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Five Thousand Dollars a Day

An Inquiry Into the Civil Penalty Consequences of Violation of a Federal Trade Commission Cease and Desist Order.

By H. Thomas Austern*

We do not wish to be understood, however, as holding that the generalized language of paragraph (2) would necessarily withstand scrutiny under the 1959 amendments. The severity of possible penalties prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application. FTC v Henry Broch & Co., 368 U.S. 360, 367-68 (1961)

(Emphasis supplied.)

I

Preliminary

Every particularized phase of the rapidly expanding federal administrative law is but a part of the whole fabric of its development. Sound growth or undesirable distortion in the procedures of one agency may be colored and shaded as inquiry is made and changes occur in the operations of other agencies. A broad approach often illuminates the particular problem.

Most of us, however, are far too close to the active arguments and the babble of criticism to acquire any real perspective. Perhaps some future definitive history of the remarkable growth of the administrative process, as a technique of government regulation over the past five decades, will bring its many strands into sharper focus.

One that may be illuminated is the inescapable American habit of hopefully applying a method of regulation that has worked

effectively at some time in one area to every emergent future problem. If a "commission" proves effective in the early regulation of railroads, it is thought to be equally useful thereafter in trade regulation, in controlling the sale of securities, in administering social security, in dealing with war damage claims, or in controlling the use of atomic energy. That the new problems are wholly different, or far more complex, or dynamically demanding, is seldom a deterrent. Analytical examination of the administrative process is not advanced by resort to easy labels.

Another curiously contradictory pattern runs through most procedural changes. This is the conflict between the realization that the regulatory problems are so complicated that they can be dealt with only by an institutionalized administrative agency (presumably endowed with expertise) and the inevitable impatience of the agencies and the public over the time required for truly knowledgeable and penetrating resolution. There is constant resort to short cuts, to notions of prima facie showings, to attempted official notice of facts not of record and to efforts to authorize temporary administrative orders pendente lite.

But the most pervasive, though often currently imperceptible, characteristic of the evolving administrative process is the slow-swing of the pendulum from judicial approbation to judicial limitation, or from agency excess or obduracy to congressional curbing restraints. These oscillations have been demonstrated in the enactment of the Administrative Procedure Act of 1946, in the admonitions about judicial review in Universal Camera, and

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1 For example, after sixteen years of commission administration, Congress is now considering the substitution of a single Administrator for the five-man Atomic Energy Commission. In 1946 a similar substitution was made for the original Social Security Board. 60 Stat. 1095-96.


3 See Dayton Rubber Co., No. 7604, FTC, June 14, 1960 (Opinion of the hearing examiner); Marco Watch Strap Co., No. 7785, FTC, March 13, 1962; compare FTC Rules §1.61 (June, 1962), authorizing "Trade Regulation Rules" expressing the "experience and judgment of the Commission" on the substantive requirements of administered statutes.


6 Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). Mr. Justice Frankfurter observed that in the administrative Procedure Act, "Congress expressed a mood." Id. at 487.
in the current efforts to enact improvements or drastic changes in agency procedure.\(^7\) Often this braking of accelerated agency action beyond the limits of public acceptance is preceded by bar association and other inquiries. Prior to World War II there was the Attorney General’s Committee on Administrative Procedure\(^8\) and currently there is the President’s newly created Administrative Conference of the United States.\(^9\)

At the present time, we appear to be at the mid-point in what may turn out to be a wide swing of the pendulum in the area of enforcement of Federal Trade Commission orders. By a series of amendments, recounted in details below, the historical concept of a Commission cease and desist order has been completely changed. As originally conceived, a cease and desist order was largely a precatory admonition, convertible where necessary in rare instances into a judicial injunctive command. This has now been changed into a self-executing order whose violation carries, when and as the Commission seeks to demand them, monetary civil penalties of staggering proportions.

Paradoxically, the potential fine for violation of a Commission cease and desist order, issued under the uncertain parameters of section 5 of the Federal Trade Commission Act or the wooly words of the Robinson-Patman Act, can be far larger than that Congress has recently specified as an increased criminal fine for hard-core Sherman Act violations.\(^10\)

Accordingly, it may be both timely and useful to examine the derivation, the scope, and the possible application of these civil penalties, the extent and reasonableness of the financial hazards to which respondents are exposed under the varieties of orders being issued by the Trade Commission, and some of the policy considerations that ought to apply both to the writing of orders and to the exaction of cumulative penalties for their violation.


\(^8\) The final report of the committee expressed dissatisfaction with administrative fact finding procedures. Report of the Attorney General’s Committee on Administrative Procedure 92 (Jan. 1941).


II

Causal Congressional Conversions

There is no question that the facts as stated by my good friend from Arkansas are correct. He has demonstrated clearly that the word 'sleeper' is appropriate, in that we were all asleep. [Laughter]. There is no question, no one at the time recognized that on an oleomargarine bill we were particularly violating the procedure and changing the fundamental law in relation to the Federal Trade Commission Act, and so the word 'sleeper' is used advisedly. It is no reflection upon any one Senator. I am really surprised that we are so wide awake, with the multitude of duties and with all the problems thrust upon us, with our mail and our visitors, attendance upon committees and on the Senate, and 1001 other things. 96 Cong. Rec. 3021 (1950) (remarks of Senator Wiley).

When Gilbert had the Mikado voice as his "object all sublime to let the punishment fit the crime," he was perhaps offering the hope that in an ideal juridical system, the form and severity of the sanction would always be adapted to the character of the misconduct.

The original schizoid objectives of section 5 of the Federal Trade Commission Act, as well as the story of how the contours of an "unfair method of competition" were successively expanded, have frequently been examined. These are as interesting as the historical derivation of the triplicated Clayton Act enforcement by the Commission, the Department of Justice, and the treble damage plaintiff. But no knowledgeable legal historian can challenge that neither in the Federal Trade Commission Act nor in the Clayton Act, as they emerged in 1914, was there any concept of criminality. Whatever an "unfair method of competition" or "a substantial lessening of competition" might come to mean, violation was not to be a crime, and future deterrence was to be achieved by civil process.

Indeed, those who originally conceived the idea of a Federal Trade Commission did not envisage it as having any direct regulatory authority and certainly no quasi-judicial powers to issue orders. As its organic statute was ultimately enacted, about a

month earlier than the Clayton Act, many believed that once the Trade Commission had defined particular business conduct as “an unfair method of competition,” and had issued its prophylactic cease and desist order, the business community would welcome the codification.12 Thereafter only infrequent occasion for any enforcement proceeding was anticipated. Only in those rare instances where there might be deliberate failure or neglect to obey the order, would the Commission then apply to a Circuit Court of Appeals for enforcement.13

Twenty-four years later in the Wheeler-Lea Act of 193814 Congress both expanded the substantive reach of section 5,15 and in amazingly casual fashion completely changed the method of enforcement.

Aside from the substantive expansion, collaterally involving a bitter argument as to whether the Trade Commission or the Food and Drug Administration was to be given authority over food, drug, and cosmetic advertising, the key procedural change waged upon Congress was immediate finality for unappealed orders so as to avoid the “three bites at the apple” of illegality—a first violation to sustain a Commission complaint and order, a second to secure a judicial order of enforcement, and a third violation to warrant punishment for contempt. Cease and desist orders, not appealed within sixty days, were made automatically final.

Yet equally significant, and far more drastic, was the entirely novel concept of punishment by civil penalty action. Without explanation or elaboration in hearings or debate, this change was introduced into the Federal Trade Commission Act. Violation of


13 It is true that the 1914 Federal Trade Commission Act also provided in §5 for court review by the respondent. Curiously, this authority was contained in a separate and subsequent paragraph. No time limit was imposed on the respondent’s seeking of court review. What was plainly contemplated was general obedience, and resort to court review or enforcement procedures only in rare instances.


15 To remedy the difficulties revealed by FTC v. Raladam, 283 U.S. 643 (1931), “any unfair method of competition” was expanded to include “or unfair or deceptive act or practice” occurring in interstate commerce.
a Commission order would thereafter result in a forfeiture to the United States of "a civil penalty of not more than $5,000 for each violation" recoverable in a civil action brought by the United States.\(^\text{16}\)

The legislative history of the Wheeler-Lea Amendment is wholly unilluminating as to why this change was made from enforcement by contempt of an order of the reviewing court to enforcement by civil penalty suit. The revision was offered with a simple reference to supposedly similar provisions in the Packers and Stockyards Act of 1921 and the Securities Exchange Act of 1934.\(^\text{17}\) What was to constitute a "violation" and why the penalty should be $5,000 "for each violation" was never discussed.

Still the intriguing mystery remains as to the origin of this shift from enforcement through judicial contempt proceedings to enforcement by civil penalty. This must perhaps remain an example of informal legislative history which is not discernible in the formal Congressional documents. As far as the Commission

\(^{\text{16}}\) The new penalty provision was incorporated as §5(1) and read in full text: "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."

Section 16 of Wheeler-Lea provided for certification by the Commission to the Justice Department of any case in which an action for penalties is ordered by the Commission. On occasion, the Justice Department has differed with the Commission as to whether the action should be brought.

Congress also provided in 1938 in §5(c) that the reviewing court might issue a temporary injunction operative during review when necessary to prevent injury to the public or to competitors pendente lite. It also provided in §14 that violations of §5 through false advertisements, where the commodity advertised might be injurious to health, would also constitute a misdemeanor punishable by fine up to $5,000, or $10,000 for a second offense, and by imprisonment. District court injunctions pendente lite were authorized in these advertising cases, even before the issuance of a complaint by the Commission or of a final cease and desist order (§18). FTC v. Rhodes Pharmacal Co., 191 F.2d 744 (7th Cir. 1951); National Health Aids, Inc. v. FTC, 108 F Supp. 340 (D. Md. 1952).

\(^{\text{17}}\) See Dunn, Wheeler-Lea Act 168, 432, 481 (1938); see also, S. Rep. No. 1705, 74th Cong., 2d Sess. 7 (1936); S. Rep. No. 221, 75th Cong., 1st Sess. 7 (1937); 80 Cong. Rec. 6594 (1936) (Senator Wheeler); 83 Cong. Rec. 397 (1938) (Representative Reece). It is somewhat difficult to accept the suggested parallel to the Packers & Stockyards Act of 1921 or to the Securities Exchange Act of 1934. At the time, the former provided for finality of orders which were not appealed, but had a far more stringent enforcement provision specifying fines or imprisonment for violation. 68 Stat. 107 (1949), 7 U.S.C. §115. The latter at the time contained provisions for automatic finality in the absence of a petition for court review, but had no provision for civil recovery by the United States for violation of the order. See 48 Stat. 901 (1934), 15 U.S.C. §78y (1958); 49 Stat. 1380 (1936), 15 U.S.C. §78 ff(b) (1958) (providing for civil penalties for violations of the Securities Exchange Act or any rule or regulation issued thereunder).
records are concerned they reveal nothing as to the origin of the concept.  

