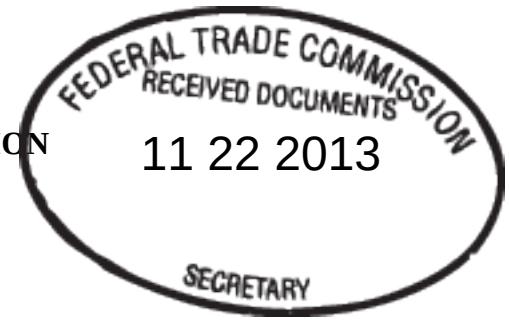

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Julie Brill
Maureen K. Ohlhausen
Joshua D. Wright

In the Matter of	)	**PUBLIC**
LabMD, Inc., a corporation, Respondent.	)	Docket No. 9357

COMPLAINT COUNSEL'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS COMPLAINT WITH PREJUDICE AND TO STAY ADMINISTRATIVE PROCEEDINGS

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INTRODUCTION

LabMD engaged in fundamental, systemic security failures that put at risk consumers' sensitive personal and health information. Compl. ¶¶ 6-11, 17-21. As a result of LabMD's failures—which continued unabated for years—a file containing the sensitive personal information of approximately 9,300 consumers was shared to a public file sharing network without being detected by LabMD. *Id.* ¶¶ 10(g), 17-20. The sensitive information included consumers' names, dates of birth, Social Security numbers, information relating to laboratory tests conducted, and health insurance policy numbers. Id. ¶ 19. As alleged in the Complaint, these are exactly the kinds of personal data used to perpetrate identity theft. *Id.* ¶¶ 6-7, 9, 12, 21. Indeed, LabMD documents containing consumers' sensitive personal information were found in the possession of identity thieves in Sacramento, California. *Id.* ¶ 21. LabMD's failure to adopt reasonable and appropriate measures to protect consumers' sensitive personal information caused or is likely to cause substantial consumer injury that is not reasonably avoidable by consumers and is not outweighed by countervailing benefits to consumers or competition. Compl. ¶ 22; *see* 15 U.S.C. § 45(n).

Respondent's Motion to Dismiss argues that, even if the Commission were to accept the Complaint's allegations as true—which the Commission must do when considering a Motion to Dismiss—the Commission should nonetheless dismiss the Complaint because: (1) Congress authorized the Department of Health and Human Services to regulate sensitive personal health information; (2) the FTC lacks jurisdiction to protect consumers from businesses' unfair data security practices; and (3) LabMD could not have known that it was required to act reasonably in securing consumers' sensitive personal information. In the alternative, Respondent asserts that the Commission should grant its Motion to Dismiss because the acts and practices alleged in the

Complaint do not affect interstate commerce, and because the Complaint does not comply with the Commission's pleading requirements. These arguments are *all* without merit, and the Commission should deny Respondent's Motion to Dismiss.

This matter fits squarely within the Federal Trade Commission's ("FTC") broad mandate under Section 5 of the Federal Trade Commission Act ("FTC Act") to protect consumers from "unfair or deceptive acts or practices," including unfair data security practices. 15 U.S.C. § 45(a). LabMD misconstrues legal precedent in an attempt to read into the Act exceptions to the Commission's unfairness authority that do not exist and run counter to the Commission's charge to protect consumers from a wide range of existing and developing threats. Indeed, Respondent's position would jeopardize the very purpose of the FTC Act, which Congress designed to empower the Commission to protect consumers from a broad array of unfair and deceptive practices in the marketplace.

The FTC's unremarkable position that companies should engage in "reasonable" practices to prevent unauthorized access to personal information (Compl. ¶ 22) is premised on Congress's mandate that the Commission find a likelihood of substantial consumer injury and consider the countervailing benefits before exercising its unfairness authority. 15 U.S.C § 45(n). The FTC pursues unfairness actions where the likelihood of substantial consumer injury, which is not reasonably avoidable, is not outweighed by countervailing benefits to consumers or to competition. *Id.* In pursuing its mandate to protect consumers from unfair information security practices, the Commission has been consistent and clear about how it enforces Section 5 of the FTC Act in data security matters: It applies Section 5's cost-benefit analysis, pursuing cases where the likelihood of consumer injury resulting from a firm's poor data security practices is not outweighed by the countervailing benefits of forgoing improved security practices.

Because the Complaint pleads specific facts, which, if proven, establish that LabMD is liable for committing an unfair practice under Section 5, the Complaint survives Respondent's Motion to Dismiss, and the Commission should permit this action to move forward in the public interest of protecting consumers and their sensitive personal information.

LEGAL STANDARD

Respondent's Motion to Dismiss is brought pursuant to Commission Rule 3.22(a), 16 C.F.R. §3.22(a). Resp. Mot. 1. Respondent's Motion should be regarded as a motion to dismiss for failure to state a claim, and the Commission should apply the standard of Rule 12(b)(6) of the Federal Rules of Civil Procedure. *In re S.C. State Bd. of Dentistry*, Docket No. 9311, 2004 WL 1814165, at *3 (F.T.C. July 28, 2004) (citation omitted). This standard requires Respondent to "show that Complaint Counsel can prove no set of facts that would entitle them to relief." *Id.* Moreover, in "evaluating whether a complaint withstands a motion to dismiss, the Commission must accept as true all of the complaint's well-pled factual allegations and must construe all inferences in the light most favorable to Complaint Counsel." *Id.* (citation omitted). The Commission should thus deny Respondent's Motion to Dismiss.

ARGUMENT

The Complaint pleads facts sufficient to state a claim that Respondent engaged in unfair practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. Specifically, the Complaint alleges that Respondent failed to employ reasonable and appropriate measures to prevent unauthorized access to consumers' personal information. Compl. ¶¶ 8, 10-11, 13-20, 22. Respondent's conduct in this regard caused or is likely to cause substantial injury to consumers. *Id.* ¶¶ 6-7, 9, 12, 17-20, 22; *see also* ¶ 21. This harm to consumers is neither reasonably avoidable, *id.* ¶¶ 12, 22, nor outweighed by countervailing benefits to consumers or competition, *id.* ¶¶ 11, 20, 22. The Commission's consideration of Respondent's Motion to Dismiss should

thus end here. *See In re S.C. State Bd. Of Dentistry*, 2004 WL 1814165, at *3.

I. SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT PROTECTS CONSUMERS AGAINST UNFAIR DATA SECURITY PRACTICES AFFECTING CONSUMERS' PERSONAL INFORMATION

Neither sector-specific statutes applicable to Respondent nor statutes applicable to other industries abrogate the FTC's data security jurisdiction under the FTC Act. Likewise, the Commission's past attempt to extend a different statute to attorneys is irrelevant to its general unfairness authority.

A. FTC and HHS Have Concurrent and Complementary Jurisdiction to Protect Consumers' Personal Information

Neither the Health Insurance Portability and Accountability Act ("HIPAA") nor the Health Information Technology for Economic and Clinical Health Act ("HITECH") provide the Department of Health and Human Services ("HHS"), as Respondent contends, with exclusive authority over the security of consumers' sensitive personal health information. Rather, the statutory framework provides the FTC and HHS with concurrent and complementary jurisdiction to protect consumers' sensitive heath information.

Congress charged HHS with improving "the efficiency and effectiveness of the health care system by, among other things, establishing "standards with respect to the privacy of individually identifiable health information." 42 U.S.C. § 1320d; HIPAA, Pub. L 104-191, 1996 HR 3103, §§ 261, 264. The FTC has a broader but complementary mandate to prevent deceptive or unfair practices, including the failure to provide reasonable and appropriate security for personal information. *See* 15 U.S.C. § 45(a). The two agencies also have complementary remedies. The FTC may seek equitable monetary and injunctive relief under Section 5, *see* 15 U.S.C. §§ 45(b), 53(b), while HHS has the authority to seek civil penalties under HIPAA and the regulations promulgated thereunder, *see* 42 U.S.C. § 1320d-5; 45 C.F.R. § 160, Subpart D.

The FTC and HHS each have prosecutorial discretion to determine when to bring an enforcement action. Exercising that discretion, the two agencies have coordinated enforcement actions that involve the failure to protect sensitive personal health information covered by HIPAA. *See In re Rite Aid Corp.*, FTC File No. 072-3121 (July 27, 2010) (settlement agreement resolving coordinated FTC-HHS information security investigations); *In re CVS Caremark Corp.*, FTC File No. 072-3119 (Feb. 18, 2009) (same).

1. Canons of Construction Do Not Strip FTC of Jurisdiction

Respondent's argument that HHS has exclusive jurisdiction to secure consumers' sensitive personal health information relies on a misinterpretation of a canon of statutory construction, in which Respondent suggests that specific statutes necessarily repeal general ones. Resp. Mot. 10-11. As explained in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank,* the canon applies when necessary to avoid contradiction or superfluity, neither of which Respondent can identify here. 132 S. Ct. 2065, 2071 (2012). By contrast, "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974); s*ee also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) ("The statutory provisions at issue here cannot be said to be in 'irreconcilable conflict' in the sense that there is a positive repugnancy between them or that they cannot mutually coexist. It is not enough to show that the two statutes produce differing results when applied to the same factual situation, for that no more than states the problem"). HIPAA does not conflict, irreconcilably or otherwise, with the consumer protection mandate of the FTC Act, and therefore both statutes should be regarded as effective.

HIPAA and the HITECH Act provide HHS with tools and methods that complement the FTC's authority to protect consumers' personal information, such as APA rulemaking authority,[1] the ability to seek civil penalties,[2] and the ability to pursue these actions without needing to establish the likelihood of "substantial injury" under the FTC Act. The application of Section 5 of the FTC Act does not render HIPAA and the HITECH Act superfluous.

2. Neither HIPAA nor HITECH Preempt or Repeal FTC Act by Implication

Respondent fails to point to any provision of HIPAA or HITECH that would divest the FTC of its unfairness authority over practices affecting consumers' personal information.[3] The FTC's authority to protect consumers from unfair practices predates the enactment of HIPAA and HITECH. Therefore, Congress's intent to preempt or repeal the FTC's unfairness authority in this regard would have needed to be "clear and manifest." *Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (citation omitted). Neither HIPAA nor HITECH contains an express or implied repeal of Section 5, so Respondent's argument fails.

HIPAA and HITECH in no way diminish the FTC's authority to protect consumers' personal information. Congress enacted HIPAA in 1996 to, among other things, improve "the efficiency and effectiveness of the health care system" by establishing "standards and requirements for the electronic transmission of certain health information," including

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[1] 42 U.S.C. § 1320d-2(d).
[2] 42 U.S.C. § 1320d-5.
[3] The only provision to which Respondent cites, Pub. L. 111-5 § 13422(b)(1) (Resp. Mot. 12) , does not appear in the text of the cited statute. Complaint Counsel presumes that Respondent intended to cite Pub. L. 111-5 § 13424, which directs the FTC and HHS to study issues related to applying HIPAA's privacy and security requirements to entities that are not subject to HIPAA. Nothing in this or any other statutory provision affects the FTC's authority to protect consumers from unfair practices.

requirements to protect the privacy and security of personal health information. Pub. L. 104–191, § 261. To effectuate this intent, Congress gave HHS the authority to conduct APA rulemaking and to obtain civil penalties for violations. *See* 42 U.S.C. § 1320d-2(d); 42 U.S.C. § 1320d-5. HITECH, enacted in 2009, strengthens HIPAA's privacy and security protections by, among other things, widening the scope of entities subject to civil penalties. *See* Pub. L. 111-5, §§ 13400-11, 123 Stat. 115, 258-276 (2009). The FTC Act confers general authority to the Commission to seek equitable remedies to prevent unfair trade practices that are likely to injure consumers. 15 U.S.C. § 45. Nothing in HIPAA or HITECH conflicts with the FTC's authority in this regard.[4]

Respondent seems to argue that the well-established repeal by implication analysis, *e.g.*, *Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 468 (1982) ("repeals by implication are not favored, . . . and whenever possible, statutes should be read consistently") (citation omitted), is somehow trumped by what it calls "the *Billing* doctrine." Resp. Mot. 13-14. In *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264 (2007), an opinion limited expressly to conflicts between the antitrust and securities laws, the Supreme Court held that the securities laws implicitly repeal the application of the antitrust laws to "underwriters' efforts to jointly promote and sell newly issued securities" because the securities laws are "clearly incompatible" with the application of the antitrust laws in that context. *Id.* at 276, 285. Because this test is limited to conflicts between antitrust and securities laws, it is not applicable here. Rather, the established

[4] Indeed, Congress enacted HITECH *after* the Commission had brought a half-dozen unfairness cases relating to data security. *See* n.9, *infra* (identifying data security cases alleging unfairness). In approving HITECH, Congress could have "clear[ly] and manifest[ly]" limited the Commission's unfairness authority. *Nat'l Assoc. of Home Builders,* 551 U.S. at 662 (2007). It did not.

law of repeal by implication governs this case.[5] Even if the Commission were to apply the *Billing* Court's analysis to this case, which it should not, Respondent has failed to show that the FTC Act's unfairness authority is "clearly incompatible" with HIPAA and HITECH.

B. Other Statutes Neither Abrogate FTC Act Nor Suggest a Prior Lack of Authority

In addition to contending that HIPAA and HITECH somehow operate to limit the FTC's jurisdiction, Respondent also advances two arguments that are without support in law or fact: (1) that Congress must expressly grant authority to the FTC to pursue particular practices; and (2) that Congress has expressly limited the FTC's authority in this field. *See* Resp. Mot. 14-20. In fact, Congress has delegated broad authority to the FTC to protect consumers against unfair business practices that are likely to injury consumers, and this matter falls squarely within this statutory authority.

1. Complementary Data Security Statutes Give the Commission Additional Means of Pursuing Data Security Practices

The fact that Congress gave the FTC additional tools and methods to pursue data security cases does not abrogate Section 5. Respondent points to several other statutes that provide the FTC with authority to pursue data security practices under the FTC Act—namely, the Fair Credit Reporting Act ("FCRA"), the Gramm-Leach-Bliley Act ("GLBA"), and the Children's Online Privacy Protection Act ("COPPA")—and argues that these statutes abrogate Section 5. Resp. Mot. 14-16. This argument has two fatal flaws: First, the fundamental purpose of the FTC Act is to empower the Commission to protect consumers against unfair or deceptive acts or practices

[5] The Supreme Court's opinion in *Nat'l Assoc. of Home Builders*, which was issued one week after the *Billing* opinion, reiterated the principle that "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest." 551 U.S. at 662 (internal quotation and citation omitted).

in the *absence* of enumerated practices. Second, the statutes identified by Respondent provide the FTC with tools and methods to supplement the Commission's already-existing authority over data security practices.

a. FTC Act delegates broad power to the Commission.

The statutory text of the FTC Act confers broad power to the Commission to protect consumers from "unfair or deceptive acts or practices." 15 U.S.C. § 45. Congress exempted from this broad grant of authority enumerated areas of commerce. *See id.* § 45(a)(2) (exempting banks, common carriers, air carriers, and other industries). Respondent's Motion asks the Commission to read into its authorizing statute an exemption for data security that does not exist. Resp. Mot. 14-20.

Congress deliberately delegated broad power to the FTC under Section 5 of the FTC Act to address unanticipated practices in a changing economy. *See FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239-40 (1972) ("Congress . . . explicitly considered, and rejected, the notion that it reduce the ambiguity of the phrase 'unfair methods of competition' by tying the concept of unfairness to a common-law or statutory standard or by enumerating the particular practices to which it was intended to apply"). The legislative history of the FTC Act reflects Congress's concerns about attempting to enumerate specific acts and practices. *See* S. Rep. No. 63-597, at 13 (1914) ("[t]here were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others") (attached hereto as **Exhibit A**); H.R. Rep. No. 63-1142, at 19 (1914) (Conf. Rep) ("It is impossible to frame definitions which embrace all unfair practices") (attached hereto as **Exhibit B**).

Indeed, while it is true that the statute does not specifically mention data security, it also does not mention any of the other established uses of its unfairness authority, including online check drafting and delivery (*see FTC v. Neovi, Inc.*, 604 F.3d 1150 (9th Cir. 2010)); sale of

telephone records (*see FTC v. Accusearch, Inc.*, 570 F.3d 1187 (10th Cir. 2009)); unilateral breach of contracts (*see Orkin Exterminating Co. v. FTC*, 849 F.2d 1354 (11th Cir. 1988)); telephone billing practices (*see FTC v. Verity Int'l*, 335 F. Supp. 2d 479 (S.D.N.Y. 2004)); unsafe farm equipment (*see In re Int'l Harvester Co.*, 104 F.T.C. 949 (1984)); or many other practices affecting commerce, all of which courts routinely find to be subject to Section 5 of the FTC Act. Respondent's argument proves too much: If the FTC could not act without Congress first identifying the practice, the Commission could not have brought these, or any other, unfairness actions.

b. Sector-specific data security laws add new powers.

Sector-specific data security laws enforced by the FTC provide the agency with tools and methods to supplement the Commission's already-existing authority over data security practices. Respondent incorrectly argues that the FTC's application of the FTC Act renders sector-specific laws, like the FCRA, GLBA, and COPPA, superfluous. Resp. Mot. 14-16. This argument fails for at least two reasons: First, these statutes do, in fact, provide tools for the FTC. For example, all three provide for APA rulemaking authority,[6] and the FCRA and COPPA also permit the FTC to pursue civil penalties, not just equitable relief.[7] Second, all three statutes permit the FTC to bring actions irrespective of substantial consumer injury.[8]

Respondent anticipates the argument that the FCRA, GLBA, and COPPA are different because they provide additional tools, such as civil penalties or rulemaking authority, but it

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[6] 15 U.S.C. § 1681s(a)(1) (FCRA); 15 U.S.C. § 6804(a)(1) (GLBA); 15 U.S.C. § 6502(b) (COPPA).
[7] 15 U.S.C. § 1681s(a)(2) (FCRA); 15 U.S.C. § 6505(d), 15 U.S.C. § 45(m)(1)(a) (COPPA).
[8] *See* 15 U.S.C. § 1681s(a) (FCRA); 15 U.S.C. §§ 6801(b), 6805(a)(7) (GLBA); 15 U.S.C. § 6505(d) (COPPA).

claims this argument "fails, for these statutes explicitly authorize the Commission to set substantive standards and to enforce those standards under the FTCA." Resp. Mot. 15 (citations omitted). Respondent's counterargument does not grasp the significance of civil penalties: When the FTC enforces the FTC Act alone, it can seek only equitable relief. 15 U.S.C. § 45(b). By contrast, when the FTC enforces the FCRA or COPPA, substantial civil penalties are available. *See, e.g., United States v. Choicepoint*, No. 06-0198 (N.D. Ga. Feb 15, 2006), Stipulated Final Judgment and Order for Civil Penalties, Permanent Injunction, and Other Equitable Relief, at 4 (ordering, in an FCRA matter relating to data security practices, payment of civil penalty of $10,000,000 pursuant to Section 621 of the FCRA, as enforced under Section 5 of the FTC Act); *United States v. Path, Inc.*, No. 13-0448 (N.D. Cal. Feb. 8, 2013), Consent Decree and Order for Civil Penalties, Permanent Injunction and Other Relief, at 11 (ordering, in a COPPA matter relating to the collection of personal information through mobile devices, payment of a civil penalty of $800,000, pursuant to Sections 1303(c) and 1306(d) of COPPA, as enforced under Section 5 of the FTC Act). Thus, even though, as Respondent correctly notes, rule violations are enforced as "an unfair or deceptive act or practice in commerce, in violation of section 5(a)," significant additional remedies are available under the FCRA and COPPA.

The fact that violations of the FCRA, GLBA, and COPPA also constitute violations of Section 5 is significant because it permits the FTC to bring an action without having to establish deception or likelihood of substantial injury under 15 U.S.C. § 45(n). By omitting the likelihood of substantial injury requirement for credit reporting agencies (FCRA), financial institutions (GLBA), and companies that handle children's data (COPPA), Congress enhanced the FTC's ability to bring data security actions against companies in specific sectors, or who trade in

specific types of information. *See* 15 U.S.C. § 1681s(a) (FCRA); 15 U.S.C. §§ 6801(b), 6805(a)(7) (GLBA); 15 U.S.C. § 6505(d) (COPPA).

2. The Commission Has Consistently Maintained Its Authority to Protect Consumers from Unfair Practices Affecting Consumers' Sensitive Personal Information

The FTC has consistently maintained its authority to protect consumers from unfair practices affecting consumers' sensitive personal information. A contrary conclusion requires a tortured application of *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). Resp. Mot. 16-20. In that case, the Supreme Court rejected the Food and Drug Administration's ("FDA") assertion of authority over tobacco because a decades-old comprehensive regulatory regime, which had developed against the backdrop of the FDA's persistent denial that it possessed such authority, irreconcilably conflicted with the FDA's reversal of its position. 529 U.S. at 137, 159-60. This case has none of the hallmarks of *Brown & Williamson*.

a. The Commission has never disclaimed its authority.

Since 2000, the FTC has brought nearly fifty data security cases, more than eighteen of which alleged that unreasonable security is an unfair act or practice.[9] The FTC has routinely

[9] The unfairness cases include: *In re TRENDnet, Inc.*, FTC File No. 122 3090 (Sept. 4, 2013) (consent order approved for public comment); *In re HTC America Inc.*, FTC Docket No. C-4406, FTC File No. 122-3049 (June 25, 2013) (consent order); *In re Compete, Inc.*, FTC Docket No. C-4384, FTC File No. 102-3155 (Feb. 20, 2013) (consent order); *In re EPN, Inc.*, FTC Docket No. C-4370, FTC File No. 112-3143 (Oct. 3, 2012) (consent order); *FTC v. Wyndham Worldwide Corp.*, No. 2:13-CV-01887 (D.N.J.) (pending litigation); *In re Upromise, Inc.*, FTC Docket No. C-4351, FTC File No. 102-3116 (Mar. 27, 2012) (consent order); *In re Lookout Servs., Inc.*, FTC Docket No. C-4326, FTC File No. 102-3076 (June 15, 2011) (consent order); *In re Ceridian Corp.*, FTC Docket No. C-4325, FTC File No. 102-3160 (June 8, 2011) (consent order); *In re Rite Aid Corp.*, FTC Docket No. C-4308, FTC File No. 072-3121 (Nov. 12, 2010 (consent order); *In re Dave & Buster's, Inc.*, FTC Docket No. C-4291, FTC File No. 082-3153 (May 20, 2010) (consent order); *United States v. Rental Research Servs.*, No. 0:09-CV-00524 (D. Minn. Mar. 6, 2009) (stipulated order); *In re CVS Caremark Corp.*, FTC Docket No. C-4259, FTC File

reported and publicized its data security program, including these enforcement activities, to Congress, consumers, and industry.[10] *See, e.g.*, *Identity Theft: Innovative Solutions for an Evolving Problem: Hearing before the Subcomm. on Terrorism, Technology, and Homeland Security of the S. Comm. on the Judiciary*, 110th Cong. at 5-6 (Mar. 21, 2007) (Prepared Statement of the Federal Trade Commission) ("[I]n several of the cases, the alleged security inadequacies led to breaches that caused substantial consumer injury and were challenged as unfair practices under the FTC Act"). The FTC has never disclaimed its authority over data security practices.

b. The Commission's requests for additional authority do not constitute disclaimers.

