

ADDRESS OF HON. R. E. FREER, COMMISSIONER,
FEDERAL TRADE COMMISSION, BEFORE THE ANNUAL CONVENTION
OF THE PROPRIETARY ASSOCIATION, BILTMORE HOTEL,
NEW YORK, N. Y., TUESDAY, MAY 17, 1938

THE WHEELER-LEA ACT.

Ladies and Gentlemen of The Proprietary Association:

It is a pleasure for me to meet here with you at your annual convention, and to discuss with you briefly and informally the work of the Federal Trade Commission, particularly in the light of the recently enacted Wheeler-Lea amendments to the Commission's organic act.

In 1931, the Supreme Court in the case of Federal Trade Commission v. Raladam, held in effect, that unless a respondent's unfair acts or practices were proved to have injured actual or potential competitors, the Commission was powerless to prevent their use, regardless of their injurious effect upon the public.

Since that time the Commission has called attention in its annual reports to the desirability of an amendment of Section 5 of its organic act and a bill to remedy this situation had been introduced by Chairman Wheeler of the Senate Interstate Commerce Committee as early as the 1st session of the 74th Congress.

As amended March 21, 1938, the Federal Trade Commission Act declares unlawful not only "unfair methods of competition" but also "unfair or deceptive acts and practices in commerce". The purpose of the additional language was to make it no longer necessary for the Commission to offer evidence establishing injury to an actual or potential competitor.

Under other amendments to Section 5, cease and desist orders of the Commission in Federal Trade Commission Act cases become final after sixty days, unless within that time respondents have applied to the appropriate United States Circuit Court of Appeals for review; and for each subsequent violation a civil penalty of not more than \$5,000 becomes recoverable in a civil action brought by the United States. The imposition of such civil penalty is an additional remedy to that formerly employed of invoking the inherent power of the courts to punish for contempt anyone who violated a court order directing compliance with an order of the Commission.

The so-called Food and Drug Sections of the Amended Act were not the result of recommendation by the Commission but were drafted and added by the Committee on Interstate and Foreign Commerce of the House of Representatives in response to a vigorous public demand for a more stringent law against false advertising, particularly of commodities affecting the public health.

Chairman Lea of the House Committee on Interstate and Foreign Commerce in the Committee Report upon the Wheeler-Lea Act stated the need of amending the Federal Trade Commission Act to be:

" . . . abuses of advertising; the imposition upon the unsuspecting; and the downright criminality of preying upon the sick as well as the consuming public through fraudulent, false, or subtle misleading advertisements."

From the terms of the invitation to me to address you, I assume that your organization is primarily interested in knowing what differences the Wheeler-Lea Act has made in the law dealing with false and misleading advertising of drugs.

I would not wish to have what I am about to say misinterpreted as a criticism of The Proprietary Association or of any of its individual members. But I am sure that you realize that advertising in the field of proprietary medicines has been in large measure responsible for consumer and Congressional demand for stricter regulation of advertising. Consequently it is you here who should be most interested in knowing just what will be required of you in the future.

Seven entirely new sections were added by Congress to the Act and five of these implement the Commission with definite and specific power over the dissemination of the advertising of food, drugs, devices and cosmetics. Section 12 declares it to be unlawful, and makes it an unfair or deceptive act or practice, to disseminate, or cause to be disseminated, by United States mails, any false advertisement for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of food, drugs, devices or cosmetics. It is likewise made unlawful to disseminate, by any means, a false advertisement for the purpose or with the likelihood of inducing the purchase in interstate commerce of food, drugs, devices and cosmetics.

It should be particularly noted that the Commission's jurisdiction attaches under any one of three conditions:

First, when an advertisement is disseminated

by United States mails;

Second, when an advertisement is disseminated

in interstate commerce by any means; and

Third, when an advertisement by any means is

intended or is likely to induce a purchase in interstate commerce.

Section 13 empowers the Commission, when it has reason to believe that any person, partnership or corporation is engaged in or is about to engage in the dissemination of any false advertisement of food, drugs, devices or cosmetics in violation of Section 12, to seek an injunction against such dissemination in any United States District Court and such courts are directed, upon proper showing, to issue a temporary injunction or restraining order.

Section 14(a) makes it a misdemeanor to violate any provision of Section 12 if the suggested or customary use of the commodity advertised

may be injurious to health, or if violation is with intent to defraud or mislead. An offender convicted by the Federal court may be punished with a fine of not more than \$5,000 or by imprisonment for not more than six months, or by both, except that if conviction is for a violation after a prior conviction punishment may be either or both a fine of not more than \$10,000 or imprisonment for not more than one year.

Section 16 directs the Commission, whenever it has reason to believe that anyone is liable to a penalty either under Section 14 or under paragraph (1) of Section 5 to certify the facts to the Attorney General, whose duty it becomes to initiate appropriate proceedings.