The next and possibly most confusing addendum to sub-section (1) of section 5 was literally slipped into the statute twelve years later. During the course of the then two-year old debate on the Oleomargarine Act of 1950, Senator Aiken became concerned about possible advertising for colored margarine which might suggest that it was a "dairy product." He feared that an order prohibiting that type of margarine advertising might be violated with impunity for an entire year, and yet the penalty for the violation would be only a modest $5,000. Consequently, he offered on the floor of the Senate a further addition to section 5(1) which read:

Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense.

18 Availing itself of the authority to submit "recommendations for additional legislation" granted in §6(f) of the Federal Trade Commission Act, the Commission had first recommended in its annual report, 1935 (pp. 14-16), an amendment to the review and enforcement proceedings of §5. Basing its recommendations upon the "interest of simplicity and uniformity of enforcement procedure," the Commission proposed that §5 be amended so that it should be unnecessary for the Commission "to establish a violation of its orders issued under §5 as a condition precedent to obtaining the court review provided for and to provide that when the Commission's order is affirmed the court shall thereupon issue its own order commanding obedience to the order of the Commission." This was the familiar "three bites at the apple" argument.

A further recommendation was made in this 1935 request in which the Commission expressed the desire that "if a respondent does not take advantage of the opportunity for court review within 60 days after issuance of the Commission's order, the order shall become final and conclusive and the court may punish violation thereof as a contempt of court." 1935 FTC Ann. Rep. 15. (Emphasis supplied.)

In its annual report, 1936, the Commission renewed its recommendations "in the interest of expedition and consistency in enforcement of its orders." 1936 FTC Ann. Rep. 17. The appeal was reiterated in the 1937 report, the Commission noting that its recommendations were incorporated "in substance" within S. 1077 [introduced by Senator Wheeler on Jan. 22, 1937] which had at that time been passed by the Senate and had received a favorable report by the appropriate House Committee. 1937 FTC Ann. Rep. 15. The 1938 report contained the text of the amendments to §5, the Commission stating that it had "recommended the amendments now incorporated in its act which strengthen its power in cases brought under that act." 1938 FTC Ann. Rep. 4. The recollection of those still extant in and out of the Commission is that the idea of civil penalties was first advanced by the late Richard Whitely of the Commission staff.

19 96 Cong. Rec. 333 (1950). Later Senator Fullbright expressed some difficulty with this drafting, but agreed to take the problem to conference. After the conference was under way, one Congressman received a telegram from a constituent objecting to the new penalty language as confusing to businessmen and terming it a "dangerous increase in bureaucratic police power." 96 Cong. Rec. 2742 (1950). This was the first of a barrage of protests.
No senator would countenance misleading advertising on oleomargarine, but everyone appeared to be equally oblivious to the possible impact of the suggested language on all other Commission orders. The addition was casually adopted by the Senate.

In the Conference Report, the change in the civil penalty provision was merely noted in passing. But by the time the debate on that report began in the House, the new provision for section 5(1), caustically referred to as "the sleeper," had aroused a vast amount of objection. This centered on the absence of any hearings on the proposal and the impropriety of its inclusion in the particular legislation.

By this time, however, the Trade Commission itself had been drawn into the controversy, and sought to justify the Aiken amendment. Its Chief of Compliance wrote urging that the increased penalties were only discretionary, and that the new language was "a common statutory provision." Its General Counsel, in writing to the House Committee, argued that the provision made no change in the existing law. In his view of the original penalty provision enacted in 1938, each appearance of a false advertisement was a separate violation. He recognized that the "maximum penalty would run into millions of dollars." But to soothe the troubled waters, he added:

The Commission has never recommended to the Attorney General, and the Attorney General has never sued for any such astronomical sums, and it is inconceivable to me that any Federal court would impose penalties under this Section which are not reasonably related both to the seriousness of the offense charged and the size and resources of the defendant. 96 Cong. Rec. 2974 (1950).

Whether discretionary civil penalties, leaving it to a judge to charge whatever the traffic might bear, was a desirable sanction was never debated.

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20 After considerable strain, an effective supporting illustration was also developed: Judge Kelley admitted that as the law stood each radio broadcast of a false advertisement of oleomargarine would be a separate violation. But he offered the further example of a highway billboard which was left in place over a period of time and as to which the government would be limited to a single $5,000 penalty. Whether the billboard would be in "commerce" within the meaning of the act was never considered. Cf. Fisher's Blend Station, Inc. v. Tax Comm'n of Washington, 297 U.S. 650, 653 (1936). See also Pantomimic Corp. v. Malone, 238 Fed. 135 (2d Cir. 1916).
Nevertheless, candor required the further comment to Congress by the Commission General Counsel that "the principal value of the amendment to the Commission would be in the field of price fixing and continuing conspiracies in restraint of trade."

Of course, this had nothing to do with oleomargarine advertising, but after a somewhat desultory debate as to whether what was good for the dairy industry was also good for the rest of the nation, the Conference Report was adopted by the House.

On the Senate side, it was frankly admitted in the debate that the change had been made without thinking about anything other than oleomargarine. But here the defense focused on why those who would deliberately violate a Commission order should even be the subject of senatoral concern, inasmuch as they did so,

with their eyes open when they cannot any longer be surprised, and cannot any longer be unaware about what they are authorized to do or not to do, by a final order of the Federal Trade Commission.

Once again the threatening prospect of "billboards showing a beautiful dairy farm scene" with contented cows and attractive milk-maids, for the false advertising of margarine, carried the day. Each violation of any Commission order under section 5 became a separate offense with the addition, somewhat strangely stated as an exception, that "for continuing failure or neglect" to obey, each day of continuance was also to be a separate basis for a $5,000 penalty.

The Commission discomfort with cease and desist orders that permitted respondents "three bites at the apple" continued as to
orders authorized by section 11 of the Clayton Act. Its pain was intensified by the Ruberoid decision in which the Supreme Court, relying on the obvious differences between section 11 of the Clayton Act and the Wheeler-Lea amendments of 1938 to section 5 of the Trade Commission Act, made it clear that no order of enforcement would be entered absent a showing of actual or imminent violation, even where the reviewing court was immediately willing to affirm the Commission order. Repeatedly, in its annual reports, the Commission urged Congress to make comparable amendments to section 11.

Beginning in 1955, bills were introduced that eventually culminated in the Finality Act of July 23, 1959. But in the hearings and debates on that enactment, the issues were sharply drawn. The opponents relied principally upon the vagaries of the Robinson-Patman Act when compounded by the use of cease and desist orders drawn in the foggy words of that statute. Great reliance was placed upon the dissenting opinion in Ruberoid, in its characterization of the Commission order as literally forbidding what the Act expressly allows, and upon the Morton Salt determination that a Commission order ought not leave a respondent at large as to its application.

On its part, the Commission insisted that discussions of order finality and of penalty ought not to be confused with the problems of drafting appropriate orders. The Congressional debates suggest that this administrative reluctance to consider that the punishment was in any way related to the crime proved persuasive.

Yet in a final plaintive plea, the Senate Committee twice expressed its "hopes that the agencies affected by this proposed legislation will continue their efforts to issue orders which are as

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26 The American Bar Association by formal resolution vigorously opposed the change as did a number of state and regional bar associations. Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary, 86th Cong., 1st Sess. 93, 96 (Finality of Clayton Act orders) (1959); Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. 199 (Legislation Affecting §§7, 11, and 15 of the Clayton Act) (1958).
definitive as possible.” On its part, the House Committee found unappealing the objection that past cease and desist orders under the Clayton Act were vague and uncertain, but somewhat more categorically announced:

The Committee intends that the Commissions and boards affected by the bill will make a continuous effort to issue orders that are as definitive as possible.

These statements were amplified on the floor by a member of the House Committee, in a further expression of hope.

The difficulty pointed out by the American Bar Association in its statement is that Federal Trade Commission cease and desist orders with respect to price discrimination are couched in such broad, general terms that sometimes they are almost the equivalent of using the statutory language. If the Federal Trade Commission made its cease and desist orders more specific, rather than just to prohibit some general line of conduct, I believe there probably would be less objection to making their orders final, giving rise to a cause of action with a penalty of $5,000 a day. That is a very severe penalty, I may point out, particularly when language is so broad that reasonable men may get different meanings out of it.

I express the hope that the Federal Trade Commission will seek to make its cease and desist orders more specific, clearer, so that there cannot be, as there is today, as broad an area of possible disagreement as to what constitutes compliance with its orders. (Emphasis added) 105 Cong. Rec. 12734 (1959).

Although Congressional hopes may spring eternal, we shall later consider whether they have thus far been realized and whether they are likely to be gratified in the future.

Two remaining curiosities in the Congressional consideration of the 1959 Finality Act warrant at least passing comment.

In the Wheeler-Lea amendment in 1938 it had been made explicitly clear that the new provisions applied to all outstanding cease and desist orders under section 5. But through incredible
inadvertence, section 2 of the Finality Act was left wholly unclear as to retroactivity. Five days after its enactment, however, the Federal Trade Commission by a press release attempted to decide the question. It offered what the statute had failed to provide—an additional sixty days after enactment within which to petition for court review on all outstanding Clayton Act cease and desist orders or to permit them to become final.

Extensive legal debate on whether the Commission could by press release do what Congress had either failed or not intended to do, culminated in litigation which ultimately settled the question. It may now be taken as established that the 1959 Finality Act does not apply to orders entered before July 23, 1959.

The second curiosity is that in the 1959 debates it was repeatedly suggested that the civil penalty provisions were needed, and would be singularly appropriate, in the enforcement of orders in merger cases under section 7 of the Clayton Act. As will be later developed, there may be room for extensive argument as to when a Commission cease and desist order as now formulated, is truly “final” either for court review or for penalty action.

To summarize the enforcement structure applicable after 1959 to Trade Commission orders under both statutes:


Section 2 of the Finality Act expressly exempted from its application all orders involved in review or enforcement proceedings in the courts of appeals at the time of enactment. It appears, however, that the Commission expects the new procedure to govern in cases instituted by the Commission before July 23, 1959, as long as the order was issued after that date. See e.g., Hearst Corp., No. 7391, FTC News Release, June 12, 1962 (Complaint issued Feb. 5, 1959; order on June 30, 1960; suit for penalties instituted June 11, 1962, in the Southern District of New York).

33 In the course of the Supreme Court’s consideration of Brown Shoe Co. v. United States, 370 U.S. 294 (1962), Justice Harlan suggested that because the District Court’s order of divestiture contained no specific plan for implementing the dissolution, there might be no final order from which appeal could be taken. After both sides submitted briefs in support of the finality of the order, the majority found that the order was “final” within the meaning of the Expediting Act, 32 Stat. 823 (1903), 15 U.S.C. §29 (1958). The Chief Justice gave as reasons for this result: (1) the Government’s complaint was fully disposed of, leaving only the approval of submitted plans to future court action, (2) a divestiture order necessarily involved lengthy negotiation and compromise which might be hampered by the uncertainty attending the disallowance of immediate appeal, and (3) though it had never expressly passed on the issue, the Supreme Court had previously followed the practice of permitting appeal from such orders.
If the respondent does not seek court review, the orders become automatically final after sixty days, and the only method of enforcement open to the government is a civil penalty suit.