The FTC's requests for additional authority showcase the reach of the FTC's unfairness authority. For example, in testimony cited in Respondent's Motion (Resp. Mot. 17 n.13), former Director of the Bureau of Consumer Protection, David C. Vladeck, explained:

> [T]he Commission enforces the FTC Act's proscription against unfair or deceptive acts or practices in cases where a business

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No. 072-3119 (Jun. 18, 2009) (consent order); *In re The TJX Cos.*, FTC Docket No. C-4227, FTC File No. 072-3055 (July 29, 2008) (consent order); *In re Reed Elsevier Inc.*, FTC File No. 052-3094 (July 29, 2008) (consent order); *In re CardSystems Solutions, Inc.*, FTC Docket No. C-4168, FTC File No. 052-3148 (Sept. 5, 2006) (consent order); *In re DSW, Inc.*, FTC Docket No. C-4157, FTC File No. 052-3096 (Mar. 7, 2006) (consent order); *United States v. ChoicePoint, Inc.*, FTC File No. 052-3069, No. 06-CV-0198 (N.D. Ga. Jan. 30, 2006) (stipulated final judgment); *In re BJ's Wholesale Club, Inc.*, FTC Docket No. C-4148, FTC File No. 042-3160 (Sept. 20, 2005) (consent order).

[10] The FTC has never suggested that its unfairness authority does not apply where these practices cause substantial injury. For example, Respondent quotes the testimony of former Commissioner Orson Swindle (Resp. Mot. 16-17 n.12), but omits the footnote to that very same sentence, which reads: "The Commission *also* has authority to challenge practices as unfair if they cause consumers substantial injury that is neither reasonably avoidable nor offset by countervailing benefits." *Protecting Information Security and Preventing Identity Theft: Hearing Before the Subcomm. on Tech., Info. Policy, Intergovernmental Relations, and the Census of the H. Comm. on Gov't Reform*, 108th Cong. (Sep. 22, 2004) (emphasis added).

> makes false or misleading claims about its data security procedures, or *where its failure to employ reasonable security measures causes or is likely to cause substantial consumer injury*.

The Threat of Data Theft to American Consumers: Hearing Before the Subcomm. on Commerce, Mfg., and Trade of the H. Comm. on Energy and Commerce, 112th Cong. 2 (May 4, 2011) (emphasis added). The FTC's requests for additional authority cannot be construed as admissions of a prior lack of authority.

Even if the FTC had originally disavowed its authority, which it did not, that fact would not be controlling. *See Smiley v. Citibank*, 517 U.S. 735, 742 (1996) ("[T]he mere fact that an agency interpretation contradicts a prior agency position is not fatal"). Unlike *Brown & Williamson*, where the FDA disavowed its authority to regulate tobacco for more than 70 years (529 U.S. at 159), here Respondent misinterprets a few isolated statements to claim disavowal.

c. Proposed legislation, if relevant at all, supports the Commission's authority.

While Congress has proposed a number of legislative initiatives relating to data security, the circumstances of the Congressional debate regarding data security affirm the FTC's authority in this area. For example, four of the data security bills Respondent cites in support of its argument included savings clauses to preserve the FTC's existing data security authority. *See* S. 1207, 112th Cong. § 6(d) (1st Sess. 2011); H.R. 2577, 112 Cong. § 6(d) (1st Sess. 2011); H.R. 1841, 112 Cong. § 6(d) (1st Sess. 2011); H.R. 1707, 112 Cong. § 6(d) (1st Sess. 2011). Preservation clauses would be unnecessary if the FTC lacked existing authority.[11] Thus, there is

[11] Similarly, Chairman John D. (Jay) Rockefeller, who co-sponsored Senate Bill 1207, asked an FTC representative: "Can you talk about how Senator Pryor's and my bill will complement ***your existing enforcement efforts***?" *Privacy and Data Security: Protecting Consumers in the Modern World: Hearing on S.B. 1207 Before the S. Comm. on Commerce, Science, and*

no support for Respondent's argument that by proposing legislation, Congress somehow believes the FTC lacks unfairness authority over practices affecting consumers' personal information. Resp. Mot. 17-18.

d. Caselaw supports the Commission's position.

To the extent that Respondent's strained interpretation of *Brown v. Williamson* may be applicable, which it is not, the Supreme Court's subsequent holding in *Massachusetts v. EPA* requires that the Commission reject Respondent's argument. 549 U.S. 497, 531-32 (2007). In *EPA*, faced with states petitioning the Environmental Protection Agency to regulate greenhouse gases under the Clean Air Act ("CAA"), the Court rejected the EPA's efforts to make the same claims that Respondent makes in this action: that Congress did not contemplate greenhouse gases as a pollutant when it passed the CAA, *id*. at 512; that later Congressional action contemplated other mechanisms to address greenhouse gases, *id*.; that the classification of carbon dioxide would create overlapping regulatory jurisdiction between the EPA and the Department of Transportation, *id*. at 513; and that the interpretation of pollutant to carbon dioxide had vast "economic and political consequences" that were far too significant to impute to Congress without an express delegation, *id*. at 512.

The Court held that greenhouse gases "fit well within" the relevant statutory definition and, that short of an "extreme" result that "clashed with . . . 'common sense[,]'" the agency should regulate the gases under the Act. *Id*. at 531-32. The Court also explained that the EPA, like Respondent in this matter, had "not identified any Congressional action that conflicts in any way" with the contested interpretation. *Id*. Finally, the Court dismissed the notion that

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Transportation, 112th Cong. 32 (June 29, 2011) (emphasis added).

overlapping jurisdiction between the Department of Transportation and the EPA was somehow improper: "The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency." *Id.* at 532.

Here, Respondent is unable to point to any "extreme" result stemming from the Commission proceeding with its administrative action in this case or in any other data security case. Accordingly, the FTC's exercise of its unfairness authority regarding unreasonable data security practices is appropriate, and Respondent's argument fails.

C. The Commission's Attempt to Extend GLBA Authority to Attorneys is Irrelevant to the Commission's Ability to Protect Consumers from Unfair Practices Affecting Consumers' Sensitive Personal Information

Respondent's reliance on *American Bar Ass'n v. FTC*, 430 F.3d 457 (D.C. Cir. 2005) is misplaced. Resp. Mot. 20. In *ABA*, the FTC had construed the GLBA's defined term "financial institution" to include attorneys engaged in the practice of law, an interpretation that the court found contrary to the meaning of the term. *Id.* at 470-71. In contrast, here, there is no debate about the meaning of the term "unfairness." 15 U.S.C. § 45(n). Congress established a specific test to determine whether a practice is unfair, and the Complaint pleads facts sufficient to state a claim that the practices at issue meet the statutory test for unfairness. Unlike in *ABA*, The Commission's authority to bring this case rests not on its own interpretation of a statutory term, but instead on the application of well-pled facts to the unambiguous unfairness test enacted by Congress.

II. FTC ACT PROVIDES SUFFICIENT NOTICE OF BUSINESSES' OBLIGATIONS

If the Commission were to hold that it may not apply its unfairness authority to LabMD's conduct because the Commission somehow failed to provide Respondent with sufficient notice of what constitutes unfairness, it would vitiate many of the Commission's consumer protection unfairness actions. Whenever the Commission brings an unfairness case, it provides the same

notice: The notice provided by the statute. 15 U.S.C. § 45(n). Neither the Commission nor any court has ever found that Section 5's definition of unfairness fails to provide sufficient notice.

A. LabMD Has Fair Notice of the Commission's Reasonableness Standard

The codification of unfairness established a cost-benefit analysis to evaluate unfair practices. 15 U.S.C. § 45(n) (requiring evaluation of the likelihood of "substantial injury" and of "countervailing benefits"); J. Howard Beales, III, Director, Bureau of Consumer Protection, Federal Trade Comm'n Remarks at the Marketing and Public Policy Conference: The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection (May 30, 2003) ("[C]odification of those principles in 1994 re-established a cost/benefit analysis (injury to consumers not outweighed by countervailing benefits) as the test for unfairness").

In order to avoid unfair practices that violate Section 5 of the FTC Act, a company must first determine whether its practices cause or are likely to cause substantial injury to consumers that is not reasonably avoidable. 15 U.S.C. § 45(n). If a company's practices are likely to cause consumer injury, Section 5 requires the company to employ measures to prevent the injury when the injury is not outweighed by countervailing benefits to consumers or competition. *Id.* In other words, a company must employ reasonable measures to prevent consumer injury that its practices would otherwise likely cause. *See id.*

Applying this Section 5 analysis to a company that maintains consumers' sensitive personal information, the unauthorized disclosure of which would cause substantial consumer injury, the company must assess whether its security practices are likely to result in the unauthorized disclosure of consumers' personal information. Section 5 requires that the company employ data security measures that would prevent the injury when the injury is not outweighed by countervailing benefits to consumers or competition. In other words, the company must employ reasonable data security practices designed to prevent consumer injury

that its practices would otherwise likely cause.

The FTC has expressly applied this test in data security matters to require "reasonable and appropriate" practices. *See* n.9, *supra*. Through the statute and FTC enforcement actions applying the statutory elements of unfairness, Respondent has ample notice of the requirement to employ reasonable, cost-effective data security practices to avoid the likelihood of substantial injury.

B. Reasonableness Standard Is Unremarkable and Applied in a Variety of Contexts

It is difficult to reconcile Respondent's argument that the standard of reasonableness based on Section 5's definition of unfair practices is "vague" (Resp. Mot. 23) and "meaningless" (*id.* 24) with the hundreds of years of Anglo-American jurisprudence predicated on the premise that standards of care are legitimate methods for evaluating parties' legal liabilities. Reasonableness provides adequate notice as to how regulated entities must behave. Data security practices are not exceptional in the field of jurisprudence nor somehow immune to an ordinary cost-benefit analysis.

1. Reasonableness Standard is Not Vague

Courts routinely find statutes and regulations premised on objective standards of care, such as reasonableness, to provide fair notice, including in contexts in which the relief available far exceeds the equitable relief available in an FTC action. For example, in criminal actions against physicians for illegally prescribing narcotics, the standard is "whether the physician prescribes medicine 'in accordance with a standard of medical practice generally recognized and accepted in the United States.'" *United States v. Merrill*, 513 F.3d 1293, 1306 (11th Cir. 2008) (citation omitted). In General Duty Clause actions under the Occupational Safety and Health Act ("OSHA"), "reasonableness" has been found to be an objective standard that provides regulated

entities with fair notice.[12] *Voegele Co., Inc. v. Occupational Safety & Health Review Comm'n*, 625 F.2d 1075, 1078-79 (3d Cir. 1980). Finally, even in tort actions for negligent data security practices, where plaintiffs can seek punitive damages, courts rely on the "reasonable and prudent person" under the circumstances standard. *In re Zappos.com, Inc.*, No. 12-00325, 2013 WL 4830497, at *3-4 (D. Nev. Sept. 9, 2013) ("Plaintiffs have sufficiently alleged that Zappos negligently failed to protect Plaintiffs' private data from electronic theft with sufficient electronic safeguards. Plaintiffs need not rely on any special duty of care. In the context of a simple negligence claim, Zappos owed Plaintiffs the duty of care owed by all persons to all other persons as a general matter: the duty to act as a reasonable and prudent person under the same or similar circumstances"); *see also Loschiavo v. City of Dearborn*, 33 F.3d 548, 552-53 (6th Cir. 1994) ("A regulation is not rendered impermissibly vague simply because it calls for a judicial determination of 'reasonableness'").

In an FTC context analogous to the Complaint's allegations here, a court in the Northern District of Georgia rejected a defendant's assertion that the term "substantiation" was unconstitutionally vague for the purpose of deception actions under Section 5:

> [The] definition [of substantiation] is context specific and permits different variations on "competent and reliable scientific evidence" depending on what pertinent professionals would require for the particular claim made. Thus, the size, duration or protocol of a scientific study, the number or type of scientific studies required to substantiate a claim, and the proper mechanism for extrapolating

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[12] The enforcement of OSHA's General Duty Clause in Department of Labor administrative courts may provide the best analogy to a data security administrative hearing under Section 5 of the FTC Act. *See, e.g.*, *Fabi Construction Co. v. Secretary of Labor*, 508 F.3d 1077, 1088 (D.C. Cir. 2007) (considering a number of factors to determine whether defendant met its "general duty," including whether defendant followed third-party technical drawings, whether defendant complied with industry standards, and expert opinion).

> results from studies will obviously vary from circumstance to circumstance depending upon the expert evidence presented. However, the standard by which these issues of fact are resolved is clear, and an advertiser can be reasonably certain of what substantiation will be required *by conferring with appropriate professionals or experts*. The fact that different scientific evidence is required for different claims impacting different products does not mean that the FTC can enforce its act arbitrarily; instead, it simply means that different claims require different substantiation. As Judge Dimock wrote in his concurring opinion in *United States v. Shackney*, 333 F.2d 475, 488 (2d Cir. 1964), "Statutes are not . . . void for vagueness because they raise difficult questions of fact. They are void for vagueness only where they fail to articulate a definite standard." *Here the FTC has articulated a definite standard; accordingly, the issues of fact that it generates do not render it unconstitutionally vague*.

FTC v. Nat'l Urological Grp., Inc., 645 F. Supp. 2d 1167, 1186-87 (N.D. Ga. 2008) (emphasis supplied), *aff'd*, 356 F. App'x 358 (11th Cir. 2009). Similarly, the FTC has articulated a definite standard for companies' data security practices: Section 5 demands that a company act when the likelihood of consumer injury resulting from its poor data security practices is not outweighed by countervailing benefits of forgoing improved security practices.

Respondent's demand for "ascertainable certainty" is a red herring. Resp. Mot. 23. First, as described in Part II.A, LabMD and similarly situated companies *do know*, with ascertainable certainty, that reasonableness is the standard for enforcement of Section 5 of the FTC Act. Second, ascertainable certainty does not require agencies to provide prescriptive guidance at the level of detail that Respondent seems to think appropriate. *See, e.g., United States v. Lachman*, 387 F.3d 42, 56-7 (1st Cir. 2004) ("The mere fact that a statute or regulation requires interpretation does not render it unconstitutionally vague"). The FTC has been consistent and clear about how it enforces Section 5 of the FTC Act against companies for their business practices related to the security of consumer data and, as a result, Respondent has received fair notice.

2. Reasonableness in Data Security is No More Complicated Than Reasonableness in Any Other Field

Data security practices are not immune from cost-benefit analyses. Section 5 requires evaluating potential injury, the likelihood of that injury, and the cost of taking precautions to prevent that injury. It is no more challenging to apply that balancing test in the context of companies' data security practices than it is in the context of companies' duties of care related to other business practices. Indeed, negligence law already imposes the same standard of care, including for data security practices. *See Zappos*, 2013 WL 4830497, at *3.

As with the application of the reasonableness standard of care in any other circumstance, what constitutes reasonable data security practices for a company that maintains consumers' sensitive personal information will vary depending on the facts of the case and a company's circumstances. This analysis includes: the sensitivity of the information the company handles (going to the magnitude of injury from unauthorized access to information); the nature and scope of the firm's activities (going to the structure of the firm's network, how the network operates, the types of security vulnerabilities and risks it faces, and feasible protections); and the firm's size and complexity (going to, among other things, the cost of implementing feasible protections).

Companies maintaining sensitive personal information have robust guidance available to assess whether their data security practices are reasonable under their circumstances. Companies may review FTC complaints and consent decrees, which concern fundamental security elements, including: conducting risk assessments to identify reasonably foreseeable risks; assessing the effectiveness of existing security measures and adopting additional measures in light thereof; testing and monitoring security measures for effectiveness; and adjusting the measures appropriately. For example, the complaints in a number of FTC actions allege that the

respondent failed to conduct adequate risk assessments and, as a result, failed to adopt easily implemented measures to address reasonably foreseeable risks that an appropriate risk assessment would have revealed.[13] The consent decrees approved by the Commission impose the same substantive relief: The Commission requires respondents to implement a comprehensive information security program that includes and reflects these same basic security elements.[14] These security elements are well known in the information technology field, and are regularly and routinely published in training and continuing education materials for network administrators and in free information technology materials.[15] Similarly, the SANS Institute has

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[13] *See, e.g.*, *In re Card Systems, Inc.*, FTC File No. 052-3148, Compl. ¶ 6(2) (Feb. 23, 2006) (proposed complaint approved by Commission); *In re Reed Elsevier Inc.*, FTC File No. 052-3094, Compl. ¶ 10(h) (March 27, 2008) (proposed complaint approved by Commission).

[14] *See, e.g.*, *In re The TJX Cos.*, FTC Docket No. C-4227, FTC File No. 072-3055 (July 29, 2008) (consent order) (requiring TJX to implement a written information security program; designate an employee accountable for its information security program; to identify risks; to design and implement safeguards to address risks; to only retain service providers capable of providing adequate safeguards; and evaluate and adjust the program regularly).

[15] Since 1990, NIST has published and updated a series of Special Publications ("SP-800") on information security topics. *See, e.g.*, NIST Special Publication 800-12, An Introduction to Computer Security: The NIST Handbook (Oct. 1995), *available at* http://csrc.nist.gov/publications/nistpubs/800-12/800-12-html/; NIST Special Publication 800-30, Risk Management Guide for Information Technology Systems (July 2002; updated September 2012), *available at* http://csrc.nist.gov/publications/nistpubs/800-30/sp800-30.pdf and http://csrc.nist.gov/publications/nistpubs/800-30-rev1/sp800_30_r1.pdf. Although prepared for government computer systems, these publications also provide guidance to the private sector. For example, HHS published guidance to entities subject to HIPAA, such as LabMD, that incorporates content from NIST Special Publications. *See, e.g.*, Department of Health and Human Services, HIPAA Security Series 6: Basics of Risk Analysis and Risk Management (June 2005, revised March 2007) at 3, *available at* http://www.hhs.gov/ocr/privacy/hipaa/administrative/securityrule/riskassessment.pdf (although the HIPAA "Security Rule does not prescribe a specific risk analysis or risk management methodology" or require covered entities to follow NIST documents, "much of the content" of HIPAA Security Series 6 "is adapted from government sources such as the NIST 800 Series of Special Publications, specifically SP-800-30 – Risk Management Guide for Information Technology Systems").

since 2001 annually published and updated a free, easily accessible compilation of the most critical security vulnerabilities confronting firms, security professionals, and law enforcement. *See, e.g.*, SANS Institute, The Top 20 Most Critical Internet Security Vulnerabilities (Updated) (November 2005), *available at* https://files.sans.org/top20/top20_2005.pdf (identifying file sharing applications as a critical vulnerability). The compilation includes reference materials, information about new vulnerabilities, security measures that companies may use to defend against attacks, and links to free security tools.

The FTC has pleaded, and will prove at trial, that based on these widely known and readily available resources, the measures LabMD employed to prevent unauthorized access to consumers' personal information fell well short of the reasonableness standard of care. That is, LabMD's practices created a likelihood of substantial consumer injury that was not outweighed by countervailing benefits of forgoing improved security practices.

C. FTC Is Not Obligated to Proceed by Rulemaking

The FTC is not obligated to engage in rulemaking to enforce the FTC Act. The FTC's decision to enforce the FTC Act's prohibition of unfair practices through individual enforcement action, or adjudication, rather than rulemaking "lies [within its] informed discretion." *PBW Stock Exch., Inc. v. SEC*, 485 F.2d 718, 732 (3d Cir. 1973) ("The courts have consistently held that where an agency, as in this case, is given an option to proceed by rulemaking or by individual adjudication the choice is one that lies in the informed discretion of the administrative agency") (citing *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 772 (1969); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)). "If the agency affords the party a 'full opportunity to be heard before the [agency] makes its determination' [*NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974)], we cannot second-guess the agency decision whether to interpret a standard by rulemaking or by adjudication. [*Chenery*, 332 U.S. at 203]." *Beazer E., Inc. v. EPA*, 963 F.2d 603, 609-10 (3d Cir.

1992).

Proceeding through case-by-case adjudication of data security matters is appropriate because the cost-benefit analysis of reasonableness is necessarily a fact-driven inquiry. Certain fields are "so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule." *Chenery*, 332 U.S. at 203. The Supreme Court articulated the importance of case-by-case adjudication in similar circumstances:

> [The National Labor Relations Board] is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion. Although there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act, nothing in the present case would justify such a conclusion. Indeed, there is ample indication that adjudication is especially appropriate in the instant context. As the Court of Appeals noted, "(t)here must be tens of thousands of manufacturing, wholesale and retail units which employ buyers, and hundreds of thousands of the latter." [*Bell Aerospace v. NLRB*, 475 F.2d 485, 496 (2d Cir. 1973)]. Moreover, duties of buyers vary widely depending on the company or industry. It is doubtful whether any generalized standard could be framed which would have more than marginal utility.

Bell Aerospace, 416 U.S. at 294 (permitting NLRB to evaluate the definition of "managerial employees" for the purpose of collective bargaining on a case-by-case basis).

III. LABMD'S ACTS AND PRACTICES AFFECT INTERSTATE COMMERCE

Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a). The act defines "Commerce" as, *inter alia*, "commerce among the several States." *Id.* § 44. This definition captures Respondent's business practices, as they are alleged to include testing of "specimen samples from consumers and reporting test results to consumers' health care providers" and the consumers are "located throughout the United States." Compl. ¶¶ 1-5. *See P.F. Collier & Son Corp. v. FTC*, 427 F.2d 261, 271 (6th Cir. 1970) (holding that the nationwide scope of operations imparted the requisite interstate character). Accordingly,

Respondent's suggestion that its practices do not affect interstate commerce is specious.

IV. COMPLAINT COMPLIES WITH PLEADING REQUIREMENTS

The pleading standard articulated in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), is inapplicable to complaints filed before the Federal Trade Commission's Office of the Administrative Law Judges.[16] *Cf.* 16 C.F.R. § 3.11(b)(2) ("The Commission's complaint shall contain . . . [a] clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law . . . ."). Even if the *Twombly/Iqbal* standard were applicable, the Complaint alleges facts sufficient to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 663 (quoting *Twombly*, 550 U.S. at 570).

