or to conceal or fail to refuse to disclose any other material fact respecting the product, where such concealment of non-disclosure is practiced with the capacity and tendency or effect of thereby misleading or deceiving the purchasing or consuming public.
Rule 5 of the Trade Practice Rules for the Ripe Olive Industry (June 14, 1940) states:

In the interest of protecting purchasers and preserving fair competition in the industry, full and non-deceptive disclosure should be made by members of the industry in their advertising, sales literature, and other selling representations of the quality, quantity, and size of the olives packed in cans or other opaque containers and offered for sale. Concealment of such information or the non-disclosure thereof, where practiced by the seller, with the capacity and tendency or effect of thereby misleading or deceiving the purchasing or consuming public, is an unfair trade practice.

However, in cases where non-disclosure does not result in material damage and the representation merely fails to be informative the courts have not upheld the Commission's order. The following case will give evidence to this fact.

Albery v. Federal Trade Commission,
C.A.O.C. 1950, 182 F 2d 36

In this case advertisers of drugs claimed only that their product would aid a certain condition when that condition arose from one certain described cause. Failure of advertisers to state affirmatively that there were other ailments not reached by the drug was not "false advertising" under section 12 of the Wheeler-Lea Amendment and the Federal Trade Commission had no power to require advertisers
to include such affirmative statements in their advertisement.

* * * *

Failure of advertisement claiming drug to possess therapeutic value in treatment of sleeplessness, nervousness, etc., to designate which of two established schools of medicine recognized the product as beneficial did not make the advertisement false within the Act and did not authorize the Federal Trade Commission to require advertisers to designate which of the established schools of medicine recognized their products as beneficial. The Federal Trade Commission claimed that the Act's purpose is to encourage the informative function of advertising.

However, the Court held that neither the purpose nor the terms of the Act are so broad as the encouragement of the informative function. Both purpose and terms are to prevent falsity and fraud—a negative restriction. When the Commission goes beyond that purpose and enters upon the affirmative task of encouraging advertising which it deems properly informative, it exceeds its authority.

Protection of the Unsuspecting

Where representations have the effect of misleading those who do not have expert knowledge or an intelligent ability to discriminate the courts have upheld the
Commission's order to cease and desist. In effect, the courts have stated that a law against misleading representations is designed to protect all classes of purchasers and especially those who are least able to protect themselves. The following cases illustrate this attitude.

Gulf Oil Corporation v. Federal Trade Commission,
C.C.A. 5, 1945, 150 F.2d 106

The Federal Trade Commission's order prohibiting certain statements in advertising an insecticide was not erroneous on the grounds that benefits set forth in the advertisements beyond those actually derived from use of insecticide were merely "puffing," which refers generally to expression of opinion not made as representation of fact, since while a seller has some latitude in puffing his goods he is not authorized to misrepresent or to assign to them benefits or virtues they do not possess.

*   *   *   *

Advertisements having a capacity to deceive may be prohibited, since the Wheeler-Lea Amendment was not made for protection of experts but for the general public including the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but are governed by appearances and general impressions.
Parker Pen Co. v. Federal Trade Commission  
C.C.A. 7, 1947, 159 F. 2d 509

The copy of an advertisement near the picture of a large blue diamond, in sizeable type and in distinctive coloration, stated that "blue diamond" fountain pens were "guaranteed for life" and further stated some distance away in smaller type next to a small blue diamond that the guarantee was effective only on payment of 35-cent service charges. The Commission found this practice to be deceptive. It claimed that a limitation on the guarantee should appear in the copy close to words "guaranteed for life" and in same size print.

* * * *

The significant point established by this case is that in protecting the public against deceptive advertising the Federal Trade Commission must protect the casual or negligent reader as well as the vigilant and more intelligent and discerning public.
Charles of the Ritz Distributors Corp.

v.

Federal Trade Commission

C.C.A. 2, 1944, 143 F.2d 676

Where the Federal Trade Commission's finding that a skin cream advertised as having ingredients which would restore the youthful appearance of the skin did not have such ingredients and was supported by substantial evidence, the Commission was authorized to find that the use of the trademark "Rejuvenescence" was deceptive and misleading, since the word is treated as a common word with the plain meaning of a renewing of youth.