If the respondent seeks court review, the Commission can obtain an enforcement order at the same time that it secured affirmance of its cease and desist order. In these circumstances, the Commission has a double-barreled enforcement weapon: It can proceed by a contempt action, or it can pursue the civil penalty route.\(^\text{34}\)

At least two questions may be ventured about the ultimate enforcement edifice thus erected. It might be argued that the possibility of ending up with a double-barreled enforcement procedure against him might serve to deter a respondent from seeking court review of a Commission order. Even more interesting is why the Commission, or the legislative draftsmen, did not provide that an order which became final, because no petition to review was filed within sixty days, might nevertheless have been made enforceable by some judicial action analogous to contempt.\(^\text{35}\) This is what the Commission had originally suggested in 1936.

What appears to be clear as a matter of history is that the original introduction of the concept of an expansive monetary penalty for violation of an administrative order, denominated both a forfeiture and a civil penalty, was originally introduced in 1938 and expanded in 1950 in an extraordinarily casual fashion\(^\text{36}\) before being extended to the Clayton Act in 1959 over vigorous and pointed objections.

III

Civil Penalties in Action—1938-61

The issuance of Commission orders phrased in general and in definite statutory language seems to me to achieve little beyond the imposition of a set of obscure \textit{ad hoc} prohibitions carrying heavy penalties for their violation. To be sure, no fine or penalty is imposed for a violation of the statute that

\(^{\text{34}}\) Whether the Commission can seek both types of punishment for the same violation has never been determined.

\(^{\text{35}}\) See pp. 524-25 \textit{infra}.

\(^{\text{36}}\) See note 18 \textit{supra}. There is also a very early federal statute of limitations, dating from 1839 for suits to recover penalties. This requires suit to be brought within five years. 28 U.S.C., §2462 (1958). No case has been found in which this limitation was applied in a civil penalty action under §5(1) of the Federal Trade Commission Act. See also, Helvering v. Mitchell, 303 U.S. 391, 401 (1938).
occurs before entry of an order. It need not and should not be a sword of Damocles suspended above his head, poised to fall with devastating effect whenever and however he should again stray." Commissioner Elman in The Quaker Oats Company, No. 8119, FTC, April 25, 1962.

The wide differences in attractiveness to the Commission between the present finality provisions and the earlier "three bites" is graphically illustrated by the relative number of times sanctions have been invoked under the two procedures. At the time of the hearings on the 1959 Finality Act only five contempt proceedings had been brought against Clayton Act violators, while the number of penalty actions under section 5 orders in the twenty-one years of Wheeler-Lea had reached sixty-four.37

The largest single penalty exacted up to 1959 had been $38,000 for violation of an order in a price-fixing case, and relatively few penalties had exceeded $5,000. Although a 1960 contempt proceeding has nudged the record up to $60,000, no sum for violation of a Commission order has yet begun to plumb the potential depths of the daily penalty provision.38

It appears, however, that the Commission is no longer to be appeased by these relatively small sums, for suit has recently been instituted for $185,000 for thirty-seven alleged violations of an advertising order, and $75,000 and $110,000 penalties have been asked for Robinson-Patman violations.39

The Commission invariably demands in its complaint the maximum $5,000 for each of the alleged violations, but in no case has the full recovery been granted. Because the amount of the penalty is said to be within the discretion of the court, the pay-off in dollars is usually a function of the respondents financial resources and the disclosed willfulness of the violation.40

The sympathy which courts manifest for the respondent labor-

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37 Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary, 86th Cong., 1st Sess. 28-31 (1959) (Bills to amend §11 of the Clayton Act).
38 All penalty actions are listed in the FTC Annual Report for the following year.
40 See e.g., United States v. Home Diathermy Co., 1960 CCH Trade Cas., ¶69,601 (S.D.N.Y. 1959) ($100 for each of the first four counts, $50 for each of the next twelve, for a total penalty of $1,000 for sixteen violations); Wilson Chemical Co., (W.D. Pa., Oct. 4, 1962) ($5,000 on each of nine violations found willful).
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ing under these potentially ruinous penalties is well illustrated by *United States v American Greetings Corp.* in which the Government requested $40,000 for eight asserted violations of a section 5 order. In its compliance report the respondent had disclosed the practice which was alleged as the basis of three of the eight counts and the Commission had not objected. Although the court agreed that estoppel will not arise against the Government, it awarded only $200 on each of these three counts, and $2,000 for each of the other five.

Few of the many substantive and procedural questions lurking in the use of civil penalty actions have yet been raised. Their potential scope and complexity will be later examined.

To date only the narrow issue has been considered under advertising orders as to what is for the court to determine and what is for the jury to decide. The Commission urges that the question of the meaning of an advertisement alleged to violate an order is an issue for the court alone. This position presumably rests on the theory that the only question in a penalty action is whether the order has been violated. It is advanced in concert with the argument that the violation presents only a question of "law" for the court. The Commission conclusion is that the jury should be concerned only with ascertaining what the respondent did, not whether that conduct violated the order. *United States v Piuma* is usually cited as the basis for this theory, which was recently swallowed in a gratuitous footnote dictum by the Third Circuit.

But careful analysis of *Piuma* readily reveals that these decisions turned on nothing more than the rather conventional concept that on a motion for summary judgment the court may decide the case where no real issue of fact is presented for decision. The plen-
tude of fact issues that can arise for determination in civil penalty actions will be explicated after the intricacies of Commission order writing have been examined.

IV

Coverage in Breadth, Depth, and Ambiguity

Though some may argue to the contrary, we do not view the narrow language of the Broch decision as justification for couching orders, either in broad or detailed language, which endeavor to define what respondents may do or must do in order to comply with the statute. We believe our present compliance procedures to be adequate. We recognize an obligation to tell the respondents, with as much specificity as possible, what they must stop doing. However, to suggest that a cease and desist order is an appropriate vehicle to gratuitously guide or instruct businessmen as to what they may do and must do, we firmly believe is beyond our province. Government regulation has not yet, and we hope never will, become a substitute for corporate management. American business, so we believe, should by and large, be left free to adopt its own methods of operation. The free enterprise system should remain, in fact, free and independent; shackled not by a bumptious bureaucracy—but restrained solely and effectively by fair enforcement of the laws enacted by the Congress. We do not regard the Broch case or any prior decision of the highest court, as a command to take over, even in part, corporate direction and control. Suggestions of this character, we believe, only serve to debase the Administrative Process.” Commissioner Kern in The Quaker Oats Company, No. 8119, FTC, April 25, 1962.

Any value judgment as to the desirability or efficacy of a penalty necessarily turns upon an examination of the scope, clarity, and specificity of the prohibitory order. There are analogous base lines. Where criminal penalties are exacted, constitutional limitations demand specifics and not generalities.45 Even as to civil suits for a statutory violation, the Supreme Court has invalidated “the exacting of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all.”46


(Continued on next page)
No different rule should apply where punishments, even though
denominated civil penalties, can reach the astronomical proportions
possible under section 5 of the Federal Trade Commission Act and
section 11 of the Clayton Act. As has been seen, the most salient
objection to the 1959 Finality Act (and certainly the most cogent
argument against its asserted retroactivity) was the existence of
earlier Commission cease and desist orders, particularly under the
Robinson-Patman Act, which were so vague and indefinite that
the retroactive exaction of civil penalties for non-compliance would
make for a truly hazardous existence for most respondents. Any
fully detailed examination as to whether that charge was historically
true would be vastly beyond the range of this essay.

But no fair evaluation of Commission order writing, past or pres-
ent, can be made without refinement of analysis that searches into
the clarity or obscurity of the underlying statutes. A cease and
desist order is the culmination of a Commission proceeding. The
order rests upon proof of a complaint which, in theory at least,
relates to the form and content of the statutory proscription.

It may be no compelling defense for ambiguous Commission
orders, but it is at least a minimum exculpation, to point to the
turgidity of the congressional directives given the Commission.
The concept of "any unfair method of competition or unfair or
deceptive act or practice in commerce" is perhaps as indefinite as it
is expansible. To lambast the drafting of the Robinson-Patman Act
would be intellectually beating a well-lacerated horse; and every
antitrust lawyer is still much at sea as to the quantitative as well as
to the qualitative content of that elusive and fee-producing phrase,
"to substantially lessen competition", ungrammatically introduced
in 1914 into sections 3 and 7 of the Clayton Act.

At best, the task of drafting orders to proscribe future violations
of these imprecise statutory provisions demands penetrating analy-
tical skill, imaginative drafting, and, cardinaly, the avoidance of
that semantic stare decisis that characterizes every lawyer's affection
for form books.

(Footnote continued from preceding page)
N.E. 566, 567 (1921) (Cardozo, J.), the New York Court of Appeals observed
that a "prohibition so indefinite as to be unintelligible is not a prohibition by which
conduct can be governed."

Rule 65(d) of the Federal Rules of Civil Procedure, derived from 28 U.S.C.
§985 (1958), specifies that "every restraining order shall be specific in terms;
shall describe in reasonable detail the act or acts sought to be restrained."
But almost five decades of Commission effort and experience discloses perhaps too little of these needed talents or true expertise.\(^{47}\) History often repeats itself. Those who have over the years drafted Commission orders have inevitably repeated each other. Prolix obscure provisions that were readily accepted by the Commission in one prototype case soon became encrusted in rigid boilerplate to be required for all similar and often for unrelated proceedings. The desire to comprehend every future possible violation led to divergent tendencies: either to repetitive statements of general prohibitions in terms of conduct "having a tendency or capacity" to achieve the prohibited end, or to the easier technique of phrasing the prohibition merely in the formal, even though obscure, language of the statute.

If the congressional admonitions at the time of the 1959 Finality Act—and the fact that the kind of order writing that preceded it was the strongest argument against retroactivity—are to be reflected in the drafting of future Commission orders, continued adherence to obscure, prolix, and repetitive boilerplate ought to be discontinued.

Uncertainty perhaps also underlies the past and continued use of tautology, exemplified in the now familiar impounding of unlawful agreement in the phrase,

\[\text{entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between and among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto.}\]  

\(^{47}\) Conventionally, the use of this term to characterize the institutional experience of an administrative agency is attributed to Mr. Justice Frankfurter. In fact, the term has older and somewhat different sources. See Webster's International Dictionary, Third Edition. Paradoxically, what appears to be the first use by the then Professor Frankfurter of the term in relation to administrative agencies was a lament that the needed expertise resided more in the private bar than in the agency staffs. See Frankfurter, The Public and Its Government 113 (1930). It appears that prior to this time, the courts never employed the term in describing the discretion conferred upon the Commission even where it was pioneering. See e.g., FTC v. Beech-Nut Co., 257 U.S. 441 (1922) (Mr. Justice Day).

\(^{48}\) As the reviewing courts made clear, this meant simply any action by agreement between any one of the respondents and anyone else, in short, a conspiracy. Mr. Justice Black commented on the quoted order preamble: "The objection is twofold; first, that it adds nothing to the words that immediately follow it; and second that if it does add anything, 'the Commission should be required to state what this novel phrase [planned common course of action] means in this order and what it adds to the four words [understanding or agreement, combination or conspiracy]. It seems quite clear to us what the phrase means."