V. MATTER SHOULD NOT BE STAYED

The Commission should deny Respondent's request that these proceedings be stayed. Commission Rule 3.22(b) provides that, absent an order, "[a] motion under consideration shall not stay the proceedings before the Administrative Law Judge . . . ." 16 C.F.R. § 3.22(b). In promulgating the Rules of Practice applicable in this matter, the Commission stated that the

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[16] *See In re Egan-Jones Ratings Co.*, Exchange Act Release No. APR-716, 2012 WL 8718369, at *2 (ALJ Aug. 8, 2012) (rejecting *Twombly* application to affirmative defenses because Commission's pleading rules only require sufficient detail "as will permit a specific response thereto"); *United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO 1148, 2012 WL 2950407, at *8 (Dep't of Justice Mar. 15, 2012) (rejecting *Twombly* pleading, reasoning prior administrative process provides notice); *United States v. Split Rail Fence Co.*, 10 OCAHO 1181, 2013 WL 2154637, at *4 (Dep't of Justice May 13, 2013) (distinguishing agency's rules from *Twombly* because they lack "entitlement to relief" requirement); *Evans v. EPA*, ARB Case No. 08-059, 2012 WL 3164358, at *4 (Dep't of Labor Admin. Review Bd. July 31, 2012). *But cf.*, *e.g.*, *In re Hanson's Window & Construction, Inc.*, 2010 WL 5093890, at *3 (EPA ALJ Dec. 1, 2010) (applying *Twombly* where agency explicitly supplements its rules with Federal Rules of Civil Procedure); *Totes-Isotoner Corp. v. United States*, 569 F. Supp. 2d 1315, 1325-26 (Ct. Int'l Trade 2008) (applying *Twombly* where agency's pleading rules are identical to Federal Rules of Civil Procedure).

purpose of Rule 3.22(b) "was to ensure that discovery and other prehearing proceedings continue while the Commission deliberates over" dispositive motions, such as Respondent's Motion to Dismiss. Fed. Trade Comm'n Rules and Regulations, 16 C.F.R. Parts 3 and 4, 74 Fed. Reg. 1804, 1810 (Jan. 13, 2010). Indeed, the Commission anticipated that the amended Rules of Practice would "expedite cases by providing that proceedings before the ALJ [would] not be stayed while the Commission considers a motion . . . ." Fed. Trade Comm'n Rules of Practice, 16 C.F.R. Parts 3 and 4, 73 Fed. Reg. 58,832, 58,836 (Oct. 7, 2008). Except to rehash arguments pending before the Administrative Law Judge regarding Complaint Counsel's ordinary, third-party discovery, Respondent has provided no rationale that could possibly justify a stay pending determination of this Motion. Accordingly, the Commission should deny Respondent's request to stay the proceedings pending resolution of its Motion.

CONCLUSION

For the foregoing reasons, the FTC respectfully requests that the Commission deny Respondent's Motion to Dismiss and deny Respondent's request to stay the administrative proceedings.

Dated: November 22, 2013

Respectfully submitted,

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Exhibit A

63D CONGRESS, 2d Session. | SENATE. | REPORT No. 597.

FEDERAL TRADE COMMISSION.

JUNE 13, 1914.—Ordered to be printed.

Mr. NEWLANDS, from the Committee on Interstate Commerce, submitted the following

REPORT.

[To accompany H. R. 15613.]

The Senate Committee on Interstate Commerce, to which was referred H. R. 15613, a bill to create an interstate trade commission, etc., passed by the House of Representatives on the 5th day of June, 1914, reports as a substitute therefor Senate bill No. 4160, reported favorably to the Senate on the 5th day of June (calendar day, June 6), 1914, to which latter bill have been added provisions regarding unfair competition and the investigation of foreign trade practices.

The substituted bill is as follows:

[Senate substitute for H. R. 15613.]

Be it enacted, etc., That a commission is hereby created and established, to be known as the Federal Trade Commission, composed of five members, not more than three of whom shall be members of the same political party, and the said Federal Trade Commission is referred to hereinafter as "the commission."

The words defined in this section shall have the following meaning when found in this act, to wit:

"Commerce" means such commerce as Congress has the power to regulate under the Constitution.

The term "corporation" or "corporations" shall include joint stock associations and all other associations having shares of capital or capital stock, organized to carry on business for profit.

"Antitrust acts" means the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; also sections seventy-three to seventy-seven, inclusive, of an act entitled "An act to reduce taxation, to provide revenue for the Government, and for other purposes," approved August twenty-seventh, eighteen hundred and ninety-four; and also the act entitled "An act to amend sections seventy-three and seventy-six of the act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen.

ORGANIZATION.

SEC. 2. Upon the organization of the commission, the Bureau of Corporations, and the offices of Commissioner and Deputy Commissioner of Corporations shall cease to exist, and the employees of said bureau shall become employees of the commission in such capacity as it may designate. The commission shall take over all the records, furniture, and equipment of said bureau. All work and proceedings pending before the bureau, may be continued by the commission free from the direction or control of the Secretary of Commerce. All appropriations heretofore made for the support and maintenance of the bureau and its work are hereby authorized to be expended by the commission for said purposes.

Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission.

The commissioners shall be appointed by the President, by and with the advice and consent of the Senate. The terms of office of the commissioners shall be seven years each. The terms of those first appointed by the President shall date from the taking effect of this act, and shall be as follows:

One shall be appointed for a term of three years, one for a term of four years, one for a term of five years, one for a term of six years, and one for a term of seven years; and after said commissioners shall have been so first appointed all appointments, except to fill vacancies, shall be for terms of seven years each. The commission shall elect one of its members chairman for such period as it may determine. The commission shall elect a secretary and may elect an assistant secretary. Said secretary and assistant secretary shall hold their offices or connection with the commission at the pleasure of the commission. Each commissioner shall receive a salary of $10,000 per annum. The secretary of the commission shall receive a salary of $5,000 per annum. The assistant secretary shall receive a salary of $4,000 per annum. In case of a vacancy in the office of any commissioner during his term, an appointment shall be made by the President, by and with the advice and consent of the Senate, to fill such vacancy, for the unexpired term. The office of the commission shall be in the city of Washington, but the commission may at its pleasure meet and exercise all its powers at any other place, and may authorize one or more of its members to prosecute any investigation, and for the purposes thereof to exercise the powers herein given the commission.

The commission shall have such attorneys, accountants, experts, examiners, special agents, and other employees as may, from time to time, be appropriated for by Congress, and shall have authority to audit their bills and fix their compensation. With the exception of the secretary and assistant secretary and one clerk to each of the commissioners, and such attorneys and experts as may be employed, all employees of the commission shall be a part of the classified civil service. The commission shall also have the power to adopt a seal, which shall be judicially noticed, and to rent suitable rooms for the conduct of its work.

All the expenses of the commission, including all necessary expenses for transportation incurred by the commissioners or by their employees under their orders in making any investigation or upon official business in any other place than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor, approved by the commission.

The Auditor for the State and other departments shall receive and examine all accounts of expenditures of the commission.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

POWERS OF COMMISSION.

SEC. 3. The commission shall have power among others—

(a) To investigate from time to time, and as often as the commission may deem advisable, the organization, business, financial condition, conduct, practices, and management, of any corporation engaged in commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) To require any corporation subject to the provisions of this act which the commission may designate to furnish to the commission from time to time information, statements, and records concerning its organization, business, financial condition, conduct, practices, management, and relation to other corpo-

rations, or to individuals, associations, or partnerships, and to require the production for examination of all books, documents, correspondence, coutracts, memoranda, or other papers relating to or in any way affecting the commerce in which such corporation under inquiry is engaged or concerning its relations to any individual, association, or partnership, and to make copies of the same.

(c) To prescribe as near as may be a uniform system of annual reports from such corporations or classes of corporations subject to the provisions of this act, as the commission may designate, and to fix the time for the filing of such reports, and to require such reports, or any special report, to be made under oath, or otherwise in the discretion of the commission.

(d) To make public, in the discretion of the commission, any information obtained by it in the exercise of the powers, authority, and duties conferred upon it by this act, except so far as may be necessary to protect trade processes, names of customers, and such other matters as the commission may deem not to be of public importance, and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation.

(e) In any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust acts if the court finds for the complainant it may, upon its own motion or the motion of any party to such suit, refer the matter of the form of the decree to be entered to the commission as a master in chancery; whereupon the commission shall proceed in that capacity upon such notice to the parties and upon such hearing as the court may prescribe, and shall as speedily as practicable make report with its findings to the court, which report and findings having been made and filed shall be subject to the judicial procedure established for the consideration and disposition of a master's report and findings in equity cases.

(f) Wherever a restraining order or an interlocutory or final decree has heretofore been entered or shall hereafter be entered against any defendant or defendants in any suit brought by the United States to prevent and restrain any violation of the antitrust acts, the commission shall have power, and it shall be its duty, upon the application of the Attorney General, to make investigation of the manner in which the order or decree has been or is being carried out, and as to whether the same has been or is being violated, and what, if any, further order, decree, or relief is advisable. It shall transmit to the Attorney General a report embodying its findings as a result of any such investigation with such recommendations for further action as it may deem advisable and the report shall be made public in the discretion of the commission.

(g) If the commission believes from its inquiries and investigations, instituted upon its own initiative or at the suggestion of the President, the Attorney General, or either House of Congress that any corporation, individual, association, or partnership has violated any law of the United States regulating commerce, it shall report its findings and the evidence in relation thereto to the Attorney General with its recommendations.

For the purpose of prosecuting any investigation or proceding authorized by this section the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documents or writings of any corporation being investigated or proceeded against.

(*h*) The commission is hereby directed to investigate, as expeditiously as may be, trade conditions in foreign countries where associations, combinations, or practices of buyers, dealers, or traders may injuriously affect the export trade of the United States, and also to investigate whether American exporters have combined with each other or with foreign producers or dealers to control prices abroad, and to report to Congress thereon from time to time.

SEC. 4. The powers and jurisdiction herein conferred upon the commission shall extend over all trade associations, corporate combinations, and corporations as hereinbefore defined engaged in or affecting commerce, except banks and common carriers.

UNFAIR COMPETITION.

SEC. 5. That unfair competition in commerce is hereby declared unlawful.

The commission is hereby empowered and directed to prevent corporations from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any corporation has been or is using any unfair method of competition in commerce, it shall issue and serve upon such corporation a written order, at least thirty days in advance of the time set therein for hearing, directing it to appear before the

commission and show cause why an order shall not be issued by the commission restraining and prohibiting it from using such method of competition, and if upon such hearing the commission shall find that the method of competition in question is prohibited by this act it shall thereupon issue an order restraining and prohibiting the use of the same. The commission may at any time modify or set aside, in whole or in part, any order issued by it under this act.

Whenever the commission, after the issuance of such order, shall find that such corporation has not complied therewith, the commission may petition the district court of the United States, within any district where the method in question was used or where such corporation is located or carries on business, praying the court to issue an injunction to enforce such order of the commission; and the court is hereby authorized to issue such injunction.

SEC. 6. That if any corporation subject to this act shall fail to file any annual or special report, as provided in subdivision (b) of section three hereof, within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

PENALTIES.

SEC. 7. Any person who shall willfully destroy, alter, mutilate, or remove out of the jurisdiction of the United States or authorize, assist in, or be privy to the willful destruction, alteration, mutilation, or removal out of the jurisdiction of the United States of any book, letter, paper, or document containing an entry or memorandum relating to commerce, the production of which the commission may require under this act, or who shall willfully make any false entry relating to commerce in any book of accounts or record of any trade association, corporate combination, or corporation, subject to the provisions of this act, or who shall willfully make or furnish to said commission or to its agent any false statement, return, or record, knowing the same to be false in any material particular, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not exceeding $5,000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Any employee of the commission who divulges any fact or information which may come to his knowledge during the course of his employment by the commission, except in so far as it has been made public by the commission, or as he may be directed by the commission or by a court, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

TESTIMONY AND IMMUNITY.

SEC. 8. The commission shall have and exercise the powers possessed by the Interstate Commerce Commission to subpœna and compel the attendance and testimony of witnesses and the production of evidence, and to administer oaths. All the powers, requirements, obligations, liabilities, and immunities imposed or conferred by the act to regulate commerce, as amended in relation to testimony before the Interstate Commerce Commission, shall apply to witnesses, testimony, and evidence before the commission.

SEC. 9. The district courts of the United States, upon the application of the commission alleging a failure by any corporation, or by any of its officers or employees, or by any witness, to comply with any order of the commission for the furnishing of information, shall have jurisdiction to issue such writs, orders, or other process as may be necessary to enforce any order of the commission and to punish the disobedience thereof.

SEC. 10. The several departments and bureaus of the Government, when directed by the President, shall furnish the commission, upon its request, all

records, papers, and information in their possession relating to any trade association, corporate combination, or corporation, subject to any of the provisions of this act.

Amend the title so as to read: "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

THE TAFT ADMINISTRATION.

The Senate Committee on Interstate Commerce has had under consideration for many years the organization of a trade commission, with powers over trade analogous to those exercised by the Interstate Commerce Commission over transportation.

Under President Taft's administration, Senate resolution No. 98, Sixty-second Congress, first session, authorizing the Senate Committee on Interstate Commerce to report to the Senate what changes were necessary or desirable in the laws relating to the control of corporations, persons, or firms engaged in interstate commerce, was presented by Mr. Clapp, the chairman of the committee, and was adopted by the Senate on the 26th day of July, 1911. Under this resolution exhaustive hearings were held, during which 103 persons gave their views on every phase of suggested trust legislation, filling nearly 3,000 pages of hearings.

At the first hearing, on the 4th day of August, 1911, the Senate Committee on Interstate Commerce took up Senate bill 2941, introduced by Mr. Newlands, for the organization of a trade commission, and Mr. Newslands made a statement regarding it. The bill and statement appear in the appendix to this report, at pages 15 to 33.

Later on, as a result of the additional light shed upon this subject by the hearings, Mr. Newlands introduced in the Senate, on February 26, 1912, Senate bill 5485, Sixty-second Congress, second session, entitled "A bill to create an interstate trade commission." This bill was tentatively taken up by the committee and amended in many particulars, but the committee took no final action upon it. The bill as tentatively amended by the Senate Committee on Interstate Commerce (appendix, p. 39) was reintroduced by Mr. Newlands on the 12th day of April, 1913, as Senate bill 829.

THE CUMMINS REPORT.

The Senate committee, after long-continued hearings under Senate resolution 98, made a report, through Mr. Cummins, on the 26th day of February, 1913 (S. Rept. 1326, 62d Cong., 3d sess.), in which were included the additional views of Messrs. Pomerene, Tillman, Gore, Newlands, Crane, Brandegee, Oliver, and Lippitt.

The report of Mr. Cummins consisted mainly of a discussion of the decisions of the Supreme Court in the various trust cases, from the Knight case down to and including the Standard Oil and Tobacco cases; but it also took up the question of the desirability of legislation supplementary to the Sherman Act, and considered the question, among others, of a trade commission, declaring "that through the intervention of such a body of men the legislative policy with respect to combinations and monopolies could be vastly more effectual than through the courts alone, which in most cases will take no cognizance of violations of the law for months or years after the violations occurred, and when the difficulty of awarding reparation

for the wrong is almost insurmountable"; and also, with reference to the disintegration of combinations and the reconstruction of the associated corporations upon lawful lines, "It can not be gainsaid that a commission, the members of which are in close touch with business affairs, and who are intimately acquainted with the commercial situation, might be extremely helpful in the required adjustment."

In the additional views of Mr. Newlands, appended to the Cummins report, Mr. Newlands declared himself in favor of the immediate organization of a trade commission and urged the passage of the trade-commission bill which he appended to his views. He quoted from previous utterances in the Senate, on January 11, 1911, as follows:

> Mr. NEWLANDS. The railroad commission bill furnishes a model for the action of Congress upon matters involving minute and scientific investigation. Had we followed the same method regarding the trusts that we followed regarding railroads, we would have made much better progress in trust regulation. The antitrust act was passed 23 years ago, about the same time that the railroad commission was organized. The railroad question is practically settled; the settlement of the trust question has hardly been commenced. Had we submitted the administration of the antitrust act to an impartial quasi judicial tribunal similar to the Interstate Commerce Commission instead of to the Attorney General's Office, with its shifting officials, its varying policies, its lack of tradition, record, and precedent, we would by this time have made gratifying progress in the regulation and control of trusts, through the quasi judicial investigations of a competent commission and through legislation based upon its recommendations. As it is, with the evasive and shifting incumbency and administration of the Attorney General's Office, oftentimes purely political in character, we find that the trusts are more powerful to-day than when the antitrust act was passed, and that evils have grown up so interwoven with the general business of the country as to make men tremble at the consequence of their disruption.

No bill was reported under the Clapp resolution and no additional action was taken by the Senate, under President Taft's administration, regarding trust legislation.

PRESIDENT WILSON'S ADMINISTRATION.

Under President Wilson's administration, after the passage of the tariff and banking laws at the extra session, the question of trust legislation came up at the regular session commencing in December, 1913. President Wilson, assuming that the Judiciary Committee of the House and the Interstate Commerce Committee of the Senate had jurisdiction over the entire subject, conferred with the chairmen of these two committees, Mr. Clayton and Mr. Newlands, with reference to framing the tentative measures which would be submitted to the committees for consideration. Meanwhile the President delivered his message of January 20, 1914, regarding antitrust legislation, in which, after recommending legislation as to interlocking directorates, holding companies, and other matters, he took up the question of a trade commission, as follows:

> The business of the country awaits also, has long awaited and has suffered because it could not obtain, further and more explicit legislative definition of the policy and meaning of the existing antitrust law. Nothing hampers business like uncertainty. Nothing daunts or discourages it like the necessity to take chances, to run the risk of falling under the condemnation of the law before it can make sure just what the law is. Surely we are sufficiently familiar with the actual processes and methods of monopoly and of the many hurtful

restraints of trade to make definition possible, at any rate up to the limits of what experience has disclosed. These practices, being now abundantly disclosed, can be explicitly and item by item forbidden by statute in such terms as will practically eliminate uncertainty, the law itself and the penalty being made equally plain.

And the business men of the country desire something more than that the menace of legal process in these matters be made explicit and intelligible. They desire the advice, the definite guidance and information which can be supplied by an administrative body, an interstate trade commission.

The opinion of the country would instantly approve of such a commission. It would not wish to see it empowered to make terms with monopoly or in any sort to assume control of business, as if the Government made itself responsible. It demands such a commission only as an indispensable instrument of information and publicity, as a clearing house for the facts by which both the public mind and the managers of great business undertakings should be guided, and as an instrumentality for doing justice to business where the processes of the courts or the natural forces of correction outside the courts are inadequate to adjust the remedy to the wrong in a way that will meet all the equities and circumstances of the case.

Producing industries, for example, which have passed the point up to which combination may be consistent with the public interest and the freedom of trade, can not always be dissected into their component units as readily as railroad companies or similar organizations can be. Their dissolution by ordinary legal process may oftentimes involve financial consequences likely to overwhelm the security market and bring upon it breakdown and confusion. There ought to be an administrative commission capable of directing and shaping such corrective processes, not only in aid of the courts but also by independent suggestion, if necessary.

TENTATIVE BILLS.

Later on, as the result of an understanding between Mr. Clayton, chairman of the House Committee on the Judiciary, and Mr. Newlands, chairman of the Senate Committee on Interstate Commerce, a bill was introduced on the same day, by Mr. Clayton in the House and by Mr. Newlands in the Senate—H. R. 12120 and S. 4160.

With reference to this bill, Mr. Clayton caused to be published in the Congressional Record on the 22d day of January, 1914, the following press dispatch:

Representative Clayton this afternoon gave to the press the full text of the tentative bill as agreed upon by a subcommittee of the Judiciary Committee of the House (Messrs. Clayton, Carlin, and Floyd of Arkansas) and the majority members of the Senate Committee on Interstate Commerce, and said:

"The bill will be introduced at the same time by Reprsentative Clayton and Senator Newlands. The bill is modeled after the lines of what is commonly known as the Newlands bill, which was introduced in the Senate by Senator Newlands, and involves the fundamental idea that a trade commission shall be created, consisting of five members, with full inquisitorial powers into the operation and organization of all corporations engaged in interstate commerce, other than common carriers. It provides for a commission of five members, makes the Commissioner of Corporations chairman of the board, and transfers all the existing powers of that bureau to the commission. Its relation to the Attorney General's office and to the courts is advisory. Its principal and most important duty, besides conducting investigations, will be to aid the courts, when requested, in the formation of decrees of dissolution, and with this end in view it empowers the courts to refer any part of pending litigation to the commission, including the proposed decree, for information and advice."

Senator Newlands, being interviewed, said:

"The trade-commission bill and several other bills limiting the debatable ground of the Sherman Act have been the subject of laborious consideration by a subcommittee of the Judiciary Committee of the House (consisting of Mr. Clayton, chairman, and Messrs. Carlin and Floyd of Arkansas) during the holidays and before. The majority members of the Interstate Commerce Committee of the Senate have been brought into consultation with them of late.

"The trade-commission bill preserves the essential features of the bill which I have been urging for some time, but contains amendments and additions of value and is, in my judgment, an improvement upon the bill as it was considered and improved by the Interstate Commerce Committee of the Senate during the last Congress. As a whole, I should say that the trade-commission bill ought to be satisfactory to members of all parties, for it is distinctively progressive, and we have endeavored to frame it in harmony with the President's views, presented in an admirable message, which has received the approval of the entire country, regardless of party. While these bills represent at present the best thought of the participants in the shaping of this legislation, they are presented simply as tentative measures, upon which the judgment of the proper committees of the House and Senate and of the country is invoked."

THE HOUSE BILL.

The House bill, H. R. 12120, introduced by Mr. Clayton, was not referred, however, to the Judiciary Committee, but to the Committee on Interstate and Foreign Commerce. The Senate bill, S. 4160, introduced by Mr. Newlands, was referred to the Interstate Commerce Committee of the Senate.

Later on a bill was introduced by Mr. Covington, of the House Committee on Interstate and Foreign Commerce (H. R. 15613) for the creation of an interstate trade commission, on the 13th day of April, 1914, covering in substance the same lines as the Clayton bill, but differing in detail and method. This bill was taken up for consideration by the House Committee on Interstate and Foreign Commerce, and after amendment by the committee was reported favorably and passed by the House on the 5th day of June, 1914.

THE SENATE BILL.

Meanwhile, however, the Senate Committee on Interstate Commerce had been considering Senate bill 4160, introduced by Mr. Newlands, and had, on the 5th day of June (calendar day June 6), 1914, after amending this measure, reported it favorably to the Senate. Later on the House bill, H. R. 15613, came over to the Senate and was referred to the Committee on Interstate Commerce.

