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Symposium on the Federal Trade Commission: A Program of Enforcement (Forward)

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SYMPOSIUM ON THE FEDERAL TRADE COMMISSION: A PROGRAM OF ENFORCEMENT

FOREWORD

RALPH F. FUCHS†

This issue of the Law Journal deals with a subject that is both timely and of great importance. Public and professional interest in the administrative agencies of government, especially the independent regulatory bodies in the Federal Government, has been at a high pitch since the "influence" disclosures of the late 1950's.¹ Much of the concern which has been expressed over the operation of the agencies has related to organizational and procedural aspects. These involve to a significant extent considerations that transcend particular agencies and can be resolved by over-all measures,² carrying forward the improvement of administrative procedure and some aspects of agency organization that was initiated by the Federal Administrative Procedure Act.³

In the end, if essential procedural fairness has been observed along the way, administrative processes must be tested by their fruits, which lie in the substantive law and the policies to which the agencies give effect under the governing statutes. These are unique to each agency; and it has consequently been urged to an increasing extent of late that the study of administrative law extend into these particularized areas.⁴

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1. Peck, *Regulation and Control of ex-Parte Communications with Administrative Agencies*, 76 HARV. L. REV. 233 (1962), comments on recent attempts to deal with "influence" operating through ex parte communications. Other material on the same and related subjects is collected in GELLHORN & BYSE, *ADMINISTRATIVE LAW: CASES AND COMMENTS* 959-1018, 1073-1129 (4th ed. 1960). For a summary of the recent studies and proposals of the Administrative Conference of the United States, on this and other topics, see Fuchs, *The Administrative Conference of the United States*, 15 AD. L. REV. 6 (1963).

2. Of the thirty formal recommendations of the Administrative Conference, ten contain proposals for legislation applicable to agencies generally or for agency practice that is intended to be substantially uniform in all or a substantial group of agencies.

3. 60 Stat. 237 (1946), 5 U.S.C. § 1001-11 (1958).

4. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 863, 1055, 1263, at 1317-18 (1962), citing other recent writings. See also Bernstein, *The Regulatory Process: A Framework for Analysis*,

So it must, if essentials are not to be ignored. It is in this area that the Journal here attempts to make a contribution.

Among the Federal regulatory agencies none is beset with greater difficulties or has been subjected to more drastic criticism than the third-oldest of the independent Federal regulatory agencies, the Federal Trade Commission.⁵ Although this Commission has happily been free of insinuations of scandal, partly because its general jurisdiction over almost all lines of interstate business has protected it from intimate association with any one,⁶ this very factor of diversity has confronted it with a greater potential volume of business than any other agency and has required especially difficult determinations of where and how to employ its authority. Until recently the Commission has proceeded in ways that had become customary, emphasizing case-by-case adjudication in cease-and-desist proceedings. Of late, however, the Commission has both given much attention to its problems of internal organization and displayed great resourcefulness in devising alternatives to its formal proceedings as means of securing compliance with the statutes it administers. The results of this development cannot yet be appraised; but they seem certain to lead to a more realistic and probably a more effective enforcement of these laws than heretofore. On the procedural side they may also lead to the development of administrative techniques that will have a wider application than simply within the Commission.

This issue of the Journal surveys some of these recent developments in the operations of the Federal Trade Commission and casts a critical eye on the question whether they have extended in the right directions. Such an organized preliminary examination of the Commission's recent activities should serve a useful purpose. Not only does it convey a lively sense of rejuvenation in the agency, but it indicates at the same time

26 LAW & CONTEMP. PROBS. 329, at 330, 340 (1961); Carrow, *Dean Landis and the Regulatory Process*, 29 GEO. WASH. L. REV. 718, at 720, 724, 730, 735 (1961); Heady & Lilienthal, *Congress and Administrative Regulation*, *id.* 238, at 258-60; Massel, *The Regulatory Process*, *id.* 181, at 199; REDFORD, *PUBLIC ADMINISTRATION AND POLICY FORMATION* (1956); and *Perspectives in the Study of Government Regulation*, 6 MIDW. J. OF POL. SCI. 1 (1962).

5. The Act establishing the Commission was adopted Sept. 26, 1914, 38 Stat. 717 (1914). It was preceded by the Federal Reserve Act of Dec. 23, 1913, 38 Stat. 251 (1913), establishing the Board of Governors of the Federal Reserve System, originally known as the Federal Reserve Board. The Board, because of the specialized nature of its functions and the informal character of most of its proceedings, is often omitted from the list of regulatory agencies which give rise to problems of procedure and of effective administration.

6. The Commission administers the Federal Trade Commission Act, 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-58 (1958); many provisions of the Clayton Act, 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 12-27 (1958); and several special acts relating to the labelling and advertising of particular kinds of commodities.

some of the factors that need to be kept in mind in estimating the value of particular modes of trade regulation.

These matters are of vital significance in the operation of the so-called free enterprise system in the United States. In fact that system is one of predominantly private, rather than of free, enterprise; and the enterprise which is left in private hands under the system is in truth much less free than most of the private portion of the economies of other countries. Nowhere else is there a pervasive anti-price discrimination law such as the Robinson-Patman Act for which the Federal Trade Commission is the primary enforcement agency;⁷ and in general the vast discretion which the Commission must exercise in trying to eliminate "unfair methods of competition . . . and unfair or deceptive acts or practices in commerce"⁸ is unknown elsewhere. American fervor in advocating and maintaining private enterprise is matched by extreme zeal in causing private business, through government regulation, to serve that general welfare which democratic government exists to secure. All the more important is it, then, to develop and refine the methods by which the relevant public policies can be carried out. Controversies over the existence of bureaucratic controls diminish to secondary importance in relation to this task.

7. Clayton Act § 2, 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1958), amending 38 Stat. 730 (1914).

8. FTC Act § 5(a) (1), 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(a) (1) (1958).