(Continued on next page)
Too often, also, at least in the earlier days, the basic order was formulated initially to cover everything, and then had appended to it a necessary series of provisos to except what was plainly lawful conduct otherwise covered.

When challenged on review, this kind of dragnet drafting was always defended by a series of clichés. That the "Commission [could not] be required to confine its road black to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal;"\textsuperscript{49} that the "Commission has wide discretion in its choice of a remedy determined adequate to cope with the unlawful practices;"\textsuperscript{50} and that what had once been administratively determined to be unlawful ought not to be open to relitigation.

Of course, where a reviewing court wanted to modify or to remand, even while affirming the finding of violation on the particular acts, it was seldom inhibited. Most Commission orders at least up to the determinative dates of 1938 and 1959 were not appealed. For those entered by consent, court review was foreclosed. Desultory compliance activity, engendered in considerable measure by the paucity of budgets, and the pre-Finality Act system of "two additional bites of the apple," alike contributed to paper orders whose sweeping coverage and foggy contours were for practical purposes never put to the test.

It would be an endless and futile task to examine all of the vagaries in drafting that have been pursued over the years and today are being presistently followed. A few highlights, necessarily catalogued under the key statutory provisions will suffice to demonstrate the problem. They may also serve to evoke sympathy for those who have had to pioneer in writing orders, even if at the same time they disclose why some orders were never enforced, and why the mechanical exaction of penalties for every separate violation of what they purported to cover might have been an economic calamity More important, even a brief recital may offer

\textsuperscript{(Footnote continued from preceding page)}

It is merely an emphatic statement that the Commission is prohibiting concerted action—planned concerted action." FTC v. Cement Institute, 333 U.S. 683, 728 (1948). See also American Chain & Cable Co. v. FTC, 139 F.2d 622 (4th Cir. 1944); American Iron & Steel Institute, 48 F.T.C. 123, 154 (1951).
\textsuperscript{49} FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952).
\textsuperscript{50} Jacob Siegel Co. v. FTC, 327 U.S. 608, 611 (1946); Niresk Indus., Inc. v. FTC, 278 F.2d 837 (7th Cir. 1960), cert. demed, 364 U.S. 883 (1960) ("or to reach identical illegal practices.")
balance in the current arguments about what should be the criteria in achieving a responsive order.

Historically, the enforcement of section 5 yielded orders in two rather different areas: hard core Sherman Act violations, and those unfair methods of competition which involved fraud or deception. The preoccupation of the Commission with more easily proved hard core Sherman Act violations has occasionally been noted. Essentially, in the resulting orders, the respondents were to be told to cease and desist from price fixing. To this injunction there might have been added a "directly or indirectly" to comprehend tacit conspiracies and whatever a court might make out of evidence of "conscious parallel action." But typically, the cease and desist order in a Sherman Act type of case was extensive, repetitive, and sought to describe every type of unlawful price or market conduct that might add up to conspiracy.

Much has also been written about the addendum to the Commission conspiracy order in National Lead which sought to prohibit the use of zone pricing by the individual participants to the conspiracy. Even though given judicial blessing by the Supreme Court, there are few who even today are astute enough to tell what in reality it prohibits.

Perhaps the ultimate development of dragnet order writing in the field of conspiracy is a recent consent order which occupies ten pages in the course of which the respondents are prohibited from basic price fixing and thirteen other specific forms of price fixing adumbrated in the complaint. This section of the order is so broad that a further proviso is necessary to permit

51 This same dichotomy is perhaps preserved in the current division between the Bureau of Antimonopoly and the Bureau of Deceptive Practices. Of course, the former now comprehends all Clayton Act violations, and the latter's jurisdiction was expanded by §§12-15 of the Wheeler-Lea Act.
52 Austern, supra note 1.
54 In a typical order, which became virtually required broilerplate, there were thirteen separate paragraphs detailing types of prohibited conduct, and then a paragraph which for good measure prohibited anything listed in the first thirteen. See American Refractories Inst., 44 F.T.C. 773, 828-31 (1938).
56 The Rubber Mfrs Assn, No. 7505, FTC, Jan. 5, 1962 (approved under its earlier procedure).
carrying out in good faith a contract to manufacture or to sell to or buy from any bona fide customer or supplier, whether such customer or supplier is or is not a respondent herein.

A further section requires each of the conspirators independently to revise his prices, and not to change them for six months unless he has to meet a competitive situation. A further section prohibits disseminating price information to competitors before it is given to the public. There are other detailed provisions in this massive order covering the activities of the respondent trade association.

On the other hand, when the Commission got away from hard core violations and endeavored to carry out its statutory mandate to foreclose potential Sherman Act violations in their incipiency, it usually did better, as the pioneering Beech-Nut order demonstrates.

Following the Wheeler-Lea Act and its emancipation from the confines of Raladam, the Commission's activities in other areas covered by section 5 of its own statute rapidly broadened. In the area of "free goods" its oscillations as to what is covered by the statute were always reflected in its writing of orders. Thus administrative struggle, both substantively and as to order writing, recently culminated in Commissioner Elman's observing in a dissent that he could not possibly tell what respondents must "stop doing what they are now doing."

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57 Ibid. This order has a further addendum specifying that "the respondent making such change shall have the burden of establishing that such change was made in good faith to meet a competitive pricing situation." Query: Is this intended to have the effect of changing the burden of proof in any subsequent civil penalties action? Cf. Samuel H. Moss, Inc. v. FTC, 148 F.2d 378 (2d Cir. 1945), cert. denied, 326 U.S. 734 (1945).


61 Mary Carter Paint Co., No. 8290, FTC, June 28, 1962. Commissioner Elman lamented his inability, as to the first part of the order to determine "what effect does it really have, and how are respondents to comply with it I confess I do not know." He continued: "Paragraph '(b)' is almost as puzzling. Presumably, it is intended to require respondents to cease advertising 'Buy 1 and get 1 Free.' But this cannot be deduced from anything to be found in the terms of the order. As the Commission's own troubles with the problem show, the (Continued on next page)
In another line of cases involving the use of deceptive company names, trade names or trademarks, the Commission has undoubtedly exercised a broad discretion as to the bite of its order, but the criteria that determine whether there is to be a complete ban on continuance or merely a required disclaimer that negatives deception, remain wholly elusive.

In the field of advertising, covered both by section 5 and its statutory progeny, sections 12 and 15, the development of cease and desist orders has had its own history. After an initial defeat in Alberty, the Commission has now launched into an effort to convert many of its orders from cease and desist prohibitions into affirmative requirements. The general format is that if the advertiser makes a particular claim, he must in turn append to it one or more disclaimers. If the product is advertised as useful for baldness, the advertiser must at the same time affirmatively point out that for only five per cent of those afflicted with baldness will the remedy be effective.

Another area of development in these advertising cases has been the coverage of the order. Typically, the early orders related to the specific product "or any other product of substantially the same composition." This technique at the very least left open for argument the definition of 'free merchandise is no easy matter. Yet respondents are ordered, on pain of heavy penalties, to cease and desist from describing merchandise as free when such is not the fact. Surely, this provision, like paragraph ' (a)' is indefensibly vague, particularly in light of the Supreme Court's recent call for Commission orders sufficiently clear and precise to avoid raising serious questions as to their meaning and application. FTC v. Henry Broch & Co., 368 U.S. 360, 368 (1962)."

Footnote continued from preceding page:

62 Bakers Franchise Corp., No. 7472, FTC, 1961, aff'd, 302 F.2d 253 (3d Cir. 1962); Elliot Knitwear Inc. v. FTC, 266 F.2d 787 (2d Cir. 1959); Perloff v. FTC, 150 F.2d 787 (3d Cir. 1945); Jacob Siegel Co. v. FTC, 150 F.2d 751 (3d Cir. 1944), rev'd, 327 U.S. 608 (1946); Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944); Allen B. Wrisley Co. v. FTC, 113 F.2d 437 (7th Cir. 1940); FTC v. Royal Milling Co., 288 U.S. 212 (1933); Royal Baking Powder Co. v. FTC 281 Fed. 744 (2d Cir. 1922).

63 After ordering discontinuance of United States in United States Assn of Credit Bureaus Inc., No. 7043, FTC, June 8, 1961, the Commission realized that requirement in a consent order in a virtually similar case, United States Credit Rating Bureau, Inc., No. C-71, FTC, Feb. 8, 1962, only six days before its order in the first case was unanimously affirmed by the Seventh Circuit. United States Assn of Credit Bureaus Inc. v. FTC, 299 F.2d 220 (7th Cir. 1962).


ment in a compliance proceeding whether two products were of similar composition. In other cases generic equivalence was specified in terms of the "X margarine or any other margarine." Recently, order coverage has extended to whole categories of products such as "cosmetics and drugs."

By and large what has been prohibited in the advertising cases has been tailored to the claims made and deemed to have been false or misleading. Yet inescapably the contest between the copywriter's creative ingenuity and the Commission's insistence that it alone can determine the implied message in words, pictures, or combinations of both in television advertising, forecasts expanding and probably hard-fought compliance litigation. Even though the Commission may in its own proceedings insist that an advertisement means what the Commission says it means, whether that type of ipse dixit will prevail in the collection of civil penalties remains to be seen.

In this dynamic area of Commission activity, the final development has been the naming in a single complaint not only of the advertiser but also of the advertising agency, and the culmination in a cease and desist order applying to all products manufactured by the advertiser and all products advertised by the agency. The prohibitions in these recent orders are set forth in terms whose vagueness is matched only by their endless coverage, ranging through printing, photography, television in black and white as well as color, and the use of what are called stage-props. How far the courts will countenance this type of omnibus scope and coverage remains to be seen.

To detail the wandering trail in the drafting of orders under the various sections of the Robinson-Patman Act and the challenges 66 But the orders on the false advertising of oleomargarine, each verbosely prohibiting in the exact words of the statute any representation "that margarine is a dairy product," leave the respondent wholly to his own devices to ascertain the content of the prohibitions of §15 of the Oleomargarine Act, 52 Stat. 114 (1938), 15 U.S.C. §55(a)(2) (1958). See e.g., E. F Drew & Co., 51 F.T.C. 1056 (1955), modified, 235 F.2d 785 (2d Cir. 1956); Reddi-Spred Corps., 51 F.T.C. 1074 (1955), modified, 229 F.2d 557 (3d Cir. 1956). Under such an order the criminal penalties provided by 52 Stat. 114 (1938), 15 U.S.C. §54 (1958), are supplemented by the equally severe civil penalty sanctions in §5(1) without the benefit of either the constitutional protections of a criminal proceeding or the desired precise formulation supposedly offered by a specific cease and desist order.

which have been made to them is hardly necessary. The peaks of confusion on section 2(a) orders are familiar to most lawyers. In Morton Salt in 1948, the Supreme Court made it clear that no price discrimination order could shift to the courts, in measuring compliance, whether there was in fact compliance with that crystal clear statute. But four years later in Ruberoid, the Court affirmed a broad order—which as a prototype was thereafter baptized a "Ruberoid order"—on the ground that all statutory defenses are available to the respondent in enforcement proceedings without being spelled out in the order.