The Senate committee reports the House bill with the recommendation that Senate bill 4160, as amended, be substituted for it, adding thereto amendments regarding the investigation of foreign trade practices and unfair competition.

AN ADMINISTRATIVE TRIBUNAL NEEDED.

Recent decisions of the Supreme Court make clear that all combinations in restraint of trade and monopolies are contrary to the law. All agree that while the Sherman law is the foundation stone of our policy on this question, additional legislation is necessary.

Experience in the execution of the law, however, as shown in the Standard Oil and American Tobacco decrees of dissolution, and in the frequent efforts of combinations to make voluntary adjustment with the Department of Justice, establishes that the question involved is administrative as well as legislative and judicial.

It is generally conceded that the peculiar character and importance of this question make it indispensable that some of the administrative functions should be lodged in a body specially competent to deal

with them, by reason of information, experience, and careful study of the business and economic conditions of the industry affected. The knowledge of the law and the information as to the facts which are essential to prove that a combination is repugnant to the law are not likely to be entirely adequate for the determination of the best form of dissolution, and this has been recognized both by the Supreme Court and by the Department of Justice. Preliminary to the judicial determination of such questions as arise, for example, in the examination of proposals for a voluntary dissolution of a combination or in testing the lawfulness of existing business arrangements, a vast mass of information in numerous branches of industry, as well as expert knowledge, is indispensable. The proper enforcement of the Sherman law also requires vigilant supervision which is most effectively obtained by a body in continual touch with the business organizations in the various industries.

The value of such administrative oversight and control has been recognized in the banking and transportation business, and we have in the Comptroller of the Currency, the newly created Federal Reserve Board, and the Interstate Commerce Commission practical illustrations of the operation of such organizations and frequent examples of the beneficial effects of their activity. As the general realization of these facts is widespread and confined to no one particular party, the introduction of this bill for a trade commission simply responds to a general need.

THE BUREAU OF CORPORATIONS.

While the Bureau of Corporations, which was established by an act of February 14, 1903, provided in some measure for the needs now generally recognized and has been of great value and public benefit in describing in detail the conditions in particular industries, and the organization, operation, and conduct of particular companies, the field which has been covered has necessarily been restricted and its organization as a division of an executive department under a single head, reporting only to the President, has not given to it either the authority or prestige which attaches to an independent commission, such as the Interstate Commerce Commission. Yet the need of such a position is quite as necessary in the governmental supervision of industrial activities as of railroads.

The establishment of a trade commission at the same time that the Interstate Commerce Commission was established would have prevented the extraordinary development of monopolistic organizations in industry. If this commission had been in existence during this period, we would not now have to deal with such organizations as the United States Steel Corporation, the International Harvester Co., or the American Sugar Refining Co.; the American Tobacco Co. would never have been organized, and even the Standard Oil Co. would not have survived the dissolution of the original Standard Oil Trust in 1892. Such a commission would have at least kept within limited bounds the activities of a multitude of price-fixing associations in different branches of business, which, together with the great trusts, have been potent causes of the present high cost of living.

OPPOSING THEORIES REGARDING A TRADE COMMISSION.

With the development of public sentiment on the subject of a trade commission, points of view have naturally changed with respect to particular provisions, and differences have also appeared with respect to the extent of the power to be lodged with such a commission. Some would found such a commission upon the theory that monopolistic industry is the ultimate result of economic evolution and that it should be so recognized and declared to be vested with a public interest and as such regulated by a commission. This contemplates even the regulation of prices. Others hold that private monopoly is intolerable, unscientific, and abnormal, but recognize that a commission is a necessary adjunct to the preservation of competition and to the practical enforcement of the law. The functions of such commissions would be as distinct and different as the ideas upon which they are founded.

The commission which is proposed by your committee in the bill submitted is founded upon the latter purpose and idea. It certainly would appear to be the part of wisdom in so important a situation to proceed carefully, and with that end in view the committee has aimed to provide a body which will have sufficient power ancillary to the Department of Justice to aid materially and practically in the enforcement of the Sherman law and to aid the business public as well, and, incidentally, to build up a comprehensive body of information for the use and advantage of the Government and the business world. Its subsequent recommendations to Congress will be fortified with actual knowledge of practical conditions, both from the point of view of business desirability and economic tendency, and will furnish to Congress an analysis of conditions that will give other and further legislation the certainty and security of foundation commensurate with the vast interests of the public and of the business world which are at stake. If conditions demonstrate and warrant, there will be a natural growth in the power of this body. At the same time the bill clothes it with sufficient power to be, we believe, of material assistance to the Department of Justice in the enforcement of the Sherman law, and of material aid to the business world in building up a body of precedent in the matter of business practices.

Proceeding now to a brief consideration of the principal provisions of the present bill and some of the more important considerations which have determined its form, it is necessary to consider the constitution of the commission; the corporations, etc., placed under its jurisdiction; the powers of inquiry, etc., of the commission, and other powers.

CONSTITUTION OF COMMISSION.

It is provided that the commission shall be composed of five commissioners with a regular term of seven years, but the terms are so arranged that the whole membership will not be subject to a complete change at any one time. The work of this commission will be of a most exacting and difficult character, demanding persons who have experience in the problems to be met—that is, a proper knowledge of both the public requirements and the practical affairs of industry. It is manifestly desirable that the terms of the commis-

sioners shall be long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience. The terms of the commissioners should expire in different years, in order that such changes as may be made from time to time shall not leave the commission deprived of men of experience in such questions.

One of the chief advantages of the proposed commission over the Bureau of Corporations lies in the fact that it will have greater prestige and independence, and its decisions, coming from a board of several persons, will be more readily accepted as impartial and well considered. For this reason also it is essential that it should not be open to the suspicion of partisan direction, and this bill provides, therefore, that not more than three members of the commission shall belong to any one political party.

The salary proposed for each commissioner is $10,000 per annum, which is the same salary as is provided for the Interstate Commerce Commission, and $2,000 per annum less than that of the members of the Federal Reserve Board under the currency law recently enacted. It would seem desirable that the salaries of the two commissions should be made equal to those of the reserve board. It is of paramount importance that men of the first order of ability should be attracted to these positions, and that service on this body should not entail too great a sacrifice to those who would serve thereon. A commission of this kind requires an unusual combination of qualifications. It requires not only a conversant knowledge with finance and transportation, but also a very comprehensive knowledge of the practical economic and legal aspects of the whole field of industry of the country, and exceptional experience, training, and judgment.

The absorption of the Bureau of Corporations by the commission, already alluded to, is a matter of such obvious desirability that it does not require any extended discussion. The work done by that bureau has demonstrated the ability of its staff, while its 10 years' experience in work along this line will be of great value to the proposed commission.

POWERS OF INVESTIGATION AND REPORTS.

Specifically subject to the jurisdiction of this commission are all corporations, trade associations, and corporate combinations engaged in interstate and foreign commerce, excepting banks and common carriers.

The commission has power to investigate the organization, business, financial condition, conduct, practices, and management of any corporation subject to the act which it may designate, and its relation to other corporations and to individuals, associations, and partnerships, and in aid thereof to require the production of information, statements, and records and the examination of books, documents, correspondence, contracts, etc., affecting the commerce in which such corporation is engaged, and to require annual or special reports from such corporations or classes of corporations as the commission may designate. The commission may make public any information obtained by it except as to trade processes, names of customers, and other matters not deemed to be of public importance;

and may also make annual and special reports to Congress, including recommendations for additional legislation.

It will be seen that while large powers of investigation are given, they are not greatly in excess of those possessed and for years exercised by the Bureau of Corporations. Reports are required only from such corporations or classes of corporations as may be designated by the commission. There are over 350,000 corporations in this country, of which perhaps a large proportion may be engaged in interstate trade, but it must be realized that the number affected by the proposed legislation will not exceed 1,000. The powers, of course, must be large, but the exercise of the powers will not be against law-abiding business, but against lawless business. It will be persuasive and corrective rather than punitive so far as well-intentioned business is concerned. Although the commission is given a wide discretion, experience has proved that governmental administrative bodies seldom abuse such authority. To attempt to make precise limits between what they may and what they may not do would often seriously hamper their successful administration. To almost every inquiry it might be possible to make specious objections which, while lacking any real merit, might effectually clog the conduct of the inquiry. The committee carefully considered the question as to whether it should limit the powers of the commission to the conduct of the large corporations, but it was deemed important that the commission should be able to get information from the small concerns as well as from the large ones, inasmuch as a corporation of small capital might be made the instrumentality of large monopolistic control.

POWER TO AID THE COURTS.

The commission is also authorized to aid the courts in the form of the decree to be entered in suits under the antitrust acts and to make investigation as to the manner in which such decrees are being carried out, as to whether they are being violated, and what, if any, further order, decree, or relief is advisable, reporting its findings on these subjects to the Attorney General. It is also authorized, if it believes from its inquiries that any corporation has violated any law of the United States regulating commerce, to report its findings and the evidence relating thereto to the Attorney General.

These powers, partly administrative and partly quasi judicial, are of great importance and will bring both to the Attorney General and to the court the aid of special expert experience and training in matters regarding which neither the Department of Justice nor the courts can be expected to be proficient.

With the exception of the Knight case, the Supreme Court has never failed to condemn and to break up any organization formed in violation of the Sherman law which has been brought to its attention; but the decrees of the court, while declaring the law satisfactorily as to the dissolution of the combinations, have apparently failed in many instances in their accomplishment simply because the courts and the Department of Justice have lacked the expert knowledge and experience necessary to be applied to the dissolution of the combinations and the reassembling of the divided elements in harmony with the spirit of the law.

TRADE CONDITIONS ABROAD.

The commission is also authorized to investigate trade conditions in foreign countries injuriously affecting the export trade of the United States, as well as whether American exporters have combined with each other or with foreign producers or dealers to control prices abroad.

UNFAIR COMPETITION.

One of the most important provisions of the bill is that which declares unfair competition in commerce to be unlawful, and empowers the commission to prevent corporations from using unfair methods of competition in commerce by orders issued after hearing, restraining, and prohibiting unfair methods of competition, which orders are enforceable in the courts.

The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.

It may be stated that representatives of the National Implement and Vehicle Manufacturers' Association, the Ohio Manufacturers' Association, and the Illinois Manufacturers' Association approved the passage of a trade commission bill and a provision regarding the inquiry into and condemnation of unfair practices in trade.

It is believed that the term "unfair competition" has a legal significance which can be enforced by the commission and the courts, and that it is no more difficult to determine what is unfair competition than it is to determine what is a reasonable rate or what is an unjust discrimination. The committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices, such as local price cutting, interlocking directorates, and holding companies intended to restrain substantial competition.

SUBPŒNA AND IMMUNITY.

In verifying the returns made by a corporation or in the conduct of such special investigations as the commission may deem necessary, it is indispensable that it should have extensive powers of inquiry, with the right to subpœna witnesses and to require the production of books and papers. The powers which, according to this bill, are granted to the commission, are practically the same as those now granted to the Interstate Commerce Commission or the Bureau of Corporations, while the same constitutional protection is given to witnesses who testify as to matters which might incriminate them.

The history of this legislation is given with particularity, so that Members of the Senate may have before them the gradual evolution

of the measure and may consult the records referred to at any stage of the proceedings.

It demonstrates that legislation regarding the organization of a trade commission has been the subject of consideration in the Senate Committee on Interstate Commerce for over three years, and in two important committees of the House for a period of over six months, during which period exhaustive hearings were had.

The legislation proposed is in line with the constantly increasing popular sentiment, as is demonstrated by the recent poll of the Chamber of Commerce of the United States, which declared overwhelmingly for such action. No contention can be made that the work of Congress on this subject has been hasty or immature. It has not been in advance of public sentiment, but rather has lagged behind.

APPENDIX.

HEARING BEFORE THE SENATE COMMITTEE ON INTERSTATE COMMERCE.

[Friday, August 4, 1911.]

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

A TRADE COMMISSION—MR. NEWLANDS'S STATEMENT.

The committee met at 10 o'clock a. m. for the purpose of considering Senate bill No. 2941, Sixty-second Congress, second session, introduced by Mr. Newlands on the 5th day of July, 1911, entitled "A bill to create an interstate trade commission, to define its powers and duties, and for other purposes."

Present: Senators Clapp (chairman), Crane, Cummins, Brandegee, Oliver, Lippitt, Townsend, Newlands, Clarke, Watson, and Pomerene.

The CHAIRMAN. The secretary will read the authority under which the committee acts.

(The secretary read as follows:)

IN THE SENATE OF THE UNITED STATES,
July 26, 1911.

Resolved, That the Committee on Interstate Commerce is hereby authorized and directed, by subcommittee or otherwise, to inquire into and report to the Senate at the earliest date practicable what changes are necessary or desirable in the laws of the United States relating to the creation and control of corporations engaged in interstate commerce, and what changes are necessary or desirable in the laws of the United States relating to persons or firms engaged in interstate commerce, and for this purpose they are authorized to sit during the sessions or recesses of Congress, at such times and places as they may deem desirable or practicable; to send for persons and papers, to administer oaths, to summon and compel the attendance of witnesses, to conduct hearings and have reports of same printed for use, and to employ such clerks, stenographers, and other assistants as shall be necessary, and any expense in connection with such inquiry shall be paid out of the contingent fund of the Senate upon vouchers to be approved by the chairman of the committee.

Attest:

CHARLES G. BENNETT, *Secretary.*

The CHAIRMAN. You may proceed, Senator Newlands. What is the number of your original bill?

Mr. NEWLANDS. No. 2941, introduced July 5, 1911.

NOTE.—Since the date of this hearing Mr. Newlands withdrew the bill in its original form, and on August 21, 1911, introduced a substitute therefor, bearing

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the same number (S. 2941), with the same title and purpose. The said substitute bill is as follows:

[S. 2941, Sixty-second Congress, first session.]

A BILL To create an interstate trade commission, to define its powers and duties, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United State of America in Congress assembled, That this act shall be referred to and cited as the interstate trade commission act. Corporations a majority of whose voting securities is held or owned by any corporation subject to the terms of sections four or sixteen of this act are referred to herein as subsidiaries of such holding or owning corporation.

SEC. 2. That on and after day of , nineteen hundred and twelve, the Bureau of Corporations shall be separated from the Department of Commerce and Labor, and shall be thereafter known as the Interstate Trade Commission; and all of the powers, duties, and funds belonging or pertaining to the Bureau of Corporations shall thereafter belong and pertain to the Interstate Trade Commission. And all the officials and employees of said bureau shall be thereupon transferred to the Interstate Trade Commission. The said commission shall also have a secretary, a chief clerk, and such other and additional employees as shall be provided by law.

SEC. 3. That the Interstate Trade Commission shall consist of five members, of whom no more than three shall belong to the same political party. The Commissioner of Corporations holding the office on the said day of , nineteen hundred and twelve, shall be ex officio a member of the commission for the first two years of its existence, and shall also be chairman of the commission for the first year of its existence, and thereafter the chairman shall be selected annually by the commission from its membership; and the then Deputy Commissioner of Corporations shall be the secretary of the commission for the first year of its existence, and thereafter the secretary shall be selected by the commission; and after the organization of the commission the titles and offices of Commissioner of Corporations and Deputy Commissioner of Corporations, respectively, shall cease to exist. The remaining four members of the commission shall be appointed by the President, by and with the advice and consent of the Senate, and the terms of such commissiners so first appointed shall be four, six, eight, and ten years, respectively, and shall be so designated by the President in making such appointments; and thereafter all the commissioners shall hold office for the term of ten years, and shall be appointed by the President, by and with the advice and consent of the Senate. Each member of said commission shall receive a salary of ten thousand dollars a year. The secretary shall receive a salary of thousand dollars a year.

SEC. 4. That every corporation heretofore or hereafter organized within the United States or doing business therein whose annual gross receipts, inclusive of the annual gross receipts of its subsidiaries, if any, exceed five million dollars, and engaged in commerce among the several States or with foreign nations, excepting corporations subject to the act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as amended, but including pipe-line companies, shall within four months after this act takes effect, or, if organized or otherwise becoming subject to this act subsequent to such taking effect hereof, then within two months after so becoming subject to this act furnish to the commission in writing statements showing such facts as to its organization, financial condition, and operations as may be prescribed by regulations to be made in pursuance of this act. Similar statements shall be made by its subsidiaries. Such statements shall be made as of such date as may be prescribed by such regulations and shall be verified under oath by such officers of such corporation as may be prescribed by the said regulations. Failure or neglect on the part of any corporation subject to this section to comply with the terms hereof within sixty days after written demand shall have been made upon such corporation by the commission, requiring such compliance, shall constitute a misdemeanor, and upon conviction such corporation shall be subject to a fine of not more than one thousand dollars for every day of such failure or neglect.

SEC. 5. That the said commission, upon finding that said statements comply with such regulations so far as applicable to such statements, shall enter such corporation for United States registration upon books to be kept by it for that purpose, and shall also record the statements so filed.

SEC. 6. That all corporations so admitted to registration shall be known as "United States registered" companies, and shall have the sole and exclusive right to use, in connection with their corporate title, their securities, their operations, and by way of advertisement of their business, the title "United States registered," or any convenient abbreviation thereof, so long as such registration shall remain in force.

SEC. 7. That any person, corporation, or company willfully using or publishing such title of "United States registered," or any title or form of words or letters reasonably indicative thereof, in connection with the business or securities or name of any corporation, with intent to represent thereby that such corporation is at that time registered as provided in this act, shall, unless such corporation be at that time duly registered under the terms of this act, be guilty of a misdemeanor, and upon the conviction thereof shall be subject to a fine of not more than one thousand dollars, and each day of such use or publication shall constitute a separate offense.

SEC. 8. That all corporations subject to this act and their respective subsidiaries shall from time to time furnish to the commission such information, statements, and records of their organization, business, financial condition, conduct, and management, at such times, to such degree and extent, and in such form as may be prescribed by the said regulations to be made under this act, and shall at all reasonable times grant to the commission, or its duly authorized agent or agents, complete access to all their records, accounts, minutes, books, and papers, including the records of any of their executive or other committees.

SEC. 9. That the commission shall from time to time make public the information received under this act, in such form and to such extent as shall be prescribed by the said regulations: *Provided, however*, That said regulations shall so far as possible, distinguish between information which is purely private, and the publication of which can serve no public interest, and such information as is not so private and is of importance to the public.

SEC. 10. The said commission may at any time, upon complaint of any person, corporation, or body, or upon its own initiative, revoke and cancel the registration of any corporation registered under this act upon the ground of either violation of any operative judicial decree rendered under an act to protect trade and commerce against unlawful restraints and monopolies, approved July second, eighteen hundred and ninety, or under sections seventy-three to seventy-seven, inclusive, of an act to reduce taxation, to provide revenue for the Government, and for other purposes, which became a law August twenty-seventh, eighteen hundred and ninety-four, or of the use of materially unfair or oppressive methods of competition, or of the acceptance of discriminations, rebates, and concessions from the lawful tariff rates of common carriers, or on the ground of refusal or neglect to allow the commission access to its records or papers as provided in section eight thereof. The commission shall also carefully investigate the capitalization and assets of the corporations registered under this act, and after due consideration of the information so obtained and otherwise secured, and after allowing reasonable time for the readjustment of corporate organization and security issues in any given case or class of cases, may revoke the registration of any such corporation upon the ground of overcapitalization; that is to say, upon the ground that the par value of the total securities, including shares of stock and all obligations running for a term of years or more, of such corporation, issued and outstanding at any time clearly exceeds the true value of the property of the corporation at that time. In determining such true value the said commission shall consider the original cost of such property, its present replacement cost, its present market value, including the good will of the corporation's business and the market value of the said securities issued by the corporation, and the fair value of the services rendered in the organization of such corporation, but the said commission shall also, as far as possible, segregate and disallow from such determination all value attaching to such property or business due solely to monopolistic power (other than patent rights or other legal franchises, the true value of which shall be considered by the commission). The said commission in considering revocation of registration under this section shall give such notice and have power to take such evidence and hold such hearings as may be prescribed by the regulations issued under this act: *Provided*, That if any subsidiary of a corporation so registered shall be guilty of conduct hereinbefore specified in this section as ground for cancellation of registration, such conduct on the part of such sub-

sidiary shall be ground for canceling the registration of the corporation to which it is so subsidiary.

SEC. 11. That in case of revocation of the registration of any corporation the commission may also order that such corporation thereafter shall not engage in interstate commerce. For every day's continuance in such commerce contrary to such order such corporation shall be subject to a fine of not more than one thousand dollars. The district courts of the United States, upon the application of said commission, alleging a failure to comply with such order of the commission, or alleging a failure to comply with or a violation of any of the provisions of this act, by any corporation subject thereto, shall have jurisdiction to issue a writ or writs of mandamus or injunction, or other order enforcing such order of the commission or commanding such corporation to comply with the provisions of this act.

SEC. 12. That the said commission may at any time, upon application by a corporation whose registration has been previously canceled, reinstate said corporation for registration and grant it registration anew: *Provided*, That the said commission is satisfied that the cause or causes for which registration was revoked no longer exist and that the commission shall find that all the requirements for registration as set forth in section four shall have been complied with anew as of the date of the new application for registration.

SEC. 13. That the said commission may at any time, if in the opinion of the commission public necessity requires such action, order and require any corporation engaged in commerce among the several States or with foreign nations, except corporations subject to the act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as amended, but including pipe-line companies, to make such statements and give such information as is prescribed in sections four and eight of this act, which information shall be published in accordance with the provisions of section nine hereof. The commission may also obtain from any such corporation, through the powers granted in section fourteen hereof, such information as shall enable said commission to determine whether such corporation is subject to the terms of this act. The decisions of the said commission made under the powers conferred upon it in this act shall be final except as to matters involving the taking of private property without due process of law and involving the extent and character of the said powers so conferred herein: *Provided, however*, That an appeal may be taken in equity to any district court of the United States from any order or decision of the said commission made under section eleven of this act.

SEC. 14. That in order to accomplish the purposes declared in sections eight and thirteen of this act the said commission shall have and exercise the same power and authority in respect to corporations subject to this act as is conferred on the Interstate Commerce Commission in said act to regulate commerce and the amendments thereto in respect to common carriers, so far as the same may be applicable, including the right to subpœna and compel the attendance and testimony of witnesses and the production of documentary evidence and to administer oaths. All the requirements, obligations, liabilities, and immunities imposed or conferred by said act to regulate commerce and by an act in relation to testimony before the Interstate Commerce Commission, and so forth, approved February eleventh, eighteen hundred and ninety-three, supplementary to said act to regulate commerce, and the act defining immunity, approved June thirtieth, nineteen hundred and six, shall also apply to all persons who may be subpœnaed to testify as witnesses or to produce documentary evidence in pursuance of the authority conferred by sections eight and thirteen hereof.