The fact that the word "Rejuvenescence" as applied to skin cream had been registered as a trademark did not prevent its use from falling within the prohibition of the Federal Trade Commission since it was applied to face cream which contained no such rejuvenating quality.

* * * * *

The important criterion in determining whether a product is falsely advertised is the net impression which the advertisement is likely to make upon the general public.
Progress Tailoring Co. v. Federal Trade Commission
C.C.A. 7, 1946, 153 F.2d 103

Petitioners' advertisements which offered a suit of clothes "free" to salesmen accepting employment with them, when in fact salesmen were required to make payment for suit with their services by selling so many suits before delivery was made, were within prohibition of the Federal Trade Commission Act, and the Federal Trade Commission was justified in directing petitioners to cease using the word "free" in their advertisements, regardless of whether it was shown that any salesman had ever been deceived, since the advertisements had a tendency or capacity to deceive.

*   *   *   *

The Federal Trade Commission may require advertisements to be so carefully worded as to protect the most ignorant and unsuspecting purchaser. If a statement in the advertisement is totally false it cannot be qualified or modified so as to appear to be true.
General Motors Corp. v. Federal Trade Commission
114 F. (2d) 33 (1940) Ford Motor Co. v. Federal
Trade Commission, 120 F. (2d) 175 (1941).

The business practice challenged by the Commission
in these cases was one of advertising a so-called "690
Plan" for financing the sale of automobiles. The adver-
tisements stated that the rate of interest was only 6 per
cent on "your unpaid balance." In fact, however, the
customer was charged 6 per cent on the original amount
of the account--the original unpaid balance--from the
date of the obligation until the date that the account
was closed. The Commission demonstrated that when interest
is calculated in this manner, the effective rate is approx-
imately 11 1/2%. A cease and desist order was accordingly
issued.

* * * * *

Both the General Motors Corp. and the Ford Motor
Company carried the orders to the Courts of Appeal. The
courts held, however, that the advertising was misleading
on the grounds that in a good many cases, buyers would
believe that they were paying 6% interest only on the
current unpaid balance. The essential consideration in
this matter is that the Wheeler-Lea Amendment was made to
protest the unthinking and credulous as well as the expert.
Bokenstette v. Federal Trade Commission,
C.C.A. 1943, 134 F.2d 369

Use of the initials "R.O.P." in interstate advertising of a chick hatchery which was not an R.O.P. operator in such a manner as to lead readers to believe that the hatchery belonged to an association using such initials and produced eggs and chickens under the association rules and regulations warranted a cease and desist order by the Federal Trade Commission.

* * * *

In this case, the mere fact that words and sentences may be literally and technically true does not prevent their being framed in such a setting as to mislead or deceive so as to warrant a cease and desist order.

It is unnecessary for the Federal Trade Commission to find that actual deception resulted before issuing a cease and desist order against false advertising, but it is sufficient to find that natural and probable result of such advertising is to cause one to do that which he would not otherwise do.

The Circuit Court of Appeals, in its ruling, therefore, found these findings of fact and conclusion binding.
De Forest's Training v. Federal Trade Commission
C.C.A., 1943, 134 F.2d 819

Statements by this company offering training in television that the beginning of a new American industry was already with us, that television was developing rapidly, that the success of a young man depended on whether he made himself available for television now, and that men who wanted steady, big-paying jobs were needed in the fast growing television industry, were misleading and an order prohibiting misrepresentations concerning possibilities or opportunities for employment of students or graduates of a course in television was proper.

*   *   *   *

The points brought out in connection with this case were that it is the duty of one offering training in television to deal fairly with the public and not to make false, deceptive or misleading statements, and that any statements made by one offering such training are to be taken in their ordinary sense.

The petition to set aside the order was denied but modified by the Court to eliminate the phrase "or any other branch of the electronics industry." The Court found no evidence in the record that the petitioner had misrepresented the possibilities or opportunities for
employment in any branch of the electronics industry other than television.

Findings of Fact if Supported by Evidence are Binding on the Courts.

It is important to note that the courts have generally accepted the findings of fact of the Federal Trade Commission if they are supported by sufficient evidence. This is in keeping with the requirement of the Act and is well illustrated by the following court decisions.