Necessarily, this means that in compliance proceedings the courts must rule on such fact issues as the existence of cost justification, changes in marketing conditions, and the contours of the meeting of competition defense. What seems beyond question is that by use of the now conventional Ruberoid type of order much of what the court sought to avoid in Morton Salt still remains open on compliance.

68 The full story is splendidly set forth in Rowe, Price Discrimination Under the Robinson-Patman Act 504 et seq. (1962). For the colorful legal vocabulary employed in characterizing the substantive provisions of the Act, see Austerm, Tabula in Naufrago—Administrative Style—Some Observations on the RobinsonPatman Act, 1953 CCH Antitrust Law Symposium 105-06.

69 FTC v. Ruberoid Co., 343 U.S. 470 (1952). The standard order, now regularly employed, prohibits "selling such products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchasers in the resale or distribution of such products."

Before the Supreme Court decision in Ruberoid, it was the Commission's theory that in the event of a later change in facts, circumstance, or law, a respondent subject to a §2(a) order would have to seek Commission modification based on the change. This position rested on a misreading of Morton Salt, which had involved upon the invalidity of a proviso which invited, but in no sense authorized, a particular differential. It is often forgotten that the Morton Salt order specifically authorized differentials which were cost-justified. For a penetrating analysis of the impracticability of conducting business in a dynamic market under a rule of required prior application to the Commission, see Shyderman Federal Trade Commission Orders Under The Robinson-Patman Act: An Argument for Limiting Their Impact on Subsequent Pricing Conduct, 65 Harv. L. Rev. 750, 766 (1952). This study, which preceded the Supreme Court opinion in Ruberoid, made it clear that the real question was not whether provisos are formally written into a cease and desist order, but what defenses might be available in an enforcement proceeding.

70 Whether or not it is still open to a respondent to argue that a changed pricing method does not violate an order because it does not affect competition was considered in National Biscuit Co., 50 F.T.C. 932 (1954). In this proceeding, an old order which prohibited price discrimination "except as permitted by section 2 of the Clayton Act" was changed to the Ruberoid form. But the Commission carefully specified that "in the event of a definite change of circumstances" the respondent was not "forever precluded from asserting one or more of the defenses which were available to him during the original proceeding." (The writer was of counsel in this proceeding.) Recent Commission dissents indicate some discomfort with wooden application of Ruberoid forms of orders. See American Oil Co., No. 8183, FTC, 1962.
Under section 2(c) of the Clayton Act, the so-called brokerage provisions which account for the predominant number of Robinson-Patman Act proceedings, the Commission orders have been from the beginning phrased merely in the words of the statute. On this very section, the Supreme Court issued its plain directive in Broch. In a proceeding involving a single transaction between a Canadian seller to an American buyer, through an American broker, whose legality under the statute required an initial decision by a divided court,\(^{71}\) the Commission entered substantially its standard *haec verba* order. On remand, the Seventh Circuit summarily limited the order to future transactions between the particular seller and the particular buyer.\(^{72}\) The Supreme Court affirmed again by divided vote in a tortuous opinion\(^{73}\) relying mainly on the ground that the Finality Act did not cover the case. Its structures about order writing for the future are quoted at the opening of this paper. Even more startling, the majority in a footnote apparently revitalized the phrase “for services rendered” which had in earlier lower court opinions been virtually excised from section 2(c)\(^{74}\).

Nevertheless, the Commission still enters section 2(c) orders in the words of the statute. The insistent theory is that section 2(c) is adequately particularized. There appears to be little or no reflection of the admonitions of the Supreme Court in Broch.

Judicial restiveness with the practice of general orders in the words of the statute, following the 1959 Finality Act, was measurably increased, notably in the Swanee, Grand Union, and American News cases.\(^{75}\) But despite the Supreme Court in Broch and the Second and Third Circuits’ reluctance to affirm broad orders, the Commission has shown little sign of departing from the easy prac-

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\(^{72}\) Henry Broch & Co. v. FTC, 285 F.2d 764 (7th Cir. 1960).

\(^{73}\) 368 U.S. 360 (1962). Mr. Justice Brennan suggested that the respondent was not incurring any risk of a contempt penalty, because when the Commission applied for an enforcement order there could be “further administrative and judicial consideration and interpretation” at which time there might be some “tailoring of the order” in the fitting of a specific asserted violation so as to meet legitimate needs of the case. *Id.* at 366. He further suggested that Broch would have the benefit of all statutory defenses or exceptions.

\(^{74}\) See Austern, *Section 2(c)*, 1946 CCH Robinson-Patman Act Symposium 37, 39-42. If this turns out to be true, the Commission and those who have aggressively sponsored §2(c) may have won a Pyrrhic victory in the Broch litigation.

\(^{75}\) Swanee Paper Corp. v. FTC, 291 F.2d 833 (2d Cir. 1961); Grand Union v. FTC, 300 F.2d 92 (2d Cir. 1962); American News Co. v. FTC, 300 F.2d 104 (2d Cir. 1962); Bankers Security Corp. v. FTC, 297 F.2d 403 (3d Cir. 1961).
tice of writing a Robinson-Patman Act order in the turgid phrases of that enactment.76

Within the Commission the battle now rages in the area of section 2(d) orders. The majority seemingly will stick to its guns.77 In a series of closely reasoned dissents, Commissioner Elman has been vigorously urging new approaches. In Vanity Fair Paper Mills, he announced his basic concept: That while the Commission had wide discretion in the choice of a remedy and presumably special competence in formulating orders, a cease and desist order, like a court decree, must be specific.

In his view, the Commission must proceed under three operating rules. First, it must determine whether an order should be limited, as in Swanee and American News, to the particular acts or practices found illegal, or more broadly, cover like and related practices. Second, whether the Commission writes a broad or narrow order, it is under a duty to spell out in a reasoned and explicit opinion its reasons for the remedy selected. In Commissioner Elman’s view,

The practice of entering broad orders in the terms of the statute, routinely and automatically, without citing need or justification therefor, is indefensible as a matter of law and sound administration. Respondents, Commission Counsel, reviewing courts, the bar, and the business community have as much right to, and as great a need for, an explanation of the reasons for the remedy selected as for the finding of violation.

Finally, Commissioner Elman pays respectful obeisance to Broch. He would require clarity and precision—

Respondents, who will be subject to similar penalties for disobedience or contempt, should be able to read the order and know, as clearly and specifically as language can convey,

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76 The Commission has no hesitation, however, in writing into every order otherwise phrased in the words of the Act any interpretive gloss which it has added. For example, in all §2(d) orders, it regularly adds the phrase “is affirmatively” to the general mandate “made available on proportionally equal terms.” See The Quaker Oats Co., No. 8119, FTC, April 25, 1962; J. A. Folger & Co., No. 8094, FTC, Sept. 18, 1962.

77 This has been manifested thus far in §2(d) cases. Much the same issues are pending in a series of cases involving advertising allowances in the toy industry. Kohner Bros., Nos. 8224-31, 8100-04, 8243, 8254, 8258. In these the Hearing Examiner limited the order to advertising placed in a toy catalog, newspaper, tabloid, handbill, circular, etc., but had refused to include television advertising. On appeal, the Commission decided on Sept. 18, 1962, to limit these orders to printed publications alone,
what conduct is, and is not, proscribed. The agency should avoid the easy ‘solution’ of simply incorporating *haec verba* general statutory prohibitions couched by Congress, and justifiably so, in broad, indefinite, and ambiguous terms, raising questions of interpretation and application that have not yet been resolved.

The same theme is played with elaboration of the melody in Commissioner Elman’s dissent in *Quaker Oats*. In both cases Commissioner Elman would have entered an order informing the respondent specifically what it must do to assure future compliance with the law. In *Vanity Fair*, he analogized this approach to the Commission’s advertising orders which embodied affirmative requirements. In *Quaker Oats* he goes further and suggests that once a violation has been found, he would have both Commission counsel and the respondent thereafter submit a series of proposed specific changes in operation which would accomplish that end. The result would be a series of specific yardsticks against which compliance could be measured, rather than leaving a respondent at large without either a fair degree of predictability or intelligibility in what he is required to do.

The majority of the Commission appears thus far to have resisted these suggestions of its lone dissenter by insisting that to write definitive orders—which are in effect affirmative commands to follow specific remedial action to achieve compliance—would constitute an interference with the free enterprise system, or at least with business management. Whether to have one’s future

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78 The *Quaker Oats* Co., No. 8119, FTC, April 25, 1962. “To suppose that an order framed in the ambiguous and indefinite language of the Robinson-Patman Act (with its complex of conditions, provisos, and defenses) is ‘intelligible to the ordinary businessman, or that he can safely predict’ what it will or will not permit is simply unrealistic.”

79 Its position is summarized in the quotation at the beginning of part IV. The present Commission’s obstinate insistence on its own views is not limited to order writing. In its petition for certiorari in *FTC v. Exquisite Form Brassier, Inc.*, 301 F.2d 499 (D.C. Cir. 1961), the Commission stated: “The Court of Appeals, by its remand, has made the good faith meeting of competition defense under Section 2(b) available to a seller who is charged with having discriminated between its customers in violation of Section 2(d) of the Robinson-Patman Act. By its decision, the court has decided an important and far-reaching question of Federal law, not yet settled by this honorable Court, which will continue to recur until finally adjudicated. With due deference to the contrary view of the Court of Appeals, a majority of its present membership believes that the Commission’s interpretation of Section 2(d) is correct and intends to adhere to it unless and until this Court or Congress should determine that the Commission’s interpretation is wrong. As this Court has frequently stated, a denial of certiorari is not an adjudication on the merits. Accordingly, a majority of the Commission as now (Continued on next page)
business conduct fettered by being told specifically what the expert enforcement agency wants to have done to achieve compliance, or whether to be left at large, aided only by the skill of counsel in avoiding possibly massive penalties may not be an attractive choice. But most businessmen would regard getting the specific order as finding the Lady rather than the Tiger.

Commissioner Elman's prescriptions for order writing echo somewhat plaintively the high hopes of the Congressional Committee Reports in 1959. Whether this minority voice crying in the wilderness will be receptively heard by appellate courts remains to be seen.

As applied to orders in merger cases under section 7 of the Clayton Act, the use of civil penalty actions may be beset with difficulties hardly foreseen in 1959. Typically, merger orders embody inherent ambiguities. Divestiture is initially ordered of what was illegally acquired, along with all additions that have been made, so as to constitute the divested company "as an effective competitor in substantially all the basic lines of commerce" in which it was originally engaged.\(^8\) In addition, supplementary prohibitions are included in the order to prohibit the making of any changes which might impair the rated capacity or market value of the assets to be divested.\(^81\) To deal with these concepts in terms of penalties may be indeed difficult.

(Footnote continued from preceding page)

constituted will not abandon what it believes to be a proper interpretation of Section 2(d) if review here should not be granted." (Emphasis added.)

The Solicitor General had authorized the filing of the petition without joining in it. Certiorari was denied on May 22, 1962, FTC v. Exquisite Form Brassier, Inc., 369 U.S. 888 (1962).