Sub-section (b) of Section 14 exempts publishers, radio-broadcast licensees, advertising agencies and other agencies or mediums for the dissemination of advertising from the criminal provisions of Section 14(a), unless they have refused to furnish the Commission with the name and post-office address of the party causing the advertising to be disseminated, and unless they are manufacturers, packers, distributors or sellers of the commodity advertised.

Section 15(a) defines the term false advertisement as "an advertisement, other than labelling, which is misleading in a material respect", and provides that "in determining whether any advertisement is misleading", the Commission is to take 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."

An advertisement of a drug shall not be deemed false "if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and if it includes, or is accompanied in each instance by truthful disclosure of, the formula showing quantitatively each ingredient of such drug."

For the purposes of the Act the terms "food", "drugs", "devices" and "cosmetics" are specifically defined.

"Food" includes anything which man or animals may eat or drink, that is, "food or drink for man or other animals" and components thereof, and specifically "chewing gum".

"Drugs" embrace not only everything ordinarily included in that term or found in the pharmacopoeias or the National Formulary, but also articles (other than food) "intended to affect the structure or any function of the body of man or other animals".

"Devices" embrace "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".

"Cosmetics" means 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 components of such articles, not including soap, however.

Under the Act as now amended, a number of different procedures are provided for, depending on the circumstances involved. First, the Commission may issue a formal complaint looking toward an order to cease and desist. Thereafter it may apply to the Department of Justice to institute suit for a civil penalty of not more than \$5,000 for each violation of such a cease and desist order after it has become final (either by failure to appeal within 60 days or by affirmance upon appeal), or to a United States Circuit Court for contempt proceedings when a respondent has disobeyed a court decree affirming and directing compliance with such a cease and desist order. Second, it may, in certain cases, in addition, institute proceedings looking toward an injunction pendente lite in the United States District Courts. Third, it may apply to the Department of Justice for the institution of criminal proceedings looking toward the imposition of fines as high as \$10,000 or imprisonment up to one year, or both, for certain serious violations of the new law relating to false advertising of foods, drugs, devices and cosmetics.

The requirement of the amended law is nothing if not plain. The Commission is fully implemented with all the necessary machinery for requiring truthfulness and candor in advertising. If any doubt heretofore existed about such a requirement of the law with respect to advertising in general, all doubt has been removed in regard to the advertising of food, drugs, devices and cosmetics.

As you can see from the changes which the Congress made in our Act, the Commission has the power as well as the duty of requiring of sellers an absolute honesty in their dealings with the public, and particularly in the advertising of food, drugs, devices and cosmetics. In discharging its new responsibilities to the public, the Commission will, I am sure, proceed with understanding and appreciation of the problems which face businessmen generally in merchandising their wares, but nevertheless primarily to carry out the mandatory policy of the law.

In the recent case of Federal Trade Commission v. Standard Education Society, the Supreme Court stated the policy of the law as follows:

"The fact that a false statement may be obviously false to those who are trained and experienced does not change its character nor take away its power to deceive others less experienced. There is no duty resting upon the citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the

trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of caveat emptor should not be relied upon to reward fraud and deception."

This statement, made by the court before approval of the recent amendments, applies with even greater force since the addition of the new provisions.

The new Federal Trade Commission amendments do entail new responsibilities both on the part of the Commission and business men. I do not have to tell you that the success of any law is primarily dependent upon wise and careful administration and public support. I know that the Commission is going to have the support of the Proprietary Association because all trade associations performing a useful service to their members must and do realize that public confidence can be gained and held only by adherence to a policy of absolute and scrupulous honesty.

Since such candor is all that the Federal Trade Commission should or will require, I am sure that the large numbers of the business world who already act upon the theory that "honesty is the best policy", will regard the Commission's new powers and remedies not as a sword to be used against them but as a shield to protect them and the public from the lesser number of unscrupulous business men.

It is my personal hope, and I know it is the hope of everyone else connected with the Federal Trade Commission, that the necessity for corrective action will be reduced to a minimum by the voluntary cooperation of advertisers, particularly in the field of drugs. You all know when advertising is false on its face, and you all know when advertising is misleading not only because of what is stated or reasonably inferred but also because of concealment or omission.

The Commission will continue in the future, as it has in the past, to determine the liability of individual advertisers in specific cases and solely on the particular relationships of the given state of facts to the provisions of the law.

In closing, may I say to you that the Commission hopes that the force of public opinion as recently expressed in a general demand for the passage of the Wheeler-Lea Act providing a stricter regulation of advertising of all commodities in general and of food, drugs, devices and cosmetics in particular, will be sufficient to cause advertisers generally to make their advertising copy tell the truth, the whole truth, and nothing but the truth.

For those few in number who choose to disregard their responsibilities under the Act, I can assure you that the Commission will promptly apply all or any of its corrective processes consistent with fairness and due process of law.