SEC. 15. That the said commission shall, on or before the day of in each year, make a report, which shall be transmitted to Congress. This report shall contain such information and data collected by the commission as it may deem of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the commission may deem necessary.

SEC. 16. That any corporation engaged in commerce among the several States or with foreign nations the amount of whose gross annual receipts, inclusive of those of its subsidiaries, shall be less than five million dollars and more than one million dollars may also, by complying and continuing to comply with the terms of sections four, eight, and nine hereof, acquire and maintain United States registration as provided in sections five and six, subject to the provision for cancellation thereof prescribed in section ten; and the information furnished by such corporation shall be subject to the provisions of section nine.

SEC. 17. That the said commission shall have power to make any and all regulations necessary and proper to carry out the purposes of this act, and at any time to alter, amend, or repeal the same or any part thereof.

SEC. 18. That any person willfully making or furnishing to said commission any statement, return, or record required by this act, when knowing such statement, return, or record to be false in any material particular, shall be guilty of a misdemeanor, and upon conviction shall be fined not more than one thousand dollars or imprisoned not more than one year, or both.

Mr. NEWLANDS. Gentlemen of the committee, for some years I have been giving consideration to this particular question and have frequently expressed the conviction that it was imperatively necessary to create an administrative tribunal vested with the powers of investigation, publicity, correction, and recommendation in the case of large industrial corporations similar to those exercised by the Interstate Commerce Commission over railroads. On several occasions I have spoken upon this subject on the floor of the Senate; particularly just before the decision in the Standard Oil case was rendered. (The decisions in the Standard Oil and American Tobacco Co. cases were handed down May 15 and May 29, 1911, respectively.)

In a speech in the Senate on January 11, 1911, upon the Tariff Commission I outlined my views as to an Interstate Trade Commission. With the permission of the committee, I will insert these remarks in the printed hearing. (See Mr. Newlands's views in Cummins's report, appendix, p. 35.)

After the call of the extra session, but before its convening, I wrote to the Hon. Champ Clark, who was destined to be the Speaker of the House of Representatives at the extra session, a letter, which appears in the Senate proceedings (Congressional Record) of May 15, 1911, and in which I outlined a legislative program for the extra session.

The purpose of the program and the necessity for thorough legislation upon the question of interstate transportation, or the railroads; interstate trade, or the trusts; and interstate exchange, or banking—all of them intervelated as parts of interstate commerce—were referred to in this letter; but I will insert in the record simply that part which is relevant to this present discussion and to interstate trade:

UNITED STATES SENATE,
Washington, D. C., March 15, 1911.

Hon. CHAMP CLARK,
House of Representatives, Washington, D. C.

MY DEAR MR. CLARK: The extra session is now approaching; the House is Democratic, the Senate and the Executive department are Republican. Under this condition of divided responsibility the question arises as to what policy the Democratic Party shall pursue. It has already been practically determined that the House will take up, in addition to the reciprocity treaty, the tariff; and the question is whether it will take up other matters of reform and constructive legislation, and, with a view thereto, select the committees necessary to the consideration of such measures. The Senate will probably follow the lead of the House in this particular.

I hope, therefore, that it will not be regarded as intrusive if I, in common with other Democrats venture a few suggestions on this score, as the question is of the highest importance to Democracy generally. * * *

INTERSTATE TRADE, OR THE TRUSTS.

The interstate-commerce act for the regulation of railroads and the antitrust act for the prohibition of trusts were passed about the same time. The administration of the former was given to a quasi judicial board; the administration of the latter was given to the Attorney General's Office. After about 23 years

of operation, through a gradual process of evolution, the regulation of railroads engaged in interstate commerce has practically been accomplished. * * *

The administration of the antitrust act, on the contrary, has been lame and halting, changing with the shifting incumbents of the Attorney General's Office, and according to requirements of political exigencies. As a result, practically no progress has been made in the control of the trusts, and whilst a few suits have been prosecuted to a successful result and others are now in process of prosecution, there exist to-day over 800 trust organizations of enormous capitalization practically without regulation or control. Experience should teach us that with reference to interstate trade a commission or board should be organized similar to the Interstate Commerce Commission, with powers of investigation, of condemnation, and of recommendation, and with a view, whilst preserving the good arising from commercial combination, to curing the pernicious practices connected therewith. Such legislation should include among the powers of the commission the power, upon complaint or its own initiative, to inquire into the organizaton of all corporations engaged in interstate trade, and upon finding that any such organization is unlawful under the terms of the antitrust act, to call upon the Attorney General to prosecute the same.

The interstate trade commission should have a power similar to that of the Interstate Commerce Commission of appearing in litigation by its own counsel. * * *

Such legislation will be necessary whatever may be the action of the Supreme Court upon the pending cases. If such combiuations are held to be legal, the regulation of their prices and practices becomes a public necessity; if they are held to be illegal, then there should be some law which, while permitting large capitalization and the ownership of many plants by a single corporation engaged in interstate trade, will protect the public from the abuses attendant upon such large capitalization and the oppression exercised by it. * * *

Sincerely, yours,

FRANCIS G. NEWLANDS.

During the extra session, on May 11, 1911, I presented in the Senate a program of legislation to be enacted or considered during the extra session. This program provided for nine questions upon which legislative action should be taken before adjournment, and for seven questions upon which the action of committees was desirable, with a view to early action during the next regular session.

Under this latter heading, namely, committee consideration, in the second subdivision, I suggested the consideration of legislation as follows:

(2) Providing, in connection with the Bureau of Corporations, for a board of interstate trade, with powers of examination, condemnatiou, and recommendation regarding interstate trade similar to those conferred upon the Interstate Commerce Commission regarding interstate transportation.

Later, on May 15, 1911, on the very day that the Standard Oil decision was being delivered in the Supreme Court, I spoke in the Senate upon the question of a legislative program for the extra session, and shall insert in the printed hearings an extract from this speech. The matter referred to is as follows: (See Appendix, p. 37.)

On May 16, after the Supreme Court had rendered its decision in the Standard Oil case, I continued my remarks of the day previous. Addressing myself to the decision of the court, I urged still further the necessity for organizing an administrative tribunal for the regulation of corporations engaged in interstate trade. I shall quote quite freely from this speech, as it contains quotations from the President, and his opinion that to leave the courts to say what is a reasonable restraint of trade, what is a reasonable suppression of competition, what is a reasonable monopoly, would be " to thrust upon the courts a burden that they have no precedents to enable them to carry, and to

give them a power approaching the arbitrary, the abuse of which might involve our judicial system in disaster."

I concur emphatically in this view that the courts are not the proper medium for exercising such a function. Because, therefore, we have clearly reached a point where some branch of the Government must do this sort of work, and because, as the President correctly states, the courts are not the proper place for it, I am advocating the establishment, as in this interstate trade commission bill, of an administrative agency that can perform this duty.

Again, in a speech upon the subject of a self-governing Senate, delivered in the Senate on June 22, 1911, in alluding to the program of legislation which I had been urging, I spoke regarding a board of interstate trade, and shall insert an excerpt in the record. (See appendix, p. 38.)

Later I drew up this bill and introduced the original on the 5th day of July, 1911. During the time I had this bill under consideration I discussed the matter with various persons whom I regarded as experts, particularly with members of the Interstate Commerce Commission, the Attorney General, the Commissioner of Corporations, the Solicitor General, and lawyers who were engaged in the trust prosecutions. I have also talked with men connected with these industrial corporations and with eminent economists, and I have found everywhere a general acquiescence in the view that something in the way of supplemental legislation was required.

It will be impossible to administer this great and necessary system of regulation through the courts. We all know that just as soon as these corporations are reorganized under these decisions they will, for a time at least, take the form of a large number of corporations, limited either in the character of the commodity with which they deal or in the area over which they operate. The management of these corporations is generally satisfactory to the stockholders; they have confidence in the existing management, and in the great financial interests and institutions that usually control that management. These stockholders will, by their proxies, practically give to those controlling interests their votes on anything they desire. So that we will eventually have, in these industrial corporations, just as we have with railroads, the practical control of all these subdivided corporations in the hands of a few great financial institutions or groups in New York, and they will dictate the membership of the boards and the general policy of all these corporations. There will be an effective unity of policy, and it will take such a form as to defeat the law officers in reaching it as a combination in restraint of trade. A mere nod, a mere suggestion, will accomplish what is desired.

The question is, Shall we wait until the courts shall go through their slow processes in the existing cases and re-create and reorganize these corporations and others against which undecided suits are now pending, and also in the numerous suits that will be brought? Or shall we organize an administrative tribunal which, vested with the powers of investigation, publicity, and correction, will, by continuous supervision, prevent the growth of these abuses which the courts are now called upon sporadically and intermittently to correct by their slow processes?

Certain fundamental considerations are thus raised, which I will present seriatim.

(1) The first question is: Shall an interstate trade commission of some kind be organized? I imagine that there can hardly be any difference of opinion on the point that there should be an administrative tribunal of high character, nonpartisan, or, rather, bipartisan, and independent of any department of the Government. I assume also that there should be a commission rather than one executive official, because there are powers of judgment and powers of discretion to be exercised. The organization should be quasi judicial in character. We want traditions; we want a fixed policy; we want trained experts; we want precedents; we want a body of administrative law built up. This can not be well done by the single occupant of an office, subject to constant changes in its incumbency and subject to higher executive authority. Such work must be done by a board or commission of dignity, permanence, and ability, independent of executive authority, except in its selection, and independent in character.

Of course, in performing any purely executive work one man is preferable to a commission. If only powers of investigation and publicity are given, a single-headed organization, like the Bureau of Corporations, might be the best for the work; but if judgment and discretion are to be exercised, or if we have in contemplation the exercise of any corrective power hereafter, or if the broad ends above outlined are to be attained, it seems to me that a commission is required.

(2) The next question is, What shall be done with the Bureau of Corporations, with its 120 experts who are full of interest in their duties, who have had long training in just this sort of work, and who have shown their capacity to do good work? Shall that bureau be entirely done away with, or shall it be merged in this new organization? And then what shall become of the chief of that bureau and his deputy, both of whom have acquired a large experience and both of whom have the confidence of the country? The Bureau of Corporations would hardly be necessary, as a separate organization, if such a commission should be created. But shall we lose the momentum, the long experience, and trained personnel that this bureau has acquired?

To avoid this loss it is obviously desirable that we merge the Bureau of Corporations—as this bill does—with all its officials, funds, and powers, in this commission, and that we make, for the first two years, the Commissioner of Corporations one of the new commissioners, and make him, for the first year, the chairman of the commission, afterwards giving the power to the commission to select its own chairman. Thus the executive work as at present organized would go on without a break, and the difficulties usual to the period of early organization would be largely obviated. My idea, also, is to utilize the Deputy Commissioner of Corporations as the secretary of the commission.

(3) The term of office of the commissioners is to be 10 years. The salary is to be $10,000. I should favor a much larger salary than that, but I do not know whether Congress would look with favor upon it.

(4) The next question is, What shall be the test of the applicability of the act to corporations engaged in interstate trade? Shall it be size, as indicated, say, by its capital or its gross annual receipts,

or shall it be the character of the business in which the corporations are engaged, namely, the production of certain great staple articles?

I have inquired with great particularity of the Commissioner of Corporations and of the Solicitor General regarding this, and they say that they think the best test would be, for the present, the gross receipts of the corporations. If this test, provided in the bill, were applied, the jurisdiction of the commission would be probably confined to between 300 and 500 corporations.

Both the Solicitor General and the Commissioner of Corporations have very carefully considered this question of a test based on the character of the production of the corporation, or of the commerce or commodity in which it deals, and they came to the conclusion that it would be very difficult to do that; that it would necessitate refinements and subrefinements with reference to the different articles.

One suggestion was made which I think would improve the bill, that all corporations whose gross receipts exceed $1,000,000 should make certain reports to be called for by the commission, which reports can be classified by the commission for the purpose of statistical information, and that these reports shall be given with a view largely to determining what are the corporations that have $5,000,000 of gross receipts; but that only the corporations that have $5,000,000 of gross receipts or above that shall be subject to the general provisions of the bill.

(5) The next question is: What shall be the powers of the commission? Shall they be confined to investigation, requirement of statements, publicity, and recommendation to the President and to Congress, or shall they go further?

I would deem it very beneficial even if we could get a bill that would go no further than that, because we would then have five men of high ability and character who would immediately start upon this as their life work—not the kind of work that we do, broken up by thousands of other considerations and by other duties, but whose specialty it would be to ascertain the facts and the abuses requiring correction, and to give publicity regarding them and then to make their recommendation to Congress.

(6) The next question is: Shall we provide the additional requirement of registration, granting to the commission the accompanying power of denying or canceling registration for certain prescribed offenses, or for violation of the regulations of the commission? And shall the punishment of a recalcitrant corporation be confined simply to a cancellation of registration?

I had a provision in the bill which I originally drew, that for disobeying the law or the regulations made in pursuance thereof a recalcitrant corporation could be prevented from engaging in interstate commerce. I am inclined to think that this is a rather extreme power and had better be left out for the present.

We must also consider as to the preciseness with which the grounds for denial or cancellation should be stated in the law and whether the commission shall have the power to make regulations, lack of compliance with which will result either in a denial of registration or a cancellation. Registration being compulsory, the denial of registration or the cancellation of registration would have simply a moral effect. The Solicitor General and the Commissioner of Corporations insist that that moral effect would be very great, though it involves

no substantial right of property, but that all these corporations will be able to secure public confidence by securing the confidence of the commission itself.

Senator CUMMINS. You do not propose any rules. The thing would have simply a moral effect if the board or commission did not have the power to determine how the corporation should be organized and how it should carry on its business.

Senator NEWLANDS. That raises the next question. If you desire to provide for registration of corporations, how far will you wish to define the powers?

As the power to regulate interstate commerce is a legislative power, the fundamental law requires that an act turning over the administration of such power to a commission or board shall prescribe the rules or standards under which the power is to be exercised. Would this apply to a mere registration in which no substantial property right is involved? For instance, would it be necessary for the law to define what are "unfair or oppressive methods of competition," what constitutes "overcapitalization" or "improper financial organization"; or could these matters be left to the judgment and discretion of the commissioners without precise legal definition?

Senator CUMMINS. What do you say about that?

Senator NEWLANDS. I am inclined to think that any general phrase intended to give them such powers as will prevent excessive capitalization or unfair or oppressive methods of competition would be upheld by the courts, particularly with reference to the denial or cancellation of the mere privilege of registration, which affects no substantial property right.

Senator CUMMINS. Without taking up the question of the constitutional power of Congress to do the thing that is suggested here, you know that there is the widest difference among Members of the Senate with regard to what constitutes proper capitalization. We debated that at some length in the railroad bill, and we could not agree even upon the subject as limited to the railways.

Senator NEWLANDS. For that very reason, it seems to me, the suggestion of our chairman, Senator Clapp, is a very reasonable one, that we should confine our present exercise of legislation at this extra session to the appointment of an interstate trade commission and the merger in such commission of the Bureau of Corporations, such commission to have simply powers of publicity, inquest, and recommendation; particularly in view of the fact that the Bureau of Corporations is not a bureau of complete publicity at present. On the contrary, it is instructed by the law to withhold from the public facts ascertained by public officers, unless the President gives his assent to publication.

Senator CUMMINS. I agree with you regarding the weakness in the organization of the Bureau of Corporations. But publicity is of no value unless the facts that are discovered can be compared with some rule of conduct which the law has laid down for the government of the corporations. It is bringing the force of public opinion to bear upon corporations to induce them or compel them to obey the law, and if you have no law, publicity is of minor importance. The facts which must underlie all this legislation are perfectly well known—well known to every student of the subject or observer of the subject; that is, the facts that are necessary to declare the law or rule of

conduct. A great many facts can be collected, as we have seen here all around, that are very curious and interesting, but they are not fundamental, they are not material, really, to the organization of the law. And it occurs to me—that is my view only—that your plan, while it leads in the right direction and we must have eventually, I think, some such tribunal, it would seem to me before we organize a commission we should be able to determine what kind of law it shall administer. You know the facts just as well now as you will then. You want to know just how every company is capitalized, how it is organized, and just how its business is done or has been done. These things are merely interesting as history; they are not essential to the conclusion that you want to reach as to how corporations should be organized and how they should conduct themselves.

Senator NEWLANDS. I agree with you as to that, that it is unnecessary in order to shape the law to have further investigation. We know to-day all the abuses that exist in corporate management. * * * But I will not pursue the question of immediate action further. I want to get through. I shall complete my statement in a very few minutes, and then I shall be very glad to take up this discussion with you, but I would like to get my statement in the record in a compact form as the basis for further hearings at the next session.

(7) In considering the powers which should be covered by this bill we shall have to take up the question as to whether the power to condemn unreasonable and extortionate prices should be included, and, if so, what should be the form of the rule or standard fixed. Shall it be analogous to that applied to the railroad companies, namely, that prices shall be reasonable and the same to all? And shall the power be given, as originally in the railroad act, to condemn only an unfair or unreasonable price, or, as was later done with the railroad act, shall the power now also include that of fixing a reasonable price? Personally, I am opposed to any attempt at present to fix prices.

(8) Next, shall the provisions regarding registration be simply persuasive or compulsory, and if compulsory as to the large corporations, shall permissive registration be granted to the smaller corporations? I incline to the view that it is better to make them compulsory, at least for the large corporations, in order to insure the effective operation of the system.

(9) Shall the commission, in case of revocation of registration, have power to order that the offending corporation shall not engage in interstate commerce? My own view is that such power should not at present be granted. Therefore I would not urge the retention of section 11, which gives the commission power, in case of revocation of registration, to forbid the offending corporation to engage in interstate commerce.

I do not think it advisable to overload the commission at this time, and yet we must bear in mind that our experience with the interstate-commerce act shows the great difficulty of adding needed amendments later on. We all know what obstructions needed amendments of the interstate-commerce act met with, and it took nearly 20 years to get that act into really workable shape.

The Commissioner of Corporations attaches great importance to registration, to the moral effect of refusing or canceling registration. He has since modified also his views somewhat as to the desirability

of a commission, an idea which he at first opposed, and I think that he is now substantially in accord with this bill. The Solicitor General has expressed himself very emphatically in favor of legislation on these lines.

I shall append to my remarks quotations from a letter from Mr. Herbert Knox Smith, in response to a series of questions which I put to him and after he had consulted with the Solicitor General.

I have consulted the Secretary of Commerce and Labor. I have also consulted the Attorney General. Both the Secretary of Commerce and Labor and the Attorney General were strong advocates of a national incorporation act, believing that national incorporation should cover interstate commerce, and that the act itself should contain all the necessary restrictions upon these corporations as to capitalization, the area of their operations, etc.

Senator BRANDEGEE. I want to understand clearly whether in favoring a national incorporation act they meant to favor that and to pass what you propose.

Senator NEWLANDS. No. In my discussions with them I stated that, so far as I was individually concerned, I had tested the sentiment of Congress regarding a national incorporation act, and particularly the sentiment of my own party; that whilst I had advocated national incorporation with reference to great transportation companies whose functions are largely national, and with a view to taking away from such States as New Jersey the jurisdiction which they had usurped over interstate commerce in the organization of corporations national in scope, I was never able to make much headway with my own party, clinging, as it does, to the exercise of State functions and guarding against Federal encroachment. Therefore my argument was addressed to them, not in opposition to their view as to national incorporation, but as to the possibility of passing a national incorporation bill, and particularly in view of the present political status, the administration having drifted from one of powerful Republican control, a control entirely in sympathy with the broad exercise of national powers, to one of divided control. I think both of them, whilst they adhere to the view that a national incorporation act would be the best method, acquiesce in the view that at present it is difficult, if not impossible, to secure the passage of such a bill. I have heard no expression from Secretary Nagel as to whether, that being the situation, he would be willing to favor a bill for an administrative commission such as this is, but the Attorney General has expressed himself regarding it, and he has indicated a disposition even to go further. I will append quotations to this effect from his recent speech at Duluth.

Finally, I wish to point out one broad consideration. In the present status of our public policy as to the great corporate problem we have at least two leading and divergent schools of thought, two tendencies, each toward a different method of procedure. The one desires to maintain by governmental action if need be, the full competitive system and to rely chiefly on competition as the regulator of corporate business. The Sherman antitrust law strongly presents this principle.

The other school inclines rather—to state the extremes—toward freely allowing combinations, both present and future, applying

thereto governmental supervision and direction as the prime regulator.

In my opinion it is too early to say which of these opposing tendencies should, or will, ultimately prevail.

Holding such a view, I am urging this bill, because the system it embodies is exactly adapted to the undeveloped situation I have just described. It is available for either tendency; it can be made to serve either principle; it will help to show which is the correct one; and it does not commit us permanently to either of these two main lines of action.

Its primary result will be to furnish both to Congress and to the public the accurate and broad information on corporate conditions that is necessary to determine the line of further advance. It neither legalizes nor forbids combination; it in no way affects the operation of the Sherman law; its work of publicity and supervision will tend strongly to promote fair competition and keep equally open to all the highways of commerce.

On the other hand, it takes the situation as it is; it recognizes that there is a large degree of combination already existing, and it makes that condition a subject for supervision, study, and report to Congress.

In short, it is a step upon which all can unite, as eminently fitted by its moderation and, indeed, by its own frankly tentative character to do what is imperatively needed for the present without prejudicing the future.

(The quotations from the address of Attorney General Wickersham, delivered at Duluth, Minn., July 19, 1911, above referred to, are as follows:)

The gradual interpretation of the act of July 2, 1890, resulting in the decisions and decrees rendered by the Supreme Court at its last term, has at last clearly demonstrated the effectiveness of that law to destroy existing combinations in restraint of interstate or international commerce and attempts to monopolize any part of it and to prevent renewed combination or monopolistic effort. * * *

But the question remains, can the great end and object of the Sherman law—namely, that the normal course of trade and commerce among the States shall not be impeded by undue restraints and monopolies—be realized through the operation of that law alone?

In dealing with transportation, Congress was not content to rely simply on the process of injunction to restrain and indictment to punish violations of the antitrust law. It also established an administrative commission clothed with powers—greatly enlarged from time to time—over those engaged in the transportation business. * * *

Within what limits is legislation to regulate corporations engaged in interstate commerce other than transportation expedient and practicable? Should the analogy of the interstate commerce law and commission be followed? * * *

That some further regulation over corporations carrying on commerce among the States may be necessary is a matter of current comment. * * *

The Federal Department of Justice is not organized or equipped to maintain constant supervision and control over business organizations. It deals only with cases of violation of law. The activities of an administrative board or commission would be directed to preventing such violations and in aiding business men to maintain a continued status of harmony with the requirements of law.