E. B. Muller & Co. v. Federal Trade Commission
C.C.A. 6, 1944, 142 F.2d 511

The conceded facts were that the manufacturer of granulated chicory misrepresented its method of achieving uniformity in color and falsely represented that a competitor's product contained molasses, sugar beet, and other foreign substances. This established that "unfair method of competition" within the Federal Trade Commission Act was practiced by the manufacturer.

* * * *

In proceeding to review a cease and desist order of the Federal Trade Commission, the findings of the Commission on issues of fact are controlling, so long as there is warrant in the record for the judgment of the Commission.
Moretrench Corp. v. Federal Trade Commission

C.C.A. 1942, 127 F.2d 792

Evidence in this case sustained the Commission's finding that the advertising of "wellpoint" used in draining wet places preparatory to building or engineering operations grossly understated the unobstructed water-passing screen areas of competing products as compared with the advertised "wellpoint." The evidence also sustained the findings that the advertising of "wellpoint" for use in draining wet places was disparaging competitors' products by claiming their failure to prevent the backwash of jetted water areas in order to make a sink.

*   *   *   *

Here the important point again is that the findings of the Federal Trade Commission, if supported by substantial evidence, are conclusive as to the facts.
Sibrone Co. v. Federal Trade Commission,
C.C.A. 1943, 135 F.2d 676

Evidence sustained Federal Trade Commission's findings that statements in petitioner's advertising respecting its product for use as a deodorant, which represented that preparation would destroy odors and that it would reduce excessive sweating to normal, were deceptive and misleading to the public and justified the Commission's order directing petitioners to cease making such representations concerning their product.

*   *   *   *

Evidence sustained the Federal Trade Commission's findings that statements in petitioners' advertising respecting its product for use in cases of dandruff, which used the term remedy, and from which it could be inferred that the preparation afforded permanent rather than temporary relief, were deceptive and misleading to the public and justified the Commission's order directing petitioners to cease making such representations concerning their product.

The point brought out here is that findings of fact of the Federal Trade Commission, when supported by evidence, should have been accepted by the Circuit Court of Appeals as binding.
Zenith Radio Corp. v. Federal Trade Commission
C.C.A. 7, 1944, 143 F.2d 29.

Evidence that the radio manufacturer advertised that its radios could receive clearly daily foreign short-wave broadcasts and that its radios had a specified number of tubes although, in fact, atmospheric and electrical conditions made daily reception impossible and some devices advertised as tubes were not tubes while others were rectifier tubes which do not perform the primary function of detecting, amplifying, or receiving radio signals, authorized the Federal Trade Commission to order the manufacturers to cease and desist from such advertising.

* * * *

The Federal Trade Commission, in determining propriety of advertising, is not required to sample public opinion to determine what the advertiser was representing to the public, but may look at the advertisements in question, consider relevant evidence that will aid in interpreting advertisements, and then decide whether the advertiser is engaging in an unfair or deceptive practice.

Substantial evidence sustained the Federal Trade Commission's findings that the advertisements of the radio manufacturer constituted an unfair or deceptive trade practice.
Stanton v. Federal Trade Commission,
C.C.A. 1942, 131 F.2d 105

The Federal Trade Commission's order to cease and desist from disseminating advertisements representing that a certain preparation was a cure or remedy for obesity or using the name "Anti-Fat Tablets," was disputed on the contentions that the order was based on erroneous findings that the preparation contained calcium carbide, instead of calcium carbonate, and that the Commission and its experts were unfamiliar with "iodine (Keysall)" listed in the formula as one ingredient of preparation.

*   *   *   *   *

When the petitioner, Clara Stanton, placed her formula in evidence before the Circuit Court, it was found that calcium carbonate was an ingredient but in too small a quantity to have any effect as an obesity cure. The Circuit Court therefore supported the findings of the Commission and the order was enforced.
However, the courts have also ruled that the evidence must be substantial, or such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. The following case illustrates the significance of this point.

Carlay Co. v. Federal Trade Commission,
C.C.A. 7, 1946, 153 F. 2d 493.

In the proceeding to review the order of the Federal Trade Commission directing petitioners to desist from disseminating advertisements which represented that excessive weight may be removed from the human body through the use of the petitioner's product and weight-reducing plan without restricting the diet, the Court held that the evidence was insufficient to support the Commission's finding that a restrictive diet was necessary.