The problems facing counsel for the respondents were nicely posed in the Commission's own petition: "The dilemma facing respondents and hearing examiners in proceedings before the Federal Trade Commission is also a matter deserving serious consideration. Federal Trade Commission hearing examiners are necessarily bound by the ruling of the Commission, despite the court's contrary holding that the defense may be interposed to a charge of violation of Section 2(d). Respondents' only recourse, therefore, after appeal to the Commission, is to the Courts of Appeals, where the issue may or may not have been adjudicated. Assuming, arguendo, that the respondent is successful in a particular circuit, it is still faced with the necessity of re-presenting the Section 2(b) defense to the hearing examiner and the Commission, on remand, which is at best a cumbersome procedure." (Emphasis added.)

In Shulton, Inc. v. FTC, 1962 CCH Trade Cas. \$70,322 (7th Cir. 1962), the Seventh Circuit agreed with the D.C. Circuit. Confronted with these statements in the petition for certiorari, the reception awaiting Commission counsel on further appeals is hardly enviable.

In J. A. Folger Co., No. 8094, FTC, Sept. 28, 1962, the Commission appears to have conceded that two courts of appeals suffice.

\(^8\) See Crown-Zellerbach Corp. v. FTC, 293 F.2d 800 (9th Cir. 1961).

\(^81\) See Foremost Dames, No. 6495, FTC, April 30, 1962,
The Commission has also yet to come to grips with final divestiture. Many of its orders provide merely for the submission within six months of a written plan for carrying out divestiture, with the plan to include a date within which compliance may be effected. Serious questions may exist as to whether this type of order is final in terms of section 11(1) of the Clayton Act, or as to the circumstances under which the Commission conceivably could seek civil penalties for non-compliance.

* * * *

This fragmentary survey of the history of Commission cease and desist orders, discloses only a few of the many problems that have arisen in the often seemingly crude and unhappily rigid drafting process. At the very least it suggests that in many areas the problem of formulating a precise and specific order, clear as to scope and reasonable as to coverage, has not been solved up to this time. Drafting problems are admittedly difficult and intractable. Yet there are a few encouraging signs that the present Commission will realistically come to grips with them under either its own organic statute or the Clayton Act.

Nevertheless, the fiscal sword of Damocles residing in the civil penalty provisions under both statutes may require the Commission to do a better job. Agency enlightenment or judicial revolt may come about either through appellate court review of the cease and desist orders entered, or through any real attempt at enforcement through civil penalty actions. Both will bring out into the open the many problems lurking in general and obscure orders.

Since 1914 the controlling statutes have authorized a reviewing court to "modify a Commission order" Almost from the beginning, the Supreme Court and many Courts of Appeals have not hesitated to do so. Moreover, they have done so in the face of the

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82 See note 33 supra.
83 The earliest case was Sears, Roebuck & Co. v. FTC, 258 Fed. 307 (7th Cir. 1919). Even in the famous Beech-Nut case the order was modified. FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1921). Through 1944 there appear to have been 80 modifications out of a total 399 petitions for review. Following the Supreme Court dictum in 1946 in the Siegel case, infra note 84, there were fewer modifications. Of the orders issued after 1944, the reviewing courts modified only 19 of 142 which reached them. Although not sinking to the 7.9% of the 1914-1924 period, the percentage of modifications (18.6%) thus receded below the level of the second decade of the FTC's work (16.3%), and well below its peak in the 1934-1944 decade (22.2%). But there is increasing evidence that with the 1959 Finality Act and the admonition in Broch, appellate courts may be more inclined to modify directly or to remand for modification,
well developed judicial gloss that fundamentally the drafting of orders should rest in the *expertise* of the Commission.

The eloquent judicial abdications in *Jacob Siegel*\(^8^4\)—that the Commission has “wide discretion in its choice of remedies deemed adequate to cope with the unlawful practices”—and in *Ruberoid*—that “Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices”—have been echoed repetitively in all appeals where the reviewing court was willing to affirm, but unwilling to take on the burden of doing the Commission’s job of order writing.” But it is often forgotten that even in *Siegel* the Supreme Court reversed the Commission and sent the proceeding back for adequate consideration of a proper order. As the Court there pointed out, Congress had in 1914 specifically empowered the courts to modify a Commission order.

As elsewhere in Commission practice, there is little consistency in how court modifications are effectuated. In *Swanee* the Commission urged upon the court that its duty under the statute was to remand the case to the Commission for modification in accordance with its mandate, but the court nevertheless entered its own decree modifying the order.\(^8^6\) In some instances, courts have been content merely to remand to have the Commission redraft its order.\(^9^7\) In others, the practice is to direct the respondent and the Commission

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\(^8^4\) *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946). The Court observed that the writing of an order was “initially and primarily for the Commission. Congress has entrusted it with the administration of the Act and has left the courts with only limited powers of review. The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unfair practices found to exist.” \(^{\text{Id. at 612-13.}}\)

\(^8^5\) *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). See also *FTC v. National Lead Co.*, 352 U.S. 419, 428 (1957); *Exposition Press v. FTC*, 295 F.2d 869, 874 (2d Cir. 1961); *Kerran v. FTC*, 265 F.2d 246, 251 (10th Cir. 1959). For an example of modification by the Supreme Court, see *FTC v. Eastman Kodak Co.*, 274 U.S. 619 (1937), where in a §5 case the Court set aside the portion of the Commission’s order requiring divestiture.

\(^8^6\) Rule 18(1) of the Second Circuit provides for submission of proposed orders after the court’s determination that the existing order is to be modified. The Commission objected that the court should remand to the Commission for a new order in the light of the opinion. It relied upon *FPC v. Idaho Power Co.*, 344 U.S. 17 (1952); *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948); and *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). See Commission’s Memorandum, Docket No. 26311, FTC, July 21, 1961. At the same time the Commission submitted a proposed order which was not limited to transactions through a third party. The court rejected the Commission’s proposal and so limited the final order.

\(^9^7\) *E.g.*, *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946).
FIvE TrousAD DoRs A DAY to file proposed judgments embodying modified orders. In many cases, a reviewing court will rewrite an order and enter it directly. Whether there are any limits to the power of a reviewing court to modify a Commission order appears never to have been mooted. Where a licensing authority is involved, there are possibly limits beyond which a reviewing court may not trench upon the administrative discretion conferred upon the agency. But where in the exercise of quasi-judicial powers the determination of individual rights are decided, and the agency order carries the sanction of heavy civil penalties, it is doubtful that the doctrine of administrative expertise in order drafting may ever override the specific statutory authority for the reviewing court to modify an order.

Whether in the future there will be more than lip service to the dictum in Siegel and the judicial gloss which followed it, or whether a realization of the impact of the civil penalty possibilities will lead appellate courts more readily to exercise their historical powers to modify, will depend on whether better orders emerge from the agency.

But the fundamental problems inherent in Commission orders in the words of the statute that are of ambiguous contour, are more likely to become acute if civil penalty actions become the vogue. In advertising cases, there will always be the difficult and elusive issue as to meaning—whether the newly devised advertisement does, directly or by implication, make a claim falling with the prohibition. On conspiracy orders, the issue in the penalty action whether parallel conduct in pricing resulted from rugged competition or from agreement will always remain a question of fact to be resolved on the full evidence.

In Robinson-Patman Act penalty actions, the ambit and variety

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88 E.g., Bankers Security Corp. v. FTC, 297 F.2d 403, 406 (3d Cir. 1961).
90 In Reddi-Spred Corp. v. FTC, 229 F.2d 557 (3d Cir. 1956), the Commission had originally permitted in a proviso the advertising of butter alone as an ingredient in margarine if the percentage was clearly stated. On the Commission's insistence that it has misread the statute, this proviso was deleted by the court. Reddi-Spred Corp., 52 F.T.C. 1492 (1956). This case suggests that because the Commission's jurisdiction is statutory, the power of a reviewing court to confine it to the subject matter of its statutes cannot be curtailed.
91 If the appellate courts appear willing to modify, it may be expected that the possible deterrent effect of the present statutory structure, permitting enforcement both by civil penalty and contempt action if there is an appeal, will have little weight.
of open questions seemed endless.\textsuperscript{93} Undoubtedly, in this area the Commission will make its usual efforts to claim \textit{stare decisis}. It may argue that its failure to accept a cost accounting justification in the initial administrative proceeding precludes the offering of a new or modified cost justification on compliance. It may assert that its rejection of a claimed good faith meeting of competition in the original proceeding precludes the advancing of that claim under changed circumstances in a penalty action.\textsuperscript{94}

But under the \textit{Ruberoid} doctrine, there are unquestionably many areas of justification and defense that can and probably will elicit extensive trials in a civil penalty proceeding: cost justification; price changes in response to changing market conditions; and the good faith meeting of competition.

These possibilities of defending a civil penalty action—which may prove appealing to both a court and jury asked to exact vast sums in a civil penalty action—will be open largely to the extent that reasonableness of coverage and clarity and specificity of what is prohibited remain lacking in Commission orders.

\section*{V}

\textit{Conclusions and Future Possibilities}

A Commission order should accentuate the positive, not the negative, side of compliance. The order should inform and direct the respondent not only as to what he may not do, but as to what he may and must do in order to carry on his business without again running afoul of the statute. It cannot be emphasized too often that the function of a cease and desist order is not to punish but to prevent violations of law. The Federal Trade Commission was not established as a police court, to impose fines on errant businessmen. The public interest expressed in the Act is not served simply by collecting fines and penalties. The Federal Trade Commission Act is not a revenue-raising or penal measure.

\textsuperscript{93} Had the modified order in Standard Oil (Indiana) Co., 43 F.T.C. 56, 58 (1946), ever become effective so as to prohibit the respondent from giving a lower price to a wholesaler who sold gasoline to his retail customers at prices lower than respondent sold directly to competing retailers, there might have been presented in a compliance case the nice question whether a Patman Act cease and desist order can in effect require a respondent to violate the Sherman Act.

\textsuperscript{94} It might also contend that an initial agency determination that two products are of like grade and quality is not thereafter open to challenge in an enforcement action. The standard \textit{Ruberoid} form of order leaves this issue open to litigation in penalty actions.
To cavil and to criticize is easy. To offer fully practicable suggestions for improvement in Commission order writing is not. There are no ready panaceas that can surmount all of the obvious hurdles. Among these are the inherent and intentional vagueness of the statutes which the Commission enforces, as well as the incredibly inept drafting of the Robinson-Patman Act; budget limitations and the intellectual immobility of some on the staff of the agency; the equal reluctance of many at the private bar to embrace new procedures; and perhaps the more basic fact that a dynamic economy soon out-modes many substantive concepts and procedures.

Nevertheless, no molehill should labor without a few fleas being born. Some conclusions, or rather predictions, may be ventured; and some suggestions offered for remedial action if these forecasts turn out to be true.

Two predictions of reasonable validity emerge from this study. The first is that the federal courts will not exact the full measure of civil penalties authorized by the Act. The second is that the present Commission will not substantially change its current order writing techniques unless compelled to do so by the courts.