Moreover, unless Congress shall provide for the establishment of corporations drawing their life and powers only from the National Government and subject only to its control, or shall confer specific powers on State corporations which will enable them to carry on commerce away from the State of their creation without the interference of States into which they go, the present unsatisfactory condition of carrying on business in the different States by means of many different corporations owned or controlled through stock ownership by a parent

company created by some one State will continue, and in the natural, normal, healthy, and legitimate growth of such business questions of the application of the Sherman law must arise which can not be properly settled with the district attorney or the Department of Justice, but which should be dealt with by an administrative body having appropriate jurisdiction.

(The letter from the Commissioner of Corporations, Mr. Herbert Knox Smith, above referred to, follows:)

HON. FRANCIS G. NEWLANDS,
United States Senate, Washington.

DEAR SENATOR: Your letter of the 2d instant was received, raising certain questions on the bill for an interstate trade commission (S. 2941) introduced by you. * * *

Taking up your questions in order:

(1) "Shall an interstate trade commission be organized?"

If the work is to be simply that of investigation and publicity, my experience would indicate that an organizaton under a single head would be decidedly more efficient. For purely executive or administrative action such form of organization is preferable. If, however, judicial or semijudicial powers are to be exercised the commission form has important advantages; it is better adapted for judicial decision, its judicial rulings would probably carry more weight, and, in any event, it tends to secure stability, continuity of policy, and greater independence of action.

(2) "Shall the Bureau of Corporations be merged in the commission?"

If the interstate trade commission is to exercise substantially the powers now used by the Bureau of Corporations it seems almost necessary that the bureau should be merged in that commission, as the bureau would have little reason for further separate existence. There is also, however, the very important consideration that the bureau is very necessary to the commission; the bureau is the one unit in the Government service which can immediately supply the experience, trained force, knowledge, and traditions which the commisson must have for its work.

(3) "Shall the test of the applicability of the acts to corporations engaged in interstate trade be the annual gross receipts, or the character of the business in which the corporations are engaged—namely, the production of great staple articles?"

The question here is a debatable one, but experience with corporate business leads me to doubt the feasibility of a classification based on kinds of business or staple commodities. Such lines of demarcation are too vague. For example, certain companies deal wholly in the manufacture of lumber, others in its sale, others in the manufacture of goods primarily made out of other materials but having a certain proportion of lumber. Similarly with the steel industry and many others. It would be almost impossible to draw the line in many cases so as to say whether a corporation was engaged in a given industry or not. Many great wholesale houses sell a large amount of hardware. Would they be included, for example, as engaged in the steel industry?

(4) "Shall the power of the commission be confined to investigation and inquest, requirement of statements and publicity, and recommendation to the President and to Congress?"

"If not, shall the additional requirement of registration be made with the accompanying power of denying or canceling registration for certain prescribed offenses or for violation of the regulations of the commission; and shall the punishment of a recalcitrant corporation be confined simply to a cancellation of registration?"

Investigation, publicity, and recommendation should be in any event parts of the system. Personally, I favor strongly registration of corporation with power of cancellation. This gives a very practical means of control, which at the same time has the great advantage that it does not actually attempt the positive regulation of business. It allows credit for proper business conduct and imposes discredit for the reverse, but assumes no power of direction and simply leaves the public to apply corrective pressure through public opinion and the investment of the public's money.

Answering also the last part of the question, it is probably better for the present to provide cancellation of registration as the only penalty for improper business conduct. I feel entirely satisfied that such United States registration would shortly become a valuable business and financial privilege for any large

corporation. The standing of the company with that public opinion that underlies legislative action and the financial status of its securities with the investing public would be affected in a very practical way by the possession or cancellation of such registry. The approval now granted to corporate transactions through existing State public-service commissions has already a very definite market effect on the price of securities and on the attitude of public opinion.

(5) "The preciseness with which the grounds for denial or cancellation should be stated in the law, and whether the commission shall have the power to make regulations, lack of compliance with which will result either in a denial or cancellation?"

The grounds of cancellation should be broadly stated, leaving the commission to apply in specific cases the general rules prescribed by Congress. If power of making regulations be conferred on the commission, it should be simply for such regulations as will carry out the terms of the act and make effective the rules laid down therein.

(6) "As the power to regulate interstate commerce is a legislative power, it has been held that the law turning over the administration of such power to a commission or board shall prescribe the rules or standards under which the power is to be exercised. Would this apply to a mere registration in which no substantial property right is involved?"

The question of whether the delegation of a power is constitutional depends wholly on the nature of the power. Legislative power, strictly speaking, can not be delegated, but executive power can, of course, be conferred by legislation, and there can also be given quite broad power of executive administration in ascertaining facts and applying to them the rule established by legislation. It seems probable that the powers granted in this bill come under the latter head and are constitutional.

An excellent case on the subject is Union Bridge Co. *v.* United States (204 U. S., 364), where the earlier cases are reviewed in detail. The case itself involved the question of whether an act of Congress granting to the Secretary of War power to order the removal of the bridge over a navigable stream "whenever the Secretary of War shall have reason to believe that any * * * bridge * * * over any of the navigable waters * * * is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise," was a delegation of legislative power.

The court held that this was not an objectionable delegation of power, and quoted, with approval from Lock's appeal (72 Pa. St., 491), as follows:

"The legislature can not delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend."

See also other cases cited in this decision.

An excellent legislative precedent is in the steamboat-inspection law, where, by section 4405, Revised Statutes, a board is given power to "establish all necessary regulations required to carry out in the most effective manner the provisions of this title." These regulations now cover over 100 pages.

In the same law, also, the inspectors are given broad power over the licenses of steamboat officers, as follows: "But such license shall be suspended or revoked upon satisfactory proof of bad conduct * * *," a power obviously closely analogous to the power of cancellation provided in your bill.

It should be noted also that the only power delegated is the mere revocation of registration. Registration is not a property right. It is simply a privilege granted through the commission and revocable by it.

Thus, as stated in paragraph 5 above, rules of action and grounds for cancellation of registration should be set forth in the bill itself, with sufficient definition to make clear the intention of Congress as to the class of acts to be covered thereby. For example, the word "overcapitalization" is perhaps sufficiently definite in itself, while "unfair or oppressive methods of competition" would perhaps be too indefinite.

(7) "In case the power to fix prices should be included," etc.

I would prefer not to discuss the form of such power, as I personally believe it unwise to confer any such power on the commission, and do not consider myself competent to treat the subject properly.

In considering any such treatment of our commercial problem as is attempted in this bill, it seems to me, at least, that the Government should not, at present, commit itself, by way of general policy, either to the theory of "unlimited competition" or of "unlimited combination." We are not, I feel, sufficiently advanced to justify us in taking a definite position in favor of either one of

these opposing ideas. Any system we adopt now should be so framed as to be alike available for either development. To give the power to fix prices would tend to commit us to a policy of industrial combination.

(8) "Shall the provision regarding registration be simply persuasive, or compulsory; and if compulsory as to the large corporations, shall permissive registration be granted to the smaller corporations?"

I believe that the system would be entirely workable, if the publicity, etc., were simply permissive, and that some complications would thus be avoided. But a compulsory system for large corporations should also bring much the same results, especially if coupled with permissive registration for smaller concerns. The permissive feature for smaller companies seems decidedly desirable.

(9) "Shall the commission, in case of revocation of registration, have power to order that the offending corporation shall not engage in interstate commerce?"

This power is a peculiarly drastic one, and would require rather elaborate machinery for its enforcement. I doubt both the wisdom and the necessity here.

I take the liberty of adding some general considerations, which may be relevant to the discussion of such a system as is proposed by your bill. These views are based on an experience of eight years in the Bureau of Corporations.

(10) The one imperative change now required in our policy toward the "corporate problem," is a change from our present system of treating that problem through occasional prosecution, to a system which will treat it with continuous administrative action. We should advance from a negative policy to a positive constructive policy; from mere occasional prohibition to permanent regulation and prevention.

(11) One of the primary objects of the commission is the providing of proper publicity. This should not be combined with the administration of the Sherman law. It is probably true that efficient publicity is inconsistent with prosecution, at least as administered by the same office. The Bureau of Corporations, the present agent of corporate publicity, secures now at least nine-tenths of its information by voluntary cooperation. The interstate trade commission would continue this work, but should the function of prosecution under the Sherman law be combined with publicity, it is obvious that the present voluntary cooperation of corporations, the main source of information, will very largely be destroyed.

There are of course exceptions to this general principle. At times it would be necessary for the information obtained by the commission and indicating a clear and flagrant violation of law to be turned over to the Department of Justice. The Bureau of Corporations has in this manner given much assistance to the Department of Justice. The numerous prosecutions of the Standard Oil Co. since 1906 for railway rate discriminations were all based on the report of that bureau, and the agents of the bureau furnished much of the evidence and assisted largely in the preparation of the cases.

Similarly, in the recent prosecution of that company under the Sherman law, the case was instituted as a result of the investigations of the bureau, was largely prepared by its agents, and, I venture to say, would not have been successfully presented without their aid. Some of the ablest men in the bureau gave over a year of their time to this case.

But in general such connection with prosecution should be wholly incidental and secondary, and the publicity work of the commission should be directed primarily at furnishing reliable economic and financial information for the general public and not at securing evidence for prosecution.

(12) One of the most important features of such an administrative system of corporate regulation is its provision, as above referred to, for broad corporate publicity. The effects of such publicity have been well shown by the past work of the Bureau of Corporations, as set forth in the Annual Report of the Commissioner of Corporations for 1910.

The report of the bureau on the transportation of petroleum, published in May, 1906, effected a sweeping decrease in the granting of railway rebates throughout the country. Practically every railroad involved in the railway discriminations described in this report canceled the objectionable rates within six months after the issuance of the report.

The report of the bureau on cotton exchanges resulted within a few months in a marked improvement in the regulations of the New Orleans Cotton Exchange, and while the New York Cotton Exchange has not yet made any changes in its system, that exchange, on March 23, 1911, voted "that it is the sense of this meeting that since * * * the Department of Commerce and

Labor has made an exhaustive investigation of the business methods of the cotton exchanges and has criticized the methods and by-laws of the New York Cotton Exchange * * * it will be good judgment on the part of this exchange to, * * * so far as possible, adopt the suggestions made by the Government."

In the tobacco industry the independent manufacturers have in many instances stated that the work of the bureau has caused the cessation of various objectionable methods of competition.

In the problem of waterways, the reports of the bureau, three in number, have very widely influenced public opinion by showing the real questions to be solved and the real advantages to be attained in waterway transportation.

A Federal administrative system of publicity and registration should develop both strength and elasticity. The administration of such a system should result in a definite and broadening policy, based on exact information, establishing definite standards of business action, of public economics, and of Government regulation, in themselves highly effective, and valuable also as the raw material for further statutory enactment.

We may fairly hope to get from it a gradual rise in the standard of business conduct, closer relationship between large business and public authorities, marked improvement in corporate accounting and in the standing of our industrial securities, and the elimination of unfair practice and business privilege. All of this without any disturbance of properly conducted business.

The time seems ripe for such action. It has been obvious since the Supreme Court decisions on the Standard Oil and Tobacco Co. cases that the public is ready and anxious for an advance to some such administrative system of regulation by the Federal Government. It seems to be true that corporate managers concede more and more the necessity for such regulation and publicity, recognizing both its public necessity and its advantage to fair business.

Very sincerely, yours,

HERBERT KNOX SMITH, *Commissioner.*

EXTRACTS FROM REPORT OF THE SENATE COMMITTEE ON INTERSTATE COMMERCE ON SENATE RESOLUTION NO. 98, FEBRUARY 26, 1913.

[S. Rept. 1326, 62d Cong., 3d sess.]

FROM MR. CUMMINS'S REPORT.

On the 26th day of July, 1911, the Senate adopted the foregoing resolution, and acting under the authority and in pursuance thereof the Committee on Interstate Commerce provided for open hearings upon the subject matter of the resolution. The hearings began on the 15th day of November, 1911, and were continued from day to day for more than three months, during which time 103 men appeared before the committee, and their statements, together with the exhibits and documents submitted by them, fill 2,799 printed pages. A printed copy of these statements, exhibits, and documents, including an index, laws and reference concerning industrial combinations in foreign countries, and a collection of judicial decisions touching the power of Congress in the regulation of commerce among the States, in all, five volumes, is herewith presented to the Senate.

While the committee is conscious that some of the matter adduced at the hearings and submitted as a part of this report is not relevant to the questions under consideration and of little worth, it believes that, upon the whole, the hearings have furnished one of the most valuable contributions that can be found in the literature of the subject. It is not yet ready to report any of the bills which are now before it, and which propose specific modifications of or additions to the existing statute; nor is it prepared at this time to report a substitute for them. It hopes that it may be able before the close of

the present session to act finally upon these bills and recommend in definite form the legislation which it may think necessary or wise to meet modern business conditions. It is, however, prepared to answer the general inquiries propounded in the resolution, and in view of the overwhelming importance of the subject it ventures to add to the direct response some observations upon the origin, purpose, and effect of the enactment commonly known as the antitrust law, to indicate wherein it is inadequate, and to suggest the general scope of further regulation.

The committee is of the opinion:

First. That the statute should stand as the fundamental law upon the subject, and that any supplemental legislation for more effectual control and regulation of interstate and foreign commerce should be in harmony with the purpose of the existing statute.

Second. That whatever may be our views respecting the power of Congress to enact a general Federal incorporation law, it is neither necessary nor desirable at this time to provide for the organization under act of Congress of industrial corporations which propose to engage in commerce among the States and with foreign nations.

Third. That it is desirable to impose upon corporations now or hereafter organized under State law, and engaged or proposing to engage in such commerce, further conditions or regulations affecting both their organization and the conduct of their business, and also to impose further conditions or regulations upon persons, copartnerships, and other associations now engaged, or hereafter engaging, in such commerce, the general character of such regulation to be the same as those laid upon corporations, except such conditions or regulations as are in their very nature peculiar to the corporate form of commercial activity.

* * * * * * *

There are three general fields in which the commission could work to the great advantage both of the people for whose protection the law exists and the people against whom it is directed.

First. If the Bureau of Corporations were converted into an independent commission composed of trained, skillful men, and clothed with adequate authority, there could be gathered more complete and accurate knowledge of the organization, management, and practices of the corporations and associations engaged in national and international commerce than we now have. In saying this the committee does not mean to disparage the work of the Bureau of Corporations as hitherto carried on, but, valuable as the work has been, it is believed that a greater service could be rendered by a commission with a distinct organization with adequate appropriations and added authority. Moreover, it is clear that the constant inquiry into and investigation of interstate commerce in order to ascertain whether the law is being violated should be more closely connected with prosecutions for violations, when found to exist, than at the present time.

Second. When the conditions upon the fulfillment of which persons and corporations may engage in commerce among the States and with foreign nations are imposed, as the committee has heretofore recommended, there will be some of them upon which the Government must act with administrative promptness rather than with

judicial deliberation and delay. For instance, suppose Congress were to declare, as the committee thinks it ought to declare, that no corporation should be permitted to engage in interstate or international commerce unless it be honestly capitalized, and that when anything but money is accepted for its stock that the value at which the property is so taken must be its fair, reasonable value. It seems clear that a corporation proposing to enter business should have an opportunity to come to some governmental tribunal and say, here is the property purposed to be taken for stock, and here is the price at which it is to be taken, and thereupon ask for approval or disapproval of the proposition. It would be most unjust in such a case to allow the corporation to go on for years and then be told that it must cease to do business because the value of the property was less than the par value of the stock issued for it.

And, again, suppose that 10 out of 20 manufacturing establishments heretofore in competition with each other desire to consolidate into one enterprise. There ought to be a way in which the men in such a venture could submit their plan to the Government and an inquiry made as to the legality of such a transaction, and if the Government was of the opinion that competitive conditions would not be substantially impaired there should be an approval, and in so far as the lawfulness of the exact thing proposed is concerned there should be a decision, and if favorable to the proposal there should be an end of that particular controversy for all time. Such results as these can be attained in no other way than through a commission which, though administrative in its character, would, in some instances, exercise quasi judicial functions. It is believed that through the intervention of such a body of men the legislative policy with respect to combinations and monopolies could be vastly more effectual than through the courts alone, which in most cases will take no cognizance of violations of the law for months or years after the violations occurred and when the difficulty of awarding reparation for the wrong is almost insurmountable.

The committee has not attempted to be comprehensive as to the usefulness of the commission in this field, and has made these suggestions only to indicate in the most general way the assistance that could be rendered in the enforcement of the law.

Third. One of the most serious problems in connection with suits brought under the antitrust act is to find the proper method of disintegrating combinations that have been adjudged unlawful. The dissolution of a corporation or a series of associated corporations must often involve the consideration of plans for reorganization in order that the property which has been unlawfully employed may thereafter be lawfully used in commerce. The courts are not fitted for the work of reconstruction, and whatever jurisdiction they now have, or that may hereafter be conferred upon them with respect to such matters, it can not be gainsaid that a commission, the members of which are in close touch with business affairs, and who are intimately acquainted with the commercial situation, might be extremely helpful in the required readjustment.

Respectfully submitted.

ADDITIONAL VIEWS OF MR. POMERENE.

With the report in general I am in accord. But there is one feature of it about which I desire to be more explicit, and that is the paragraph discussing the certainty of the provisions of the Sherman law as applicable to certain cases and its uncertainty as applicable to others.

I approve the view that—

> There are many forms of combination and many practices in business which have been so unequivocally condemned by the Supreme Court that as to them and their like the statute is so clear that no person can be in any doubt respecting what is lawful and what is unlawful.

There are other forms of organization and acts which seriously interfere with competition, such as interlocking directories, watering of stock, selling of merchandise in one locality at a less price than in another, and other practices which are so contrary to sound business principles and good morals that they can and should be specifically controlled or prohibited by statute. As to these, in the interest of certainty, there should be other and further legislation. But, whatever may be the additional legislation, there will be many other contracts, combinations, and practices in "undue and unreasonable restraint of trade," which it is impossible for Congress to define by statute, because any attempt to so define them will, in practice, be found to exclude many other contracts, combinations, and practices which are equally inimical to the public good. As to these, we must always depend upon the sound wisdom and discretion of courts and juries for relief, just as in the past we have been obliged to trust to their judicial administration.

To illustrate: We know that legislatures and courts have constantly refused to define fraud because the multiplicity of acts and circumstances involved in human affairs make it impossible of definition.

The same may be said with equal truth as to what constitutes "undue or unreasonable restraint of trade."

It is said with a great deal of force that men are not always able to tell in advance whether certain acts are in "undue or unreasonable restraint of trade." But however difficult this may be, it is no reason why they should be left for decision to the selfishness of interested parties uncontrolled by judicial decision under the principles of the common law or under the broad provisions of the Sherman law.

In criminal cases it is often difficult to say in advance whether a given state of facts constitutes a reasonable doubt. But is that a reason why courts and juries should not attempt to say in a specific case whether there was, in fact, a reasonable doubt or not?

In negligence cases it is equally difficult to say whether a given state of facts constitutes contributory negligence on the part of the plaintiff or reasonable care on the part of the defendant. But can this be urged as a reason for not leaving special cases to the judgment of the court and jury?

In my judgment, what is "undue or unreasonable restraint of trade" must, in many cases if not in most cases, be left largely for judicial determination and sound judgment and good morals will be

a sufficient guide for those who are actuated by a proper public spirit rather than by selfish motives.

While I believe there can be some additional legislation along the lines indicated, I am firmly of the opinion that the Sherman law is a clear and certain guide for reasonable men who desire to comply with the law and do not exert themselves to evade its provisions.

ATLEE POMERENE.

ADDITIONAL VIEWS OF MR. TILLMAN.

The undersigned is not now prepared to say that a new national commission should be established for the better administration of the antitrust law. He is inclined to believe that we have too many commissions now, composed largely of so-called "lame ducks," both Democrats and Republicans, who have been defeated at the polls and are given these places mainly as a compensation and means of support. He thinks Congress ought to perform its own functions rather than surrender them to commissions thus created by Executive appointment.

He does not assent to the particular language used on any point in the report of the committee, except where he has specifically so stated.

As the committee is not now ready to propose specific measures of legislation, he prefers to wait and to listen to the recommendations of the incoming President of the United States.

B. R. TILLMAN.

ADDITIONAL VIEWS OF MR. GORE.

I concur in the main body of the report and in the conclusions arrived at, except as to the specific recommendation looking to the establishment of a commission. Upon that recommendation I reserve my judgment for the present. I could not yield my assent to this proposition without first considering both the principles and details of any measure proposing such a commission. My ultimate assent would depend upon the constitution and character of the commission and upon the extent and limitation of its powers and purposes. It may be possible that a commission could with propriety be vested with power to pass upon the form of a proposed organization, but no commission should have authority to grant indulgences as to the methods, conduct, and operations of any such organization.

T. P. GORE.

Mr. Newlands confined himself entirely to the question of a trade commission bill, and included in his observations his original interstate trade commission bill as tentatively amended and approved by the Interstate Commerce Committee. His views are as follows:

ADDITIONAL VIEWS OF MR. NEWLANDS.

Whilst I agree with the general conclusion reached by Mr. Cummins in his report, I have not been able to study with sufficient care the decisions of the Supreme Court relating to the trusts to enable

me to form an independent opinion as to his analysis of them. For years I have contended that if at the time the Sherman Act was passed (the date of its passage being almost contemporaneous with that of the interstate-commerce act regarding the railroads) we had organized an interstate trade commission similar to the Interstate Commerce Commission, and with somewhat similar powers of investigation and correction, we would have prevented or remedied many of the abuses which have since grown up, and that we would have gradually evolved a system of commercial law, through administrative process, as complete as that which has been built up regarding our system of transportation.

I presented my views relating to this matter at the first hearing of this committee regarding the control of corporations on the 4th day of August, 1911, and on the 16th of November, 1911 (hearings, pp. 1 to 26, inclusive). I then discussed a bill for the organization of an interstate trade commission (Senate bill No. 2941), which was introduced by me on the 5th of July, 1911, and a substitute bill of the same number, introduced by me August 21, 1911.

As a result of the additional light shed upon this subject by the hearings, I introduced in the Senate, on February 26, 1912, a bill (Senate bill 5485, 62d Cong., 2d sess.) entitled "A bill to create an Interstate Trade Commission," etc.

Later on, as a result of subsequent consideration, this bill has been amended, and I present it with the alterations as a tentative proposal for criticism and suggestion. The bill as amended is annexed hereto.