*   *   *   *

The essential consideration in this matter was that "substantial evidence" was necessary to sustain the findings of the Federal Trade Commission, not a mere scintilla, and it means such relevant evidence as a reasonable mind would accept as adequate to support a conclusion, and it must be of such character as to afford a substantial basis of fact from which fact an issue can be reasonably inferred.
Unfair Competition

Prior to the passage of the Wheeler-Lea Act, the Supreme Court had ruled that injury to a competitor must be proven before any action can be taken against a false and deceptive advertisement. Since the passage of the Wheeler-Lea Act, the Supreme Court has reversed its decision on this point in effect declaring that deceptive statements extolling the quality of merchandise in active competition are sufficient evidence for a charge of unfair methods of competition. Although it is difficult to determine whether the change is directly attributable to the Wheeler-Lea Amendment the following case illustrates this new attitude.

Federal Trade Commission v. Raladam Co., 1942
62 S. Ct. 966, 316 U.S. 149, 86 L. Ed. 1336

The Federal Trade Commission's findings that seller of fat-reducing remedy had made misleading and deceptive statements to further sales, that the product had many active rivals, and that the mis-statements had a tendency and capacity to induce people to purchase seller's product to exclusion of products of competitors were adequate basis for cease and desist order.

* * * * *
Where the Federal Trade Commission find that misleading and deceptive statements were made with reference to the quality of merchandise in active competition with other merchandise, it is authorized to infer that trade will be diverted from the competitors who do not engage in such unfair methods. The Supreme Court affirmed the order of the Federal Trade Commission to cease and desist, after the Circuit Court of Appeals set it aside. Although the Circuit Court of Appeals held that there was a lack of evidence in support of injury to a competitor, the Supreme Court said that,

When the Federal Trade Commission finds that deceptive statements are being made extolling the quality of merchandise in active competition with other merchandise, it is authorized to infer that trade will be diverted from competitors who do not engage in such unfair methods.

It further held that one of the objects of the Federal Trade Commission Act was to prevent potential injury by stopping unfair methods of competition in their incipiency.

Conclusions

The success of the Commission depends not only upon its own interpretation of the law, but also upon its ability to obtain court approval of its decisions. The Act provides that cease and desist orders issued by the Commission are reviewable by the U. S. Circuit Courts of Appeal, and
thereafter, upon writ of certiorari, by the U. S. Supreme Court.

Almost without exception the courts have upheld the Commission's interpretation of unfairness and deception, and the Supreme Court regularly has denied appeals from these decisions. The attitude of the courts, in keeping with the provision of the Act, has been that the Federal Trade Commission's findings are controlling if they are supported by evidence.

Although the Wheeler-Lea Act has defined false advertising as advertising that is false in a material respect, it does not state specifically what types of deceptions are to be covered. It, therefore, has given a great deal of discretionary power to the Commission in judging what constitutes a deception.

Where injury or loss to the public or to a competitor can be shown, the Commission has generally succeeded in its prevention activities regardless of whether the deception was committed by commission or omission. The practice of "puffing," however, has been considered a legitimate one regardless of the validity involved.

CHAPTER VI
SUMMARY AND CONCLUSIONS

Prior to the passage of the Federal Trade Commission Act there was very little federal control over false and deceptive advertising. The only federal laws that could limit the use of false advertising were the prohibition against the use of the mails to defraud and the Pure Food and Drug Act of 1906. Neither of these laws was effective in prohibiting selling misrepresentations. As a consequence the only real restraining factor in the maintainance of truth in advertising was the character and conscience of the advertiser. A great deal of false and deceptive advertising was to be found in this early period.

With the passage of the Federal Trade Commission Act in 1914 the first step was taken towards federal control of selling misrepresentations. Although the Act did not deal specifically with false advertising its prohibition of unfair methods of competition was interpreted by the Commission as well as the courts to include false and deceptive advertising.

The Federal Trade Commission Act however, was not effective in preventing false advertising. In the first place, the scope and jurisdiction of the Federal Trade Commission was limited to unfair methods in competition.
Secondly, the Commission's cease-and-desist order against objectionable advertising was not enforceable if the offender did not wish to obey it until it was approved by the courts. The burden of obtaining court approval was placed on the Commission allowing the offender to continue his false advertising without fear of penalty until such court sanction was obtained.