I. Only the most sanguine bureaucrat can expect on the basis of experience that the civil penalty provisions will be applied by

Footnote: The writer is completely certain on only two minor recommendations: (1) Wherever an appellate court reviews and modifies an order of the Commission, it is not too much to ask that the opinion set forth in full text at least the provisions which are being modified. In some cases the courts have done so, e.g., in FTC v. Beech-Nut Co., 257 U.S. 441 (1922), and in Bankers Sec. Corp. v. FTC, 297 F.2d 403 (3rd Cir. 1961). But in other cases, such as FTC v. National Lead Co., 352 U.S. 419 (1957), the student or lawyer who wishes to study the development of the order must wend his weary way through the lower court opinion, which is often again a blank, and back to the Federal Trade Commission reports which are hardly current. (2) Virtually needed is a comprehensive and decent digest of all Federal Trade Commission cases. Only a lawyer with the memory of Lord Macaulay, or the facilities and finances for maintaining his own elaborate Federal Trade Commission digests, can ever have any secure feeling that he has examined everything relevant to his problem.

the courts at any level remotely reaching the astronomical monetary possibilities authorized. Few courts will even bother to try to parse the second sentence of the penalty provision.  

II. Despite the most valiant efforts at reform, exemplified in the present Commission's courageous willingness to modify its Rules of Practice and to experiment with new procedures, an administrative agency is an institution. Many lawyers are strangely resistant to change. Even if the majority of the Commission were persuaded of the need for major reforms in order writing, it is difficult to believe that any five men, together with their legal assistants at the top level, could speedily reverse most of the current techniques in order writing.

But as this study suggests, there is considerable evidence that the majority of the present Commission will not change most of the current concepts as to how a cease and desist order should be written, unless and until they are compelled to do so by the reviewing courts, including the Supreme Court, in each area of the Commission's enforcement responsibility. Or perhaps there may more dramatically have to be congressional revision of the procedural sections of the statutes, or the establishment of a trade court.

There are many who believe that the 1959 Finality Act will set in motion a pattern of far closer judicial scrutiny and a readier willingness by reviewing courts to rewrite Commission orders. This could occur despite the historical gloss suggesting broad

(Footnote continued from preceding page)  

See part III supra. Analytically, the maximum potential liability might be achieved under either the first or the second sentence. For example, a respondent subject to a Ruberoid type order might make two sales at discriminatory prices on two separate days in a calendar month. Each of these would be a "separate violation" under the first part of the second sentence. Query: If these were the only sales made during the month, would the failure to abide by the order throughout the entire month permit a penalty for "each day of continuance"? In advertising cases, could it be said that a single television commercial which falls short of compliance, broadcast 85 nights on a national network of 50 stations, will yield a daily penalty of $425,000 and accumulate an annual penalty of $21,125,000? And how long will the Commission wait to recommend suit, and thus permit penalties to accumulate? Faced with these arithmetic possibilities, it seems clear that the Commission will neither ask for any theoretically full penalty, nor would any court remotely consider exacting them. But cf. United States v. U.M.W., 830 U.S. 258 (1947).
deference to the agency’s expertise. Although it is often a working
aphorism that things must get worse before they can get better,
there are some who think that on many types of Commission
orders the end of the road has been reached.

History suggests, however, that administrative agencies are
sometimes responsive to demands for a change where an articulate
bar, and dissenting opinions within the Commission itself, keep
pounding away. Petitions for review are effective, but usually only
on the particular order. Bar association remonstrance is often taken
as the customary complaint of lawyers who have lost their cases,
and hence is not overly persuasive. Most important perhaps is the
presumptuous, but obviously desirable, offer of provocative analysis
and suggestions.

III. If the Commission were willing to improve its order writ-
ing operations, what basic concepts might be reexamined and what
modified procedures might be useful? Some seven areas may be
offered for consideration:

A. Precedent Industry-Wide Inquiries. There are some who
believe that the Commission might best return to its historical
function of bringing about changes in business practices that will
reflect compliance with the law, by de-emphasizing its concern with
individual violations and endeavoring paramountly to achieve
industry-wide changes. It is suggested that the cardinal problem in
enforcement is the competitive impact of an individual order rather
than unwillingness to comply.\(^{97}\)

If this approach commends itself, it may well be that the
Commission ought to use its abundant investigatory powers, not to
obtain by section 6 mail order inquires the evidence wanted for
wholesale prosecutions, but to carry on broad scale studies into
industry-wide trends, practices, and the competitive pressures which
have produced them.\(^{98}\) The ready analogue is to the English Royal

\(^{97}\) This is supported by reference to the problems engendered by *Moog Indus.*
and the Supreme Court directives in affirming that order. *Moog Indus.,* Inc. v.
CCH Antitrust Law Symposium 75.

\(^{98}\) On June 27, 1962, the Commission placed on suspense four pending cases
involving the advertising of analgesics in order to undertake an industry-wide
investigation of all such advertising. The stated objective is to enable the
Commission to give simultaneous treatment to each advertiser of analgesics
treatment “consistent with that given his competitors.” This is a step in the right
direction, but an industry-wide investigation preferably ought to precede any
complaints.
Commission which inquires, recommends, and to an extraordinary degree brings about the kinds of industry changes which ought to be the fundamental objective of the Commission. 99

Upon completion of its study in depth, the Commission might in a formal document indicate what practices in the particular industry it has determined violate the statutes. After an appropriate period for readjustment to this codex for the particular industry, the Commission might then with propriety embark upon vigorous prosecution by complaint and order.

Whether this will work is difficult to evaluate. Recent experience suggests that even if a businessman is willing to make drastic changes or to abandon time-honored practices, he will not, and with competitive warrant possibly cannot, do so unless he has firm assurance that his competitors will simultaneously make the same changes. If this difficulty could be surmounted, the necessity for individual complaints which raise the problem of how to construct appropriate orders might be minimized. One answer may be that an industry-wide determination of the rules of the game may in itself be useful to a seller in resisting demands by a buyer.

B. Improvement of Consent Procedure. Most complaints are settled by consent orders. The settlement approach offers wide opportunity for improvement in order writing, but a strong case can be made that the new consent procedures recently put into effect do not do so.

Theoretically, no proposed complaint is now submitted to the Commission by its staff unless its counsel is prepared forthwith and solidly to prove the allegations. The order appended to the proposed complaint is supposedly articulated in relation to those charges. The Commission is called upon to review the proposed order not in the light of a developed record, but on what it must accept in the staff presentation of what Commission counsel believes might be proved. But no plaintiff's lawyer, or Commission counsel in support of a complaint, has ever understated what he thinks he can prove.

99 To a degree this type of approach may be reflected in the June, 1962, Commission proposals for Industry Guides and General Trade Regulations (Subpart E). On the other hand, these revisions continue to recite that "general and special economic surveys and investigations" are in part designed for "the investigation of possible violations of law" and "the proof of such violations in adjudicative proceedings." It might also be desirable to avoid the provocative arguments about the participation of counsel in public investigations.
Nor is it captious to suggest that, in considering the consent order to be offered, the Commission cannot give the proposal the type of knowledgeable consideration the agency could if it had before it, not merely the *ex parte* anticipations of the prosecuting branch, but also the counter-arguments of the respondent, and, more importantly, a developed record. At best, the Commission in approving the *proposed* order to be attached to the proposed complaint is making a wholly *ex parte* determination. It is not acting in its quasi-judicial capacity.

But the trouble with the present consent procedure goes deeper. The proposed order is usually offered to the respondent on a "take-it-or-leave-it" basis. The boilerplate order is put forward; it is said that the Commission has already determined that it will accept only the proposed order substantially in the form submitted; and the Compliance Division often will not even discuss the impact of the boilerplate upon the respondent, however much he is willing in good faith to offer specific programs for compliance. Indeed, in some cases there is even a refusal by Commission counsel even to discuss such proposals.

This seemingly wooden approach to settlement offers a further road-block. The respondent cannot get beyond the counsel in support of the complaint and the staff member from the Office of Consent Orders. Unless they can be satisfied, no settlement is possible then, and under the new rules, ever thereafter. In effect, counsel in support of the complaint can foreclose to the respondent and essentially to the Commission itself any real opportunity to utilize the consent disposition that is useful and economical, both for the Commission and the respondent.

Nevertheless, the price exacted for the tendered but rigid and unchangeable consent order is the waiver of appeal, and the foreclosure of any opportunity to argue to the Commission what would be appropriate relief.

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100 Occasionally, it is reported, a particularly pertinacious counsel for respondent can secure some changes in the proposed order; but if the staff lawyers adhere to the view that they have no latitude, these efforts will fail.

101 Whether the current practice complies with §5(b) of the Administrative Procedure Act is doubtful. That section requires that "the agency" shall afford an opportunity for submission of a settlement. 60 Stat. 239 (1946), 5 U.S.C. §1004 (1958). It is doubtful whether the Office of Consent Orders can be equated with the Commission, or whether this abdication by the Commission is desirable.

102 It is doubtful whether in a subsequent proceeding, the respondent has (Continued on next page)
What needs cardinaly to be done in this area of consent procedure is to afford to counsel in support of the complaint and to the Office of Consent Orders the same type of freedom for developing a cease and desist order as is given to prosecuting counsel in the Antitrust Division. The apparent apprehension that any Commission lawyer, who deviates from the cease and desist order attached to the proposed complaint, risks his official neck and his record should be dissipated.

Moreover, it might be well completely to eliminate the practice of attaching proposed orders—which at best have had only *ex parte* Commission consideration and at worst only perfunctory review—and to open the consent procedure to more sensitive and more productive opportunities for the development of consent cease and desist orders.

Those opportunities are particularly needed by the smaller respondents lacking the financial resources to engage in prolonged hearings, and upon whom a consent order may have a far more serious competitive effect. In a real sense these smaller respondents are often compelled by circumstances to accept a consent settlement, and they are measurably the chief victims of all defects in the consent procedure.

C. Separation of the Determination of Violation from the Consideration of an Appropriate Order

It is a commonplace that in a trial of an antitrust charge, ordinarily the issue of violation is first litigated in the federal courts, and thereafter there are submissions and hearings, often including the taking of additional testimony, as to appropriate injunctive relief.103

Some adaptation of this technique to Commission proceedings is well worth investigating. There are signs that at the Commission level the necessity for having the benefit of comment and possible argument on the appropriate order is needed where the Com-

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mission concludes to reverse a dismissal by a hearing examiner or to broaden the order he has entered.104

As a working suggestion, it might be possible to divide oral arguments before the Commission into two parts. Argument on the findings or the existence of violation might precede an integrated argument on the appropriate form of relief.

There is an inescapable feeling among some lawyers that tendering an order to the Commission on appeal, particularly where the respondent was the winning party before the hearing examiner, necessarily concedes weakness as to the merits. A rule or statement by the Commission might provide for separating the argument into two parts. Both sides would first argue the merits, and then a further argument on relief would be afforded.105

But the most effective change in consideration upon appeal would be an extension of present section 4.22(c) to provide that where the respondent has won a dismissal before the hearing examiner, there first be a complete Commission determination and opinion on the merits. If the Commission concludes to reverse, the proceeding ought then be sent back to the hearing examiner for his views on an appropriate order with the opportunity of further appeal, if desired, to the Commission as to form of order.106 Yet, here again, there will have to be a new look at what is an appropriate order.