Whilst I believe that the Sherman Antitrust Act should not be altered, I believe that it should be supplemented by such legislation as is shown to be necessary by the experience of the time. Such variety of views exists as to what this supplementary legislation shall be that I do not believe early legislation on this line is practicable. But I do believe that all can agree upon an Interstate Trade Commission with powers of investigation and correction, and with the power to aid the courts in the administration of the Sherman Act and other supplementary legislation; and I believe that such a commission should be organized immediately, so that Congress can soon have the benefit of the recommendations which it will make as the result of its experience.

I shall not enter into any labored argument upon this question. I shall simply content myself with quoting from previous utterances in the Senate.

In the Senate, January 11, 1911:

Mr. NEWLANDS. * * * The railroad commission bill furnishes a model for the action of Congress upon matters involving minute and scientific investigation. Had we followed the same method regarding trusts that we followed regarding railroads, we would have made much better progress in trust regulation. The antitrust act was passed 21 years ago, about the same time that the railroad commission was organized. The railroad question is practically settled; the settlement of the trust question has hardly been commenced. Had we submitted the administration of the antitrust act to an impartial quasi judicial tribunal similar to the Interstate Commerce Commission instead of to the Attorney General's office, with its shifting officials, its varying policies, its lack of tradition, record, and precedent, we would by this time have made gratifying progress in the regulation and control of trusts, through the quasi judicial investigations of a competent commission and through legislation based upon its recommendations. As it is, with the evasive and shifting incumbency and administration of the Attorney General's office, oftentimes purely political

in character, we find that the trusts are more powerful to-day than when the antitrust act was passed, and that evils have grown up so interwoven with the general business of the country as to make men tremble at the consequence of their disruption.

In the Senate, May 16, 1911:

Mr. NEWLANDS. Mr. President, whilst I was addressing the Senate yesterday upon the importance of taking up immediately certain questions upon which public opinion has been formed, and crystallizing them into legislation, I referred, among others, to the great questions of the combinations of capital called trusts which have assumed of late years so powerful and menacing an aspect. * * *

The Supreme Court yesterday acted upon this matter with reference to one of the great trusts in a decision which applies to them all, and, as the result probably of the inertia and the inaction of Congress, has taken upon itself what the dissenting member of that court, Mr. Justice Harlan, declared to be judicial legislation, and has written into the statute words which Congress never put there; and so to-day we have a decision upholding the antitrust act so far as it applies to unreasonable restraint of trade.

The question, therefore, presents itself to us whether we are to permit in the future the administration regarding these great combinations to drift practically into the hands of the courts and subject the question as to the reasonableness or unreasonableness of any restraint upon trade imposed by these corporations now existing and to be brought into existence in the future to the varying judgments of different courts upon the facts and the law, or whether we will organize, as the servant of Congress, an administrative tribunal similar to the Interstate Commerce Commission, with powers of recommendation, with powers of condemnation, with powers of correction similar to those enjoyed by the Interstate Commerce Commission over interstate transportation.

* * * * * * *

* * * What has been our experience regarding that branch of interstate commerce which covers transportation? Our experience has been that 20 years ago, just about the time the antitrust act was passed, Congress passed the interstate-commerce act, creating a commission as its servant to attend to its duties under rules prescribed by Congress. The regulation of interstate commerce belonged to Congress. Congress wisely saw that it could not undertake that regulation in all its details; that it could not pass rate bills which would be satisfactory to every section of the country; that it could not reduce rates that were claimed to be excessive and increase rates that were claimed to be too low; that it could not correct the varying abuses which creep into the administration of every great enterprise. Therefore it created this commission as its servant, to carry out its will under rules established by it.

The history of the last 23 years proves the wisdom of our action. By a gradual process of evolution this commission, as the result of gradual improvements in legislation and as the result of constantly increasing powers recommended by it and affirmed by Congress, has become a tribunal second in importance only to the Supreme Court of the land. It has made transportation a science. It has studied all the intricate questions relating to it, and in a recent illuminating decision has formulated a great state paper that has impressed the country and the world with its wisdom.

Now, contrast that action with other action taken by Congress regarding the trusts. It would have been possible 23 years ago, when the interstate commerce act was passed, with reference to interstate trade, to have established an industrial or trade commission or board similar to the Interstate Commerce Commission with reference to transportation. If we had done so and had put upon that commission the same class of men who have been appointed upon the Interstate Commerce Commission, we would have had the constant corrective power of that commission applied both to the existing trade corporations and to the trade corporation afterwards created. Many abuses would have been prevented. Many abuses would have been corrected. As a result of the constant study and inquiry of a competent board engaged in this work as a specialization recommendations would have been made to Congress which would have been accepted, as were those recommendations made with reference to interstate transportation, and a great body of administrative law would have been built up and combinations of capital would have been effected without the abuses which have existed during the past 23 years. * * *

In the Senate, June 22, 1911:

Mr. NEWLANDS. What is the second one which I suggested? I suggested legislation providing, in connection with the Bureau of Corporations, for a board of interstate trade, with powers of examination, correction, and recommendation with regard to interstate trade similar to those conferred upon the Interstate Commerce Commission regarding interstate transportation. This resolution was offered before the recent decision of the Supreme Court regarding the trusts, and I then declared that, whatever might be the decision of that court, the creation of such a commission was essential. Interstate trade is just as much a part of interstate commerce as interstate transportation. The abuses of interstate trade have become just as great as the abuses of interstate transportation in the past have been. Obviously the teachings of experience lead us to the organization of a commission or board similar to the Interstate Commerce Commission, with a view of taking hold of the great combinations of capital and making them obedient to the law, giving such a commission powers of examination, recommendation, and condemnation similar to those enjoyed by the Interstate Commerce Commission.

Since that decision the trust managers themselves have seen a great light, and in public examinations have stated that in their judgment the time has come for as complete regulation of corporations engaged in interstate trade as of corporations engaged in interstate transportation. Whether that regulation will ever extend so far as the regulation of the price itself is a matter to be determined in the future, for Congress will be called upon to decide how great these corporations shall be, what the extent of their capital shall be, what number of plants they shall own, and what shall be the extent of their operations. If they conclude to maintain the principle of competition, even though it leads to destruction, there will then, of course, be no necessity of regulating prices. But if they recognize the principle of helpful cooperation instead of destructive competition, then it will be necessary for them in extreme cases to face the question of the regulation of prices just as the prices of any public utility are regulated.

I do not venture to express an opinion now as to what course should be pursued with reference to this great question, but it is time that the Interstate Commerce Committee of the Senate were entering upon an inquiry of the most important question in economics that has engaged the attention of the country since the railroad question was first presented to it.

Quotation from Mr. Newlands's statement before the committee on the 15th day of November, 1911 (hearings, p. 25):

Senator NEWLANDS. Mr. Chairman, during the late extra session I introduced Senate bill 2941, for the creation of an interstate trade commission with powers over corporations engaged in interstate trade similar in many respects to those possessed by the Interstate Commerce Commission over interstate transportation. On the 4th of August, toward the close of the extra session, this committee, of which I am a member, gave me a hearing on the bill and I made a preliminary statement, explaining its terms and the conditions it was intended to meet. That statement, together with quotations from the President, the Attorney General, and the Commissioner of Corporations, has been printed as the first part of the hearings under the resolution introduced by the chairman.

The bill provides that all interstate corporations (except railroads) whose gross annual receipts exceed $5,000,000 shall make regular reports to the commission as to their business transactions, shall be subject at will to the examination of the commission, and shall, upon complying with such requirements, have the exclusive right to use the title "United States registered." The bill also provides that for violation of the Sherman law, improper capitalization, unfair methods of competition, acceptance of railway rebates, or other improper business transactions the commission may at will cancel such registration. It is recognized that the right of a cor-

poration to publish the fact of such registration will shortly become a valuable financial privilege, and that the fear of cancellation of such right will be a strong restraining influence against improper transactions.

The bill provides a permanent administrative body of trained experts, who shall have as their sole specialty the supervision and registration of large corporations and supply accurate information thereon to the public, and shall make recommendations to Congress for any further legislation that may seem necessary.

I may later on have something further to say before this committee regarding this bill; but I wish to state at present that since the bill was introduced there has been a wide discussion throughout the country upon two divergent lines of thought, one insisting on absolutely free and unrestricted competition as the regulator of corporate business, and the other inclining toward allowing large combinations of capital and applying thereto Government supervision and direction as the prime regulator. It is difficult to say now which of these opposing tendencies should or will ultimately prevail. The bill which I have introduced is, in my judgment, adapted to this undeveloped situation. It will help us to determine which of these theories is the correct one; it will furnish to Congress and to the public the accurate and broad information on corporate conditions that is necessary to determine the line of further advance. It does not affect the operation or the enforcement of the Sherman law; its work of publicity and supervision will tend to promote fair competition and keep equally open to all the highways of commerce. On the other hand, it takes the situation as it is, recognizes that there is a large degree of combination already existing, and makes that condition a subject for supervision, study, and report to Congress. Its frankly tentative character and its moderation recommend it as a step upon which all can unite in doing what is imperatively needed for the present without prejudicing the future.

I trust that the committee will see the wisdom, without waiting for the end of this investigation, of recommending this tentative measure, which will be an aid in the final solution of all the pressing questions relating to trade corporations.

The following is the Interstate Trade Commission bill introduced by Mr. Newlands as tentatively amended by the Senate Committee on Interstate Commerce.

The committee took no final action upon it:

[S. 5485, Sixty-second Congress, second session.]

A BILL To create an Interstate Trade Commission, to define its powers and duties, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this act shall be referred to and cited as the Interstate Trade Commission act. Corporations a majority of whose voting securities is held or owned by any corporation subject to the terms of this act are referred to herein as subsidiaries of such holding or owning corporation.

SEC. 2. That there is hereby created a body to be known as the Interstate Trade Commission, which shall consist of three members of whom no more than two shall belong to the same political party. The commission shall be appointed by the President, by and with the advice and consent of the Senate, and the terms of such commissioners so first appointed shall be three, six, and nine years, respectively, and shall be so designated by the President in making

such appointments; and thereafter all the commissioners shall hold office for the term of nine years, and shall be appointed by the President, by and with the advice and consent of the Senate. Vacancies shall be filled by like appointment and confirmation for the unexpired term. Each member of said commission shall receive a salary of $10,000 a year. The office of the commission shall be at Washington, in the District of Columbia, but the commission may hold meetings elsewhere when necessary and convenient.

SEC. 3. That the Bureau of Corporations is hereby transferred to and merged in said commission, and all of the powers, duties, records, papers, and funds belonging or pertaining to the Bureau of Corporations shall hereafter belong and pertain to the Interstate Trade Commission, and all the officers and employees of said bureau shall thereupon be officers and employees of the Interstate Trade Commission. The said commission shall also have a secretary, a chief clerk, and such clerks, inspectors, examiners, experts, messengers, and other assistants as from time to time may be necessary and as may be appropriated for by Congress.

SEC. 4. That all corporations engaged in commerce among the several States or with foreign nations, excepting common carriers, shall from time to time furnish to the commission such information, statement, and records of their organization, business, financial condition, conduct, and management and the organization, business, financial condition, conduct, and management of their subsidiaries at such time, to such degree and extent, and in such form as may be prescribed by the commission; and the commission at all reasonable times, or its duly authorized agent or agents, shall have complete access to all records, accounts, minutes, books, and papers of such corporations and their subsidiaries, including the records of any of their executive or other committees. Failure or neglect on the part of any corporation subject to this act, or of any of its subsidiaries, to comply with the terms of this section within such time after written demand shall have been made upon such corporation by the commission requiring such compliance, as shall be fixed by the commission, shall constitute a misdemeanor, and upon conviction such corporation shall be subject to a fine of not more than $1,000 for every day of such failure or neglect.

SEC. 5. The information so obtained shall be public records, and the commission shall from time to time make public such information in such form and to such extent as it may deem necessary.

SEC. 6. That the district courts of the United States, upon the application of the commission alleging a failure to comply with any order of the commission or alleging a failure to comply with or a violation of any of the provisions of this act by any corporation subject thereto, shall have jurisdiction to issue a writ or writs of mandamus or injunction or other order enforcing such order of the commission or commanding such corporation, its officers and employees, to comply with the provisions of this act.

SEC. 7. That for the purposes of this act the commission shall have the power to require by subpœna the attendance and testimony of witnesses and the production of all books, papers, contracts, agreements, documents, or other things of every kind and nature whatsoever relating to any matter under investigation by the commission. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States at any designated place of hearing, and in case of disobedience to a subpœna the commission, or any party to a proceeding before the commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any corporation subject to the provisions of this act, or other person, issue an order requiring such corporation, or other person, to appear before said commission (and produce books, documents, and papers, if so ordered) and give evidence touching the matter in question, and any failure to obey such order of the court may be punished by such court as a contempt thereof. This claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying.

The testimony of any witness may be taken at the instance of a party in any proceeding or investigation pending before the commission by deposition at any time after the inquiry is instituted. The commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it at any stage of such proceeding or investigation. Such deposition

may be taken before any person authorized so to do by the commission and who has power to administer oaths.

Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided. Such testimony shall be reduced to writing.

Witnesses whose testimony is taken under the provisions of this act shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

No person shall be excused from attending and testifying, or from producing books, papers, documents, or other things before this commission or in obedience to the subpœna of the commission whether such subpœna be signed or issued by one or more of the commissioners on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify under oath or produce evidence, documentary or otherwise, before said commission in obedience to a subpœna issued by it in a proceeding instituted upon its own initiative: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. The purpose of this provision is to give immunity only to natural persons who under oath testify in response to a subpœna of the commission in an inquiry instituted by the commission.

SEC. 8. That the said commission shall, on or before the first day of January in each year, make a report, which shall be transmitted to Congress. This report shall contain such information and data collected by the commission as it may deem of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the commission may deem necessary.

SEC. 9. That any person willfully making or furnishing to said commission any statement, return, or record required by this act, when knowing such statement, return, or record to be false in any material particular, shall be guilty of a misdemeanor, and upon conviction shall be fined not more than $1,000 or imprisoned not more than one year, or both.

SEC. 10. That in case a final decree shall be issued against any corporation under the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, or under sections seventy-three to seventy-seven, inclusive, of "An act to reduce taxation, to provide revenue for the Government, and for other purposes," which became a law August twenty-seventh, eighteen hundred and ninety-four, the court entering such decree may, in its discretion, refer to the commission its decree, with instructions to take evidence, consider such facts, and report to the court the findings as to method of dissolution or reorganization as the commission shall consider best fitted to carry out such decree; if a reorganization takes place under a decree, the commission shall inform itself respecting the reorganization, and if it is of the opinion that it is not in harmony with the decree it shall, through counsel, inform the court for such action as the court may take.

SEC. 11. That the said commission may at any time, upon complaint of any person or corporation, or upon its own initiative, or upon the request of the Attorney General, or of the corporation affected, investigate any corporation subject to the provisions of this act for the purpose of determining whether such corporation has been guilty of a violation of the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, or under sections seventy-three to seventy-seven inclusive, of an "Act to reduce taxation," and so forth, which became a law August twenty-seventh, eighteen hundred and ninety-four, or of any of the provisions of this act, and may hold such hearings and take such evidence as it may deem necessary; and in case the commission shall find that such corporation has been guilty of a violation of the provisions of said acts or of this act it shall make a finding, stating the facts, and prescribing the acts, transactions, and readjustments necessary in order that said corporation may thereafter comply with the terms of said acts and of this act, and shall transmit a copy of the said finding in full to such corporation. If within sixty days after transmitting said finding, or such extension thereof as shall be given by the commission, the corporation shall not have complied with the terms of the

finding, and shall not have performed the acts prescribed as necessary to make it comply with the said acts or with this act, the commission shall report the fact of noncompliance to the Attorney General, together with a copy of such finding, for his action under the said acts or of this act. But the commission may, if it deems it proper, report the facts to the Attorney General without calling upon such corporation for compliance with said acts or with this act.

Nothing contained in this act shall be construed to prevent or interfere with the Attorney General in enforcing the provisions of the act to protect commerce, and so forth, approved July second, eighteen hundred and ninety.

Messrs. Crane, Brandegee, Oliver, and Lippitt expressed themselves as follows:

MINORITY VIEWS.

The undersigned members of the Senate Committee on Interstate Commerce are unable to agree to the report of the majority of the committee on Senate resolution 98, as to "what changes are necessary or desirable in the laws of the United States relating to the creation and control of corporations engaged in interstate commerce and what changes are necessary or desirable in the laws of the United States relating to persons or firms engaged in interstate commerce."

While certain features of the report are commendable, there are several conclusions therein which do not accord with our views, and therefore we are prevented from approving the report as a whole.

W. M. CRANE.
FRANK B. BRANDEGEE.
GEORGE T. OLIVER.
HENRY F. LIPPITT.

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Exhibit B

63D CONGRESS, 2d Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 1142.

FEDERAL TRADE COMMISSION.

SEPTEMBER 4, 1914.—Ordered to be printed.

Mr. ADAMSON, from the committee of conference, submitted the following

CONFERENCE REPORT.

[To accompany H. R. 15613.]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H. R. 15613) to create an interstate trade commission, to define its powers and duties, and for other purposes, having met, after full and free conference have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate, and agree to the same with an amendment as follows:

In lieu of the matter inserted by said amendment insert:

That a commission is hereby created and established, to be known as the Federal Trade Commission (hereinafter referred to as the commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission.

The commission shall have an official seal, which shall be judicially noticed.

Sec. 2. That each commissioner shall receive a salary of $10,000 a year, payable in the same manner as the salaries of the judges of the

courts of the United States. The commission shall appoint a secretary, who shall receive a salary of $5,000 a year, payable in like manner, and it shall have authority to employ and fix the compensation of such attorneys, special experts, examiners, clerks, and other employees as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress.

With the exception of the secretary, a clerk to each commissioner, the attorneys, and such special experts and examiners as the commission may from time to time find necessary for the conduct of its work, all employees of the commission shall be a part of the classified civil service, and shall enter the service under such rules and regulations as may be prescribed by the commission and by the Civil Service Commission.

All of the expenses of the commission, including all necessary expenses for transportation incurred by the commissioners or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the commission.

Until otherwise provided by law, the commission may rent suitable offices for its use.

The Auditor for the State and Other Departments shall receive and examine all accounts of expenditures of the commission.

Sec. 3. That upon the organization of the commission and election of its chairman, the Bureau of Corporations and the offices of Commissioner and Deputy Commissioner of Corporations shall cease to exist; and all pending investigations and proceedings of the Bureau of Corporations shall be continued by the commission.

All clerks and employees of the said bureau shall be transferred to and become clerks and employees of the commission at their present grades and salaries. All records, papers, and property of the said bureau shall become records, papers, and property of the commission, and all unexpended funds and appropriations for the use and maintenance of the said bureau, including any allotment already made to it by the Secretary of Commerce from the contingent appropriation for the Department of Commerce for the fiscal year nineteen hundred and fifteen, or from the departmental printing fund for the fiscal year nineteen hundred and fifteen, shall become funds and appropriations available to be expended by the commission in the exercise of the powers, authority, and duties conferred on it by this Act.

The principal office of the commission shall be in the city of Washington, but it may meet and exercise all its powers at any other place. The commission may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States.

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

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

tween the District of Columbia and any State or Territory or foreign nation.

"Corporation" means any company or association incorporated or unincorporated, which is organized to carry on business for profit and has shares of capital or capital stock, and any company or association, incorporated or unincorporated, without shares of capital or capital stock, except partnerships, which is organized to carry on business for its own profit or that of its members.

"Documentary evidence" means all documents, papers, and correspondence in existence at and after the passage of this Act.

"Acts to regulate commerce" means the Act entitled "An Act to regulate commerce," approved February fourteenth, eighteen hundred and eighty-seven, and all Acts amendatory thereof and supplementary thereto.

"Antitrust Acts" means the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; also the sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," approved August twenty-seventh, eighteen hundred and ninety-four; and also the Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen.

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

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

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

ing such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

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

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

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

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

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

Sec. 6. That the commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

(c) Wherever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings

and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.

(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

Sec. 7. That in any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust Acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. The commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such a decree as the nature of the case may in its judgment require.

Sec. 8. That the several departments and bureaus of the Government when directed by the President shall furnish the commission, upon its request, all records, papers, and information in their possession relating to any corporation subject to any of the provisions of this Act, and shall detail from time to time such officials and employees to the commission as he may direct.

Sec. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpœna the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpœnas,

and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpœna the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpœna of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpœna issued by it: Provided, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

***Sec. 10.** That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary*

evidence, if in his power to do so, in obedience to the subpœna or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000 or by imprisonment for not more than one year, or by both such fine and imprisonment.

Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to this Act, or who shall willfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

Sec. 11. Nothing contained in this Act shall be construed to prevent or interfere with the enforcement of the provisions of the antitrust Acts or the Acts to regulate commerce, nor shall anything contained in the Act be construed to alter, modify, or repeal the said antitrust Acts or the Acts to regulate commerce or any part or parts thereof.

And the Senate agree to the same.

STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE.

The House bill as it passed on June 5 last and went to the Senate was not considered for amendments in the Senate Committee on Interstate Commerce, but instead there was reported to the Senate an entirely new bill, which was substituted for the House bill, and which, with various amendments adopted in the Senate, passed that body on August 5 last.

The conferees have brought the original House and Senate bills into harmony by drafting a measure, within the limits of conference, the provisions of which embody the essential features of both bills. These two bills are for purposes of comparison with the conference bill here set forth:

HOUSE BILL.

AN ACT To create an Interstate Trade Commission, to define its powers and duties, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a commission is hereby created and established, to be known as the Interstate Trade Commision (hereinafter referred to as the commission), which shall be composed of three commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than two of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of two, four, and six years, respectively, from the date of the taking effect of this act, the term of each to be designated by the President, but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission.

The commission shall have an official seal, which shall be judicially noticed.

SEC. 2. That each commissioner shall receive a salary of $10,000 a year, payable in the same manner as the salaries of the judges of the courts of the United States. The commission shall appoint a secretary, who shall receive a salary of $5,000 a year, payable in like manner, and it shall have authority to employ and fix the compensation of such other officials, clerks, and employees as it may find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress.

Until otherwise provided by law the commission may rent suitable offices for its use.

All of the expenses of the commission, including all necessary expenses for transportation incurred by the commissioners or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the commission.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

The Auditor for the State and Other Departments shall receive and examine all accounts of expenditures of the commission.