As a result of these limitations false and deceptive advertising continued on a large scale. Public sentiment was finally aroused and in 1938 Congress passed the Wheeler-Lea Amendment to the Federal Trade Commission Act. The Act greatly improved the Commission's power to prohibit selling misrepresentations.

There were four important improvements made by this amendment. (1) The Act prohibited unfair and deceptive acts and practices in commerce. This enabled the Commission to attack false advertising where it was in the public interest without having to prove injury to a competitor. (2) Section 5 of the Federal Trade Commission Act was amended to provide that orders to cease-and-desist should become final at the expiration of 60 days from service of the order unless appeal is taken to the courts. Thereafter violations of final orders to cease-and-desist are subject to civil penalty proceedings brought by the Attorney General in the United States District Courts. (3) Sections 12 to 15, inclusive,
make specific provision for the prevention of the dissemination of false advertisements of food, drugs, cosmetics, and devices. The amendment also empowers the Commission to prevent advertisers of food, drugs, devices, or cosmetics which may cause injury when used under prescribed or customary conditions from disseminating advertisements that fail affirmatively to reveal that such products are dangerous or that their use under certain conditions may cause bodily injury. (4) The dissemination of a false advertisement of a food, drug, device, or cosmetic, where the use of the commodity advertised may be injurious to health or where the act of disseminating is with intent to defraud or mislead, constitutes a misdemeanor, and conviction subjects the offender to a fine of not more than $5,000, or imprisonment of not more than 6 months, or both.

In proceeding against a false and deceptive advertisement the Commission has the same power as it had under the Federal Trade Commission Act to issue a complaint, gather evidence, hold hearings, and decide the case. There are three basic methods by which the Commission may prohibit false and deceptive advertising. It may issue a formal cease-and-desist order against the violation, it may enter into an agreement whereby the advertiser agrees to discontinue the violation, or it may engage in trade practice conferences whereby a whole industry agrees to stop certain practices.
Where the Commission has found it necessary to issue a cease-and-desist order and the offender has appealed to the courts, the courts have generally accepted the rulings of the Commission when there is substantial evidence in support of its claims following the requirement of the Act. However, where the Commission has attempted to prohibit advertisements that merely indulge in puffing or are unimportantly false the courts have refused approval in keeping with the Act's definition of false advertising.

APPRAISAL AND RECOMMENDATIONS.

The Wheeler-Lea Act was created to provide for action to correct false advertising without penalization in that large class of cases where there is no fraudulent or criminal purpose, for prompter and more effective enforcement of cease-and-desist orders, and for criminal penalties for certain violations of the Act. Although the Commission's work has been in accord with the objectives and purpose of the Act it has been subject to a serious limitation. Since the Wheeler-Lea Act is civil law an offender is not subject to any penalty until he has been ordered to stop the false and deceptive advertising and has been caught violating the order. With the Commission unable to get to all of the false advertising at its inception it is easy to see why a great deal of it still continues.
However, before criticizing this feature of the law one must consider that if the alternative was adopted whereby the Wheeler-Lea Act was made criminal law far greater difficulty would be encountered. The adoption of criminal procedure would result in clogging the courts with criminal cases and providing probably even weaker control over false and deceptive advertising. The present law, in spite of the limitation seems to be the better of the two solutions.

It must also be remembered that the extent of the seriousness of this weakness in the Wheeler-Lea Act depends upon the ability of the Federal Trade Commission quickly and effectively to take up instances of false and deceptive advertising. The Federal Trade Commission must have adequate funds to survey the entire field of advertising and promptly take action against an offender. The Commission must also be sufficiently staffed with personnel that can investigate a possible offense, issue a complaint, gather evidence, and order the offender to stop the violation with the greatest amount of speed and efficiency. Only in such manner can the time be reduced during which an advertiser is able to continue his violation before being dealt with.