D. Required Flexibility in Order Drafting. Both the Commission itself and cardinally its staff should be freed from boilerplate

104 Section 4.22(c) of the revised Rules provides that where the Commission contemplates the entering of a broader order than in the initial decision or where it reverses a dismissal by the hearing examiner, it will serve a copy of the proposed order on all parties. Within twenty days, the respondent may file exceptions to the proposed order with a statement of its reasons in support. If such exceptions are filed, Commission counsel gets ten days to file a statement supporting the proposed order. See Giant Foods, Inc., No. 7773, FTC, June 13, 1962. No formal argument is afforded. Moreover, even if Commission counsel has other ideas, he would be quite hardy to suggest that the Commission order is lacking in any respect. Cf. Paul J. Lighton, No. 8305, FTC, April 25, 1962, where the Commission modified an order to which neither the counsel in support of the complaint nor the respondent had objected.

105 There is a further interesting suggestion in Sandura Co., No. 7042, FTC, June 13, 1962, in a proviso permitting certain types of contracts with distributors provided the respondent "obtains the Commission's prior approval." While it is not clear whether this application is made directly to the Commission or the Compliance Division, this does tend in the direction of affording to respondents the opportunity to present a plan which will realistically achieve compliance with the law rather than with the rigid verbal limitations of the cease and desist order.

106 At the very least, any argument on the form of order should follow the Commission decision to reverse the hearing examiner.
provisions, and in the now familiar language, every order should be approached in terms of tailoring the prohibitions to accomplish compliance in the particular case. As already noted, government lawyers in the Department of Justice have this freedom to a very considerable extent. The Commission staff should be not only authorized, but affirmatively invited, to utilize their talents and drafting skills in writing responsive orders.

The two objections ordinarily advanced to this type of drafting freedom seem to be without substance. There appears to be little merit in the argument that there will be an inappropriate interference with business management in the writing of affirmative directions to a respondent which, if followed, will accomplish compliance with the law. The Commission never hesitates in an advertising case, or in other deceptive practice cases, to enter what are in effect affirmative directions. If those directives are followed, there is no argument about compliance. If business management wishes to pursue alternatives, it can avail itself of other procedures.107

The further objection, loosely derived from Morton Salt, that the Commission cannot throw upon the courts the burden of determining whether future conduct violates the law is plainly overworking the language of that opinion.108 Where the order is phrased in the words of the Act, that burden is practically imposed on the courts in most enforcement proceedings, and particularly in Robinson-Patman Act cases after Ruberoid has afforded every respondent the opportunity of offering every statutory exception and justification.

The suggestion that a revolution in both the sensitivity sought and the effort to be applied in order writing, can be brought about by Commission directive may be Utopian. Administrative reform, like politics, is the art of the possible. Every private lawyer conservatively leans on contract provisions and legal forms which have run the gauntlet of judicial test. Not unnaturally, Commission

107 See pp. 521-23, Points E and G, infra. But a combination of both affirmative directives and boilerplate will not do the job. The specifics of the order in Rayex Corp., No. 7346, FTC, April 2, 1962, are reasonably explicit. But these specifics are followed by a tent-like prohibition against placing in the hands of others “means and instrumentalities by and through which” the respondent “may deceive and mislead the purchasing public.” The difficulty here is that the order does not make plain that if the respondent follows the specifics, he is in compliance and not constantly in an in terrorem position on the rest of the order.

108 See note 68 supra.
counsel will be drawn toward order language and forms that have won Commission approval in earlier cases. This is not only the easy way, but it also offers the advantage of protection against possibly being sand-trapped by what the respondent offers or against building a record within the agency for legal ineptitude. What may be needed is an explicit understanding that the staff counsel who pioneers in writing better orders will, if the Commission thinks him wrong, be instructed, rather than castigated directly or by inference.

Unless the whole area of order writing is thrown open for bold pioneering, improvising new techniques, and achieving real clarity, it will remain the timid, wooden procedure of undeviating insistence upon encrusted boilerplate provisions.

E. Use of Advisory Opinions in the Interpretation of Orders. During the course of a recent argument on appeal, in which the propriety of a section 2(d) order written in the words of the Act was being argued, Chairman Dixon suggested that any respondent faced with unresolved questions under a broad order could obtain a binding opinion letter from the Commission, presumably under the new advisory opinion sections in the revised rules.¹⁰⁹

This may afford a promising avenue for implementation of the basic objective of the Commission, not to exact penalties, but to secure compliance. But once again it offers promise only if its operation is not confined to the technical parsing of the order, but instead permits a realistic inquiry into the business facts. Insofar as consent orders are concerned, there is some barmer in the limitation that only the complaint and the order subsist in the record, and only the complaint is available for interpretation of the order. But this should not foreclose open-minded inquiry and an attitude that relates the proposed commercial conduct on which advice is sought to the basic purposes of the statute, rather than narrowly to the words of the order.

Some have objected on a variety of grounds to this suggestion for the use of advisory opinions to implement compliance with orders. There is the objection that an overworked and underpaid Commission staff should not do the work of private lawyers in advising their clients. But it will be only in the difficult areas that

¹⁰⁹ See §§1.91-1.93 of subpar. (f). In terms, these provisions relate to violations of the statute rather than of outstanding orders.
an advisory opinion will be sought, and the Commission staff can readily dispose of the trivia.

Moreover, the same objections could be offered to the current practice of obtaining tax rulings or so-called railroad release clearances from the Antitrust Division. For the respondent without adequate means to secure experienced legal counsel, the advisory opinion route might be the only available one; and even for those who have more experienced counsel, their talents can be effectively deployed in the intelligent focusing of the issues and presentation of the facts in the application for an advisory opinion.

Some at the private bar have objected that the Commission advisory opinions will always be rigid and narrow, challengeable only under threat of a $5,000 a day civil penalty, and that one who has asked and been given a negative answer may be in a prejudiced position before a court in an enforcement proceeding. Perhaps the answer to this objection is that it will always remain the respondent's option. In any event, as an avenue for making orders work without endeavoring to exact large monetary penalties, it is worth trying.\(^{110}\)

The use of applications for advisory opinions to explain and, when necessary, to narrow the application of orders that were too broadly or too obscurely drafted, necessarily encounters the further logical objection that it would be equally possible and infinitely preferable to tailor them to the situation in the first place. So long as the advisory opinion is not withdrawn, the net result would be the same as though a fully articulated order had originally been entered. Similarly, if a fully tailored order turns out to be either too restrictive or overly literal, it always lies in the power of the Commission to modify it.

F Administrative Compliance Consideration. To some extent it is fair to say that the filing, consideration, and frequent refusal to accept a compliance report achieves the same purposes that might be served by a request for an advisory opinion. For some, the opportunities for informal consultation with representatives of the Compliance Division, or the exchange of correspondence, have proved effective. But further consideration and expansion of

\(^{110}\) The use of advisory opinions on the meaning of orders cannot, however, even justify the continued use of present boiler-plate or the continued entry of order which are framed merely in the words of the statute.
this type of activity by the Compliance Division might be fruitful.

In the first place, the staff of the Compliance Division ought to be freely available in discussions of proposed consent settlements. The occasional adamant refusal of counsel in support of the complaint either to discuss whether a particular form of compliance will meet the order (on the formal ground that this is not within his province), or to invite those who will enforce the order to discuss what it will mean if the respondent accepts it, is often a complete road-block to settlement.

In addition, some have reported that in discussing compliance after the order is entered there is an occasional literal adherence to the words of an order, rather than an open minded approach to the objectives of the statute involved. This attitude of "the words of this order are plain, only the Commission can change them" is somewhat frustrating when what is offered in a compliance report is on any fair evaluation not in violation of the Act.

Whether Compliance Division discussions with a respondent are formal or informal, the same approaches and attitudes are needed that should apply in applications for an advisory opinion. In this respect, the two procedures represent the obverse and the reverse of the same valuable coin of effective compliance.

G. Modification of Orders. The number of cases in which respondents have sought modification of outstanding cease and desist orders is relatively few. Whatever may be the past reasons—the relaxed attitude of respondents prior to the 1959 Finality Act, the hostility formerly displayed to applications for modification, or the futility of hoping to obtain a meaningful modification—this route may in the future additionally offer promise for alleviating both the current problems and achieving real compliance.

In the past, applications for modification have usually rested on legal arguments, and seldom has there been the introduction of new evidence at a new hearing. Perhaps where such modifications are sought, a new effort to refer the application in the first instance to a hearing examiner for the production of additional evidence, particularly as to changes in the respondent's operations or in the industry pattern, might render this avenue more useful.

IV The remaining question is whether civil penalties—the inescapable penumbra of $5,000 a day that threatens a respondent under a broad and ambiguous order—should be wholly abolished.
If the conclusion is sound that the courts will never exact the potentially horrendous penalties specified in the law, and arithmetically spelled out in some of its legislative history, perhaps a reexamination of the desirability of this sanction in enforcement may be warranted.

In terrorem sanctions which no one anticipates will ever be fully invoked do not make for sound law enforcement. The fact that the bark of the statute may be far worse than its operating bite is neither a desirable predicate for legal advice, nor any comfort to the occasional respondent from whom the full potential penalties may some day be exacted. Only to the degree that an order is narrow and explicit will penalty actions be effective. Despite Commission affection for broad orders, it does not follow that broad orders will ever achieve better compliance.\(^\text{111}\)

In 1936 the Commission itself had advanced the proposal that where after sixty days an unappealed order became automatically final, it might somehow be thereafter enforced by contempt action. The details were not explicated. Perhaps the idea was that the Commission would simply docket the order in the district court in which the respondent resided or had its principal place of business. But some doubts exist as to whether this technique might not be an invasion of the constitutionally separate powers of the judiciary, whether a federal court could be put in this ministerial posture, and whether any agency could by its own act convert its order into a judicial decree.\(^\text{112}\) There appears to be insufficient basis to determine from the Commission's point of view whether the contempt route or the civil penalty procedure represents the more effective sanction, and for respondents who have inadvertently or willfully flaunted an order, whether a contempt proceeding would afford any real comfort or lessening of the penalty. Some insist, however, that the theoretically more flexible contempt procedure might permit a court more in the Gilbertian spirit to fashion the punishment to the crime.

Most of us are not without hope that there will be a growing realization that the cardinal function of the Commission is to

\(^{111}\) Perhaps for this reason there has not to date been a reported civil penalty sought in a \$2(a) Patman Act order.

achieve industry-wide accommodation to the broadly stated, however vague, command of Congress in both the Federal Trade Commission Act and the Clayton Act, rather than to collect penalties for the Treasury. What is basically needed is an understanding insight into the problems that confront respondents subject to obscure orders who have to continue doing business in the dynamics of a competitive market, and an avoidance of the idea that it is the Commission's main assignment to issue a multitude of complaints and a host of obscurely phrased and broadly applicable cease and desist orders that leave the recipients subject to astronomically large potential penalties.

Depending upon what happens during the next few years in the formulation and enforcement of Commission orders, particularly those entered under the Clayton Act, it is not unlikely that in this area of civil penalties, there may be one of the wide swings of the pendulum that have characterized the growth of administrative law.