**Federal Trade Commission Act (1914)**

**Herbert Hovenkamp**

The Federal Trade Commission Act (38 Stat. 717) was originally passed in 1914 with President Woodrow Wilson's enthusiastic support. In its current form, the act states that "unfair methods of competition ... and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." The statute created a new government agency, the Federal Trade Commission (FTC), a five-member board with broad authority to regulate unfair and deceptive business practices. No more than three of the FTC members can be from the same political party, and they are appointed for overlapping seven-year terms. This was intended to limit the amount of control that any particular president and his political party have over the FTC.

**SUPPORT FOR THE FTC AND OTHER COMMISSIONS**

Many political groups supported the creation of the commission. First, Progressive Party members believed that the courts were too conservative about condemning anticompetitive practices and tended to side with big business. Further, court processes were cumbersome and took a long time. Often, many years went by from the filing of a complaint until a final decision. By contrast, an administrative agency was not obligated to follow strict rules of evidence and did not have to use juries. The commissioners themselves could listen to evidence and then issue "cease and desist" orders telling firms that certain practices must be stopped. Even businesses largely supported the FTC because of cumbersome court procedures and the inconsistent results of jury trials in many different courts. Many businesses believed that a single commission could clarify and give them advance notice of the kinds of practices that were unfair.

The Federal Trade Commission Act was part of a broad-based movement in the late nineteenth and early twentieth centuries to use commissions rather than courts to regulate various forms of business conduct. Commissions were regarded both as more streamlined in their decision-making process and also as more specialized. However, early in its history the FTC was hampered by a conservative Supreme Court that was highly suspicious of regulatory agencies and limited their power.

Several commissions were set up as part of this movement:

• The Interstate Commerce Commission supervised railroads and other public transportation and cargo carriers.

• The Securities Exchange Commission regulated corporate stocks and bonds.

• The Civil Aeronautics Board regulated interstate air traffic.

• The Federal Power Commission (now called the Federal Energy Regulatory Commission) regulated the provision of electric power.

• The Food and Drug Administration regulated medicines, pharmaceuticals, foods, and a few related products such as cosmetics.

The FTC eventually was divided into two bureaus, or branches. The Competition Bureau was intended to enforce that part of the law dealing with "unfair methods of competition." The Consumer Protection Bureau was intended to enforce that part of the law condemning "unfair or deceptive acts or practices." Each bureau has broad power to define the business practices that violate the statute. However, the power is not unlimited. If the commission decides to condemn a certain practice, it ordinarily issues a "cease and desist" order, telling the company that it must stop that practice. The company can either agree or appeal the FTC's order to a court. If the court agrees with the FTC, it will "enforce" the order. If it disagrees it will "vacate" the order and either let the company off entirely or else send the case back to the FTC so that the FTC can consider other issues it may have overlooked.

**COMPETITION**

When the FTC's Bureau of Competition is enforcing the law against "unfair methods of competition," its power overlaps extensively with the power of the Department of Justice to enforce the antitrust laws. The FTC has the power to enforce the Clayton Act directly, but its power over offenses covered by the Sherman Act is even broader. The Supreme Court held in FTC v. Brown Shoe Co. (1966) that the phrase "unfair methods of competition" includes everything that the Sherman Act includes plus some additional practices that might not violate the Sherman Act.

One example of this broader power is part of the law of price fixing. The Sherman Act, which prohibits contracts, combinations, and conspiracies "in restraint of trade," condemns price fixing by cartels (groups of businesses that try to limit competition). But under the terms of the Sherman Act, this price fixing must be done by agreement for the practice to be considered illegal. Economists know, however, that there are some markets called "oligopolies" in which firms can achieve cartel-like results without ever agreeing with each other. For example, if there are four gasoline stations on a busy intersection, each one of them can see what the other ones are charging for gas. If one station puts up its price in the morning, each of the others can match the price, acting entirely on its own. The four stations may effectively fix the price at a higher level without ever formally agreeing with each other to do anything. Although this would not be a Sherman Act violation, the FTC has taken the position since the 1940s that it could be an "unfair method of competition" under the Federal Trade Commission Act (Triangle Conduit and Cable Co. v. FTC [1948]). Since the early 1980s, however, the courts have cut back the FTC's power to condemn oligopoly pricing unless there is a fairly explicit agreement among the parties.

The FTC also enforces the Clayton Act provision against anticompetitive mergers. In general, when the FTC enforces the merger laws the standards are the same as when the Justice Department enforces the Clayton Act. As a result, we have one set of merger standards for most firms. In general, the merger laws come into play when a merger either creates a monopoly or makes it more likely that the firms will engage in price-fixing or oligopoly behavior. If a market contains several dozen firms of roughly the same size, then price fixing is unlikely. The concern for possible price fixing gets stronger as the number of firms in the market falls below seven or eight. This is because price-fixing agreements tend to work better when the number of participants in the agreement is fairly small.

**CONSUMER PROTECTION**

The Bureau of Consumer Protection in the FTC is concerned with deceptive practices. One division of this Bureau is concerned with false and misleading advertising. Another is concerned with misleading credit practices by lenders. The FTC has also established rules regarding how car dealers must report features such as the miles that a used car has been driven or its gasoline mileage. Increasingly the FTC has become involved in enforcement against fraudulent practices by telemarketers as well as practices by sellers over the Internet, including complaints about spam, or unsolicited e-mails. The FTC also has always paid very close attention to health claims, particularly for products that are said to be "miracle" drugs or to cause dramatic weight loss.

**EFFECTIVENESS**

The FTC has made many hundreds of rules governing many aspects of business behavior. Some of the rules are very complicated, but others are quite simple. Here are two examples, the first concerning advertising and the second concerning product warranties:

Advertising must tell the truth and not mislead consumers. A claim can be misleading if relevant information is left out or if the claim implies something that's not true. For example, a lease advertisement for an automobile that promotes "$0 Down" may be misleading if significant and undisclosed charges are due at lease signing.

If your ad uses phrases like "satisfaction guaranteed" or "money-back guarantee," you must be willing to give full refunds for any reason. You also must tell the consumer the terms of the offer.

These rules, simple and straightforward, have protected the average consumer from unfair business practices for decades. Although the FTC is a large government agency, it encourages consumers to file complaints when they believe they have been the victim of a false or misleading claim. The FTC actively maintains a web site for this purpose.