In spite of continuance of false and deceptive advertising tribute must be paid to the accomplishments of the Commission and the success of this legislation in reducing false advertising. An analysis of the work of the Commission
would indicate a high degree of success. A mere comparison of the kinds and numbers of false advertisements appearing in various media prior to passage of the Wheeler-Lea Act with those of today would indicate considerable progress. It is also significant to note that in the constant surveys of media advertising which the Commission carries on less than two per cent of all those advertisements that are checked are found to be questionable. This would tend to indicate a cooperative spirit on the part of most advertisers and a general adherence to the law.

In the final analysis it can be stated that the Act itself is an effective and well conceived piece of legislation and that the Federal Trade Commission has dealt with the problem of false and deceptive advertising in a reasonably effective manner.
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PAMPHLETS

APPENDICES
APPENDIX A

The Wheeler-Lea Act

AN ACT

To amend the Act creating the Federal Trade Commission, to define its powers and duties, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1 of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, as amended (U.S.C., 1934 ed., title 15, sec. 41), is hereby amended by inserting before the period at the end of the third sentence thereof a colon and the following: "Provided, however, That upon the expiration of his term of office a Commissioner shall continue to serve until his successor shall have been appointed and shall have qualified."

Sec. 2, Section 4 of such Act, as amended (U.S.C., 1934 ed., title 15, sec. 44), is hereby amended to read as follows:

Sec. 4. The words defined in this section shall have the following meaning when found in this Act, to wit:

"Commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

"Corporation" shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.
"Documentary evidence" includes all documents, papers, correspondence, books of account and financial and corporate records.


"Antitrust Acts" means the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890; also sections 73 to 77, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", approved August 27, 1894; also the Act entitled "An Act to amend sections 73 and 76 of the Act of August 27, 1894, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", approved February 12, 1913; and also the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914."

Sec. 3. Section 5 of such Act, as amended (U.S.C., 1934 ed., title 15, sec. 45), is hereby amended to read as follows:

"Sec. 5. (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

"The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 406 (b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

"(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place
therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such persons, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the transcript of the record in the proceeding has been filed in a circuit court of appeals of the United States, hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: Provided, however, That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate circuit court of appeals of the United States, in the manner provided in subsection (c) of this section.

"(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the
United States, within any circuit where the method of competition or the act or practice in question was used or where such person, by filing in the court, within sixty days from the date of the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript 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 writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code.

"(d) The jurisdiction of the circuit court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

"(e) Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein,
and shall be in every way expedited. No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

"(f) Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and return post office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

"(g) An order of the Commission to cease and desist shall become final -

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

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

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

"(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.
"(h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

"(i) If the order of the Commission is modified or set aside by the circuit court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the circuit court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

"(j) If the Supreme Court orders a rehearing; or if the case is remanded by the circuit court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

"(k) As used in this section the term 'mandate,' in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

"(l) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States.
SEC. 4. Such Act is further amended by adding at the end thereof new sections to read as follows:

"Sec. 12. (a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to disseminated, any false advertisement -

"(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or

"(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.

"(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 5.

"Sec. 13. (a) Whenever the Commission has reason to believe-in, or is about to engage in, the dissemination or the causing of dissemination of any advertisement in violation of section 12, and

"(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 5, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 5, would be to the interest of the public, the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

"(b) Whenever it appears to the satisfaction of the court in the case of a newspaper, magazine, periodical, or other publication, published at regular intervals -

"(1) that restraining the dissemination of a false advertisement in any particular issue of such
publication would delay the delivery of such issue after the regular time therefor, and

"(2) that such delay would be due to the method by which the manufacture and distribution of such publication is customarily conducted by the publisher in accordance with sound business practice, and not to any method or device adopted for the evasion of this section or to prevent or delay the issuance of an injunction or restraining order with respect to such false advertisement or any other advertisement, the court shall exclude such issue from the operation of the restraining order or injunction.

"Sec. 14. (a) Any person, partnership, or corporation who violates any provision of section 12 (a) shall, if the use of the commodity advertised may be injurious to health because of results from such use under the conditions prescribed in the advertisement thereof, or under such conditions as are customary or usual, or if such violation is with intent to defraud or mislead, be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than $5,000 or by imprisonment for not more than six months, or by both such fine and imprisonment; except that if the conviction is for a violation committed after a first conviction of such person, partnership, or corporation, for any violation of such section, punishment shall be by a fine of not more than $10,000 or by imprisonment for not more than one year, or by both such fine and imprisonment; Provided, That for the purposes of this section meats and meat food products duly inspected, marked, and labeled in accordance with rules and regulations issued under the Meat Inspection Act approved March 4, 1907, as amended, shall be conclusively presumed not injurious to health at the time the same leave official establishments.

"(b) No publisher, radio-broadcast licensee, or agency or medium for the dissemination of advertising, except the manufacturer, packer, distributor, or seller of the commodity to which the false advertisement relates, shall be liable under this section by reason of the dissemination by him of any false advertisement, unless he has refused, on the request of the Commission, to furnish the Commission the name and post-office address of the manufacturer, packer, distributor, seller, or advertising agency, residing in the United States, who caused him to disseminate such advertisement. No advertising agency shall be liable under this section by reason of the causing by it of the dissemination of any false advertisement, unless it has refused, on the request of the Commission, to
furnish the Commission the name and post-office address of the manufacturer, packer, distributor, or seller, residing in the United States, who caused it to cause the dissemination of such advertisement.

"Sec. 15. For the purposes of sections 12, 13, and 14 -

"(a) The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof but also the extent to which the advertisement fails to reveal facts material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions as are customary or usual. No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and includes, or is accompanied in each instance by truthful disclosure of the formula showing quantitatively each ingredient of such drug.

"(b) The term "food" means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.

"(c) The term "drug" means (1) articles recognized in the official United States Pharmacopoeia, official Homoeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and (2) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (3) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (4) articles intended for use as a component of any article specified in clause (1), (2), or (3); but does not include devices or their components, parts, or accessories.

"(d) The term "device" (except when used in subsection (a) of this section) means instruments, apparatus, and contrivances, including their parts and accessories, intended (1) for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or (2) to affect the structure or any function of the body of man or other animals.
"(e) The term "cosmetic" means (1) articles to be rubbed, poured, sprinkled, or sprayed on, introduced into or otherwise applied to the human body or any part thereof intended for cleansing, beautifying, promoting attractiveness, or altering the appearance, and (2) articles intended for use as a component of any such article; except that such term shall not include soap.

"Sec. 16. Whenever the Federal Trade Commission has reason to believe that any person, partnership, or corporation is liable to a penalty under section 14 or under subsection (1) of section 5, it shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of the provisions of such section or subsection.

"Sec. 17. If any provision of this Act, or the application thereof to any person, partnership, corporation, or circumstance, is held invalid, the remainder of the Act and the application of such provision to any other person, partnership, corporation, or circumstance, shall not be affected thereby.

"Sec. 18. This act may be cited as the "Federal Trade Commission Act".

Sec. 5. (a) In case of an order by the Federal Trade Commission to cease and desist, served on or before the date of the enactment of this Act, the sixty-day period referred to in section 5 (c) of the Federal Trade Commission Act, as amended by this Act, shall begin on the date of the enactment of this Act.

(b) Section 14 of the Federal Trade Commission Act, added to such Act by section 4 of this Act, shall take effect on the expiration of sixty days after the date of the enactment of this Act. Approved, March 21, 1938.
APPENDIX B


SEC. 5. That unlawful methods of competition in commerce are hereby declared unlawful.

The Commission is hereby empowered and directed to prevent persons, partnerships or corporations, except banks and common carriers subject to the acts to regulate commerce, from using unfair methods of competition in commerce.

Whenever the Commission shall have reason to believe that any such person, partnership or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership or corporation may make application, and upon good cause shown may be allowed by the Commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition in question is prohibited by this Act it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership or corporation an order requiring such person, partnership or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

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If such person, partnership or corporation fails or neglects to obey such order of the commission while the same is in effect, the Commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission. The findings of the Commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the supreme court upon certiorari as provided in Section 240 of the judicial code.

Any party required by such order of the Commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or
modify the order of the Commission as in the case of an application by the Commission for the enforcement of its order, and the findings of the Commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the Commission shall be exclusive.

Such proceeding in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or judgment of the court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the anti-trust acts.

Complaints, orders and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person, partnership or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership or corporation at his or its principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order or other process registered and mailed as aforesaid shall be proof of the service of the same.