SEC. 3. That upon the organization of the commission and election of its chairman all the existing powers, authority, and duties of the Bureau of Corporations and of the Commissioner of Corporations conferred upon them by the act entitled "An act to establish the Department of Commerce and Labor," approved February fourteenth, nineteen hundred and three, and all amendments thereto, and also those conferred upon them by resolutions of the United States Senate passed on March first, nineteen hundred and thirteen, on May twenty-seventh, nineteen hundred and thirteen, and on June eighteenth, nineteen hundred and thirteen, shall be vested in the commission.

All clerks and employees of the said bureau shall be transferred to and become clerks and employees of the commission at their present grades and salaries. All records, papers, and property of the said bureau shall become records, papers, and property of the commission, and all unexpended funds and appropriations for the use and maintenance of the said bureau shall become funds and appropriations available to be expended by the commission in the exercise of the powers, authority, and duties conferred on it by this act.

That the Bureau of Corporations and the offices of Commissioner of Corporations and Deputy Commissioner of Corporations are upon the organization of the commission and the election of its chairman, abolished, and their powers, authority, and duties shall be exercised by the commission free from the direction or control of the Secretary of Commerce.

The information obtained by the commission in the exercise of the powers, authority, and duties conferred upon it by this section may be made public, in the discretion of the commission.

SEC. 4. That the principal office of the commission shall be in the city of Washington, where its general sessions shall be held; but whenever the interest of the public may be promoted, or delay or expense prevented, the commission may hold special sessions in any part of the United States. The commission may, by one or more of its members, or by such officers as it may designate, prosecute any inquiry necessary to its duties in any part of the United States.

SEC. 5. That, with the exception of the secretary and a clerk to each commissioner, all employees of the commission shall be a part of the classified civil service, and shall enter the service under such rules and regulations as may be prescribed by the commission and by the Civil Service Commission.

SEC. 6. That the words defined in this section shall have the following meaning when found in this act, to wit:

"Commerce" means such commerce as Congress has the power to regulate under the Constitution.

"Corporation" means a body incorporated under law, and also joint-stock associations and all other associations having shares of capital or capital stock or organized to carry on business with a view to profit.

"Capital" means the stocks and bonds issued and the surplus owned by a corporation.

"Antitrust acts" means the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; also the sections seventy-three to seventy-seven, inclusive, of an act entitled "An act to reduce taxation, to provide revenue for the Government, and for other purposes," approved August twenty-seventh, eighteen hundred and ninety-four; and also the act entitled "An act to amend sections seventy-three and seventy-six of the act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen.

"Acts to regulate commerce" means the act entitled "An act to regulate commerce," approved February fourteenth, eighteen hundred and eighty-seven, and all amendments thereto.

"Documentary evidence" means all documents, papers, and correspondence in existence at and after the passage of this act.

SEC. 7. That the several departments and bureaus of the Government when directed by the President shall furnish the commission, upon its request, all records, papers, and information in their possession relating to any corporation subject to any of the provisions of this act, and shall detail from time to time such officials and employees to the commission as he may direct.

SEC. 8. That the commission may from time to time make rules and regulations and classifications of corporations for the purpose of carrying out the provisions of this act.

The commission may from time to time employ such special attorneys and experts as it may find necessary for the conduct of its work or for proper representation of the public interest in investigations made by it; and the expenses of such employment shall be paid out of the appropriation for the commission.

Any member of the commission may administer oaths and affirmations and sign subpœnas.

The commission may also order testimony to be taken by deposition in any proceeding or investigation pending under this act. Such depositions may be taken before any official authorized to take depositions by the acts to regulate commerce.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this act or any order of the commission made in pursuance thereof.

SEC. 9. That every corporation engaged in commerce, excepting corporations subject to the acts to regulate commerce, which, by itself or with one or more other corporations owned, operated, controlled, or organized in conjunction with it so as to constitute substantially a business unit, has a capital of not less than $5,000,000, or, having a less capital, belongs to a class of corporations which the commission may designate, shall furnish to the commission annually such information, statements, and records of its organization, bondholders and stockholders, and financial condition, and also such information, statements, and records of its relation to other corporations and its business and practices while engaged in commerce as the commission shall require; and to enable it the better to carry out the purposes of this act the commission may prescribe as near as may be a uniform system of annual reports. The said annual reports shall contain all the required information and statistics for the period of twelve months ending with the fiscal year of each corporation's report, and they shall be made out under oath or otherwise, in the discretion of the commission, and filed with the commission at its office in Washington within three months after the close of the year for which the report is made, unless additional time be granted in any case by the commission. The commission may also require such special reports as it may deem advisable.

If any corporation subject to this section of this act shall fail to make and file said annual reports within the time above specified, or within the time extended by the commission for making and filing the same, or shall fail to make and file any special report within the time fixed by the order of the commission, such corporation shall forfeit to the United States the sum of $100 for each and every day it shall continue in default in making or filing said annual or special reports. Said forfeitures shall be recovered in the manner provided for the recovery of forfeitures under the provisions of the acts to regulate commerce.

SEC. 10. That upon the direction of the President, the Attorney General, or either House of Congress the commission shall investigate and report the facts relating to any alleged violations of the antitrust acts by any corporation. The report of the commission may include recommendations for readjustment of business in order that the corporation investigated may thereafter maintain its organization, management, and conduct of business in accordance with law. Reports made after investigation under this section may be made public in the discretion of the commission.

For the purpose of prosecuting any investigation or proceeding authorized by this section the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against.

SEC. 11. That when in the course of any investigation made under this act the commission shall obtain information concerning any unfair competition or practice in commerce not necessarily constituting a violation of law by the corporation investigated, it shall make report thereof to the President, to aid him in making recommendations to Congress for legislation in relation to the regulation of commerce, and the information so obtained and the report thereof shall be made public by the commission.

SEC. 12. That in any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the com-

plainant is entitled to relief, refer said suit to the commission to ascertain and report an appropriate form of decree therein; and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require.

SEC. 13. That wherever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust acts, the commission shall have power, and it shall be its duty, upon its own initiative or upon the application of the Attorney General, to make investigation of the manner in which the decree has been or is being carried out. It shall transmit to the Attorney General a report embodying its findings as a result of any such investigation, and the report shall be made public in the discretion of the commission.

SEC. 14. That any person who shall willfully make any false entry or statement in any report required to be made under this act shall be deemed guilty of a misdemeanor, and upon conviction shall be subject to a fine of not more than $5,000, or to imprisonment for not more than three years, or both fine and imprisonment.

SEC. 15. That any officer or employee of the commission who shall make public any information obtained by the commission without its authority, or as directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

SEC. 16. That for the purposes of this act, and in aid of its powers of investigation herein granted, the commission shall have and exercise the same powers conferred upon the Interstate Commerce Commission in the acts to regulate commerce to subpœna and compel the attendance and testimony of witnesses and the production of documentary evidence, and to administer oaths. All the requirements, obligations, liabilities, and immunities imposed or conferred by said acts to regulate commerce and by the act in relation to testimony before the Interstate Commerce Commission, approved February eleventh, eighteen hundred and ninety-three, and the act defining immunity, approved June thirtieth, nineteen hundred and six, shall apply to witnesses, testimony, and documentary evidence before the commission.

SEC. 17. That the commission shall on or before the first day of December in each year make a report, which shall be transmitted to Congress. This report shall contain such facts and statistics collected by the commission as may be considered of value in the determination of questions connected with the conduct of commerce by corporations, excepting corporations subject to the acts to regulate commerce, including an abstract of the annual and special reports of corporations made to the commission under section nine of this act: *Provided*, That no trade secrets or private lists of customers shall be embraced in any such abstract. The report shall also include such recommendations as to additional legislation as the commission may deem necessary. The commission may also from time to time publish such additional reports or bulletins of facts and statistics relating to corporations engaged in commerce as may be deemed useful and do not violate the provisions of this act.

SEC. 18. That nothing contained in this act shall be construed to prevent or interfere with the Attorney General in enforcing the provisions of the antitrust acts or the acts to regulate commerce.

SENATE BILL.

AN ACT To create an Interstate Trade Commission, to define its powers and duties, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a commission is hereby created and established, to be known as the Federal Trade Commission, composed of five members, not more than three of whom shall be members of the same political party, and the said Federal Trade Commission is referred to hereinafter as "the commission."

The words defined in this section shall have the following meaning when found in this act, to wit:

"Commerce" means such commerce as Congress has the power to regulate under the Constitution.

The term "corporation" or "corporations" shall include joint-stock associations and all other associations having shares of capital or capital stock, organized to carry on business for profit.

"Antitrust acts" means the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; also sections seventy-three to seventy-seven, inclusive, of an act entitled "An act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; and also the act entitled "An act to amend sections seventy-three and seventy-six of the act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen.

SEC. 2. Upon the organization of the commission, the Bureau of Corporations, and the offices of Commissioner and Deputy Commissioner of Corporations shall cease to exist, and the employees of said bureau shall become employees of the commission in such capacity as it may designate. The commission shall take over all the records, furniture, and equipment of said bureau. All work and proceedings pending before the bureau may be continued by the commission free from the direction or control of the Secretary of Commerce. All appropriations heretofore made for the support and maintenance of the bureau and its work are hereby authorized to be expended by the commission for said purposes.

Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission.

The commissioners shall be appointed by the President, by and with the advice and consent of the Senate. The terms of office of the commissioners shall be seven years each. The terms of those first appointed by the President shall date from the taking effect of this act, and shall be as follows:

One shall be appointed for a term of three years, one for a term of four years, one for a term of five years, one for a term of six years, and one for a term of seven years; and after said commissioners shall have been so first appointed all appointments, except to fill vacancies, shall be for terms of seven years each. The commission shall elect one of its members chairman for such period as it may determine. The commission shall elect a secretary and may elect an assistant secretary. Said secretary and assistant secretary shall hold their offices or connection with the commission at the pleasure of the commission. Each commissioner shall receive a salary of $10,000 per annum. The secretary of the commission shall receive a salary of $5,000 per annum. The assistant secretary shall receive a salary of $4,000 per annum. In case of a vacancy in the office of any commissioner during his term, an appointment shall be made by the President, by and with the advice and consent of the Senate, to fill such vacancy, for the unexpired term. The office of the commission shall be in the city of Washington, but the commission may at its pleasure meet and exercise all its powers at any other place, and may authorize one or more of its members to prosecute any investigation, and for the purposes thereof to exercise the powers herein given the commission.

The commission shall have such attorneys, accountants, experts, examiners, special agents, and other employees as may, from time to time, be appropriated for by Congress, and shall have authority to audit their bills and fix their compensation. With the exception of the secretary and assistant secretary and one clerk to each of the commissioners, and such attorneys and experts as may be employed, all employees of the commission shall be a part of the classified civil service. The commission shall also have the power to adopt a seal, which shall be judicially noticed, and to rent suitable rooms for the conduct of its work.

All the expenses of the commission, including all necessary expenses for transportation incurred by the commissioners or by their employees under their orders in making any investigation or upon official business in any other place than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor, approved by the commission.

The Auditor for the State and other Departments shall receive and examine all accounts of expenditures of the commission.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

SEC. 3. The commission shall have power among others—

(a) To investigate from time to time, and as often as the commission may deem advisable, the organization, business, financial condition, conduct, practices, and management, of any corporation engaged in commerce, relating to or in any way affecting the commerce in which such corporation under inquiry is engaged.

(b) To require any corporation subject to the provisions of this act which the commission may designate to furnish to the commission from time to time information, statements, and records concerning its organization, business, financial condition, conduct, practices, management, and relation to other corporations, or to individuals, associations, or partnerships, and to require the production for examination of all books, documents, correspondence, contracts, memoranda, or other papers relating to or in any way affecting the commerce in which such corporation under inquiry is engaged, and to make copies of the same.

(c) To prescribe as near as may be a uniform system of annual reports from such corporations or classes of corporations subject to the provisions of this act, as the commission may designate, and to fix the time for the filing of such reports, and to require such reports, or any special report, to be made under oath, or otherwise in the discretion of the commission.

(d) To make public, in the discretion of the commission, any information obtained by it in the exercise of the powers, authority, and duties conferred upon it by this act, except so far as may be necessary to protect trade processes, names of customers, and such other matters as the commission may deem not to be of public importance, and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation.

(e) In any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust acts if the court finds for the complainant it may, upon its own motion or the motion of any party to such suit, refer the matter of the form of the decree to be entered to the commission as a master in chancery; whereupon the commission shall proceed in that capacity upon such notice to the parties and upon such hearing as the court may prescribe, and shall as speedily as practicable make report with its findings to the court, which report and findings having been made and filed shall be subject to the judicial procedure established for the consideration and disposition of a master's report and findings in equity cases.

(f) Wherever a restraining order or an interlocutory or final decree has heretofore been entered or shall hereafter be entered against any defendant or defendants in any suit brought by the United States to prevent and restrain any violation of the antitrust acts, the commission shall have power, and it shall be its duty, upon the application of the Attorney General, to make investigation of the manner in which the order or decree has been or is being carried out, and as to whether the same has been or is being violated and what, if any, further order, decree, or relief is advisable. It shall transmit to the Attorney General a report embodying its findings as a result of any such investigation, with such recommendations for further action as it may deem advisable, and the report shall be made public in the discretion of the commission.

(g) If the commission believes from its inquiries and investigations, instituted upon its own initiative or at the suggestion of the President, the Attorney General, or either House of Congress that any corporation, individual, association, or partnership has violated any law of the United States regulating commerce, it shall report its findings and the evidence in relation thereto to the Attorney General with its recommendations.

For the purpose of prosecuting any investigation or proceeding authorized by this section the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documents or writings of any corporation being investigated or proceeded against.

(h) The commission is hereby directed to investigate, as expeditiously as may be, trade conditions in foreign countries where associations, combinations, or practices of buyers, dealers, or traders may injuriously affect the export trade of the United States, and to report to Congress thereon from time to time.

SEC. 4. The powers and jurisdiction herein conferred upon the commission shall extend over all trade associations, corporate combinations, and corporations as hereinbefore defined engaged in or affecting commerce, except banks and common carriers.

SEC. 5. That unfair competition in commerce is hereby declared unlawful.

The commission shall have authority to prevent such unfair competition in commerce in the manner following, to wit:

Whenever it shall have reason to believe that any person, partnership, or corporation is violating the provisions of this section it shall issue and serve upon the defendant a complaint stating its charges in that behalf and at the same time a notice of hearing upon a day and at a place therein fixed. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint.

Upon such hearing the commission shall make and file its findings, and if the commission shall find that the person, partnership, or corporation named in the complaint is practicing such unfair competition it shall thereupon enter its findings of record and issue and serve upon the offender an order requiring that within a reasonable time to be stated in said order that the offender shall cease and desist from such unfair competition. The commission may at any time set aside, in whole or in part, or modify its findings or order so entered or made. Any suit brought by any such person, partnership, or corporation to annul, suspend, or set aside, in whole or in part, any such order of the commission shall be brought against the commission in a district court of the United States in the judicial district of the residence of the person or of the district in which the principal office or place of business is located and the procedure set forth in the act of Congress making appropriations to supply urgent deficiencies and insufficient appropriations for the fiscal year of nineteen hundred and thirteen, and for other purposes, relating to suits brought to suspend or set aside, in whole or in part, an order of the Interstate Commerce Commission shall apply.

Persons, partnerships, or corporations filing or causing to be filed complaints before the commission shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States.

If within the time so fixed in the order of the commission the person, partnership, or corporation against which the order is made shall not cease and desist from such unfair competition, and if in the meantime such order is not annulled, suspended, or set aside by a court, the commission may bring a suit in equity in a district court in any district wherein such person or persons reside or wherein such corporation has its principal office or place of business to enforce its said order, and jurisdiction is hereby conferred upon said court to hear and determine any such suit and to enforce obedience thereto according to the law and rules applicable to suits in equity. All the provisions of the law relating to appeals and advancement for speedy hearing in suits brought to suspend or set aside an order of the Interstate Commerce Commission shall apply in suits brought under this section: *Provided*, That no order or finding of the court or commission in the enforcement of this section shall be admissible as evidence in any suit, civil or criminal, brought under the antitrust acts: *Provided further*, That neither the orders of the commission nor the judgment of the court to enforce the same shall in any wise relieve or absolve any person or corporation from any liability under the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety.

SEC. 6. That if any corporation subject to this act shall fail to file any annual or special report, as provided in subdivision (b) of section three hereof, within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

SEC. 7. Any person who shall willfully destroy, alter, mutilate, or remove out of the jurisdiction of the United States or authorize, assist in, or be privy to the willful destruction, alteration, mutilation, or removal out of the jurisdiction of the United States of any book, letter, paper, or document containing an entry

or memorandum relating to commerce, with the intent to prevent the production thereof, or who shall willfully make any false entry relating to commerce in any book of accounts or record of any trade association, corporate combination, or corporation, subject to the provisions of this act, or who shall willfully make or furnish to said commission or to its agent any false statement, return, or record, knowing the same to be false in any material particular, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not exceeding $5,000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Any employee of the commission who divulges any fact or information which may come to his knowledge during the course of his employment by the commission, except in so far as it has been made public by the commission, or as he may be directed by the commission or by a court, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 8. The commission shall have and exercise the powers possessed by the Interstate Commerce Commission to subpœna and compel the attendance and testimony of witnesses and the production of evidence, and to administer oaths. All the powers, requirements, obligations, liabilities, and immunities imposed or conferred by the Act to regulate commerce, as amended in relation to testimony before the Interstate Commerce Commission, shall apply to witnesses, testimony, and evidence before the commission.

Each corporation having a capital of $5,000,000, to determine which fact the amount of its capital stock, surplus, bonded indebtedness, and undivided profits shall be combined, subject to the provisions of this Act shall, within ninety days after the taking effect of this Act, designate in writing an agent in the city of Washington, District of Columbia, upon whom service of all notices, orders, and processes issued by the commission may be made for and on behalf of said corporation, and file such designation in the office of the commission, which designation may from time to time be changed by like writing similarly filed; and thereupon service of all notices, orders, or processes issued by the commission may be made upon such corporation by leaving a copy thereof with such designated agent at his or its office in the city of Washington with like effect as if made personally upon such corporation, and in default of such designation of such agent service of any notice, order, or other process may be made by posting such notice, order, or process in a conspicuous place in the office of the commission.

All notices, orders, or other process to be served upon individuals or other corporations than those having such capital shall be duly served personally on such individuals and upon the president, chief executive officer, or a director of such other corporations, respectively, unless they shall have designated, as they are hereby authorized to do, an agent as aforesaid with power and authority to accept service of such notices, orders, or other process.

SEC. 9. The district courts of the United States, upon the application of the commission alleging a failure by any corporation, or by any of its officers or employees, or by any witness, to comply with any order of the commission for the furnishing of information, shall have jurisdiction to issue such writs, orders, or other process as may be necessary to enforce any order of the commission and to punish disobedience thereof.

SEC. 10. The several departments and bureaus of the Government, when directed by the President, shall furnish the commission, upon its request, all records, papers, and information in their possession relating to any trade association, corporate combination, or corporation, subject to any of the provisions of this Act.

SEC. 11. Nothing contained in this Act shall be construed to prevent or interfere with the enforcement of the provisions of the antitrust Acts or the Acts to regulate commerce, nor shall anything contained in the Act be construed to alter, modify, or repeal the said antitrust Acts or the Acts to regulate commerce or any part or parts thereof.

The amended bill as agreed to in conference changes the name of the proposed trade commission from "Interstate Trade Commission" to "Federal Trade Commission." This is desirable to prevent confusion of name with the Interstate Commerce Commission. Because of certain administrative work not contemplated by the House

bill, the number of commissioners has been changed from three to five. In all other respects the organization of the commission is as provided in sections 1 and 2 of the House bill.

The Bureau of Corporations is abolished, as in the House bill, and its powers are conferred on the commission. Instead of transferring them by reference to the original act creating the bureau, as in section 3 of the House bill, they are explicitly set out in section 6, paragraph (a), of the bill as agreed to by the conferees. This has been done because the bill now gives to the commission certain powers which so continuously and directly concern the business interests of the country that it is desirable to have the law show on its face its exact extent and application.

The definitions respecting "commerce," etc., remain substantially as in section 4 of the House bill.

The provision of section 9, paragraph 1, of the House bill requiring annual reports from all corporations engaged in commerce having a capital of over $5,000,000 has been changed to meet the Senate provision leaving the classes of corporations to make such reports to the discretion of the commission. In view of the large number of corporations with a capital of over $5,000,000 which are not necessarily engaged in any commerce potential for combination or monopoly this seemed a desirable change.

The commission is required to make the investigations relating to alleged violations of the antitrust acts as provided in section 10 of the House bill, except that the expression "direction of the Attorney General" is eliminated. He is the head of an executive department and the direction of the President is deemed sufficient. The reports of such investigations do not include, at the discretion of the commission, recommendations for readjustments of business, so that the corporations investigated may operate lawfully, but a new subsection is added, section 6, paragraph (*e*), requiring the commission to make recommendations of this character on the application of the Attorney General.

The powers conferred upon the commission in sections 12 and 13 of the House bill to assist the Department of Justice, upon direction of the courts, in solving the difficult economic problems connected with trust dissolutions under the antitrust law, and upon the initiative of the commission itself to supervise the compliance with decrees of dissolutions are retained in the conference bill in section 6, paragraph (*c*), and in section 7.

The conference bill contains a provision, section 6, paragraph (*h*), authorizing the commission to make investigations respecting practices which may affect the foreign trade of the United States. This was in the Senate bill substantially as it now appears.

The publicity of the facts which ought to be the common property of the American business man provided for practically as in the House bill, and the administrative processes for conducting investigations, summoning witnesses, and punishing violations is substantially as in the House bill.

Section 5 declares unfair methods of competition to be unlawful and empowers the commission, after hearing, to order the discontinuance of the use of such methods.

It is now generally recognized that the only effective means of establishing and maintaining monopoly, where there is no control of

a natural resource as of transportation, is the use of unfair competition. The most certain way to stop monopoly at the threshold is to prevent unfair competition. This can be best accomplished through the action of an administrative body of practical men thoroughly informed in regard to business, who will be able to apply the rule enacted by Congress to particular business situations, so as to eradicate evils with the least risk of interfering with legitimate business operations.

It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of this country. Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case. What is harmful under certain circumstances may be beneficial under different circumstances.

The orders of the commission will be enforceable only through the courts. In order to obtain the speediest settlement of disputed questions, it is provided that the commission shall apply for the enforcement of its orders directly to the circuit court of appeals. The findings of the commission as to the facts are to be conclusive. The court's function is restricted to passing on questions of law. The court will determine such questions on the record in the proceeding before the commission. No new evidence may be adduced on the hearing in court except upon good cause shown, and if the court permits the introduction of additional evidence, such evidence will be taken by the commission and then filed in court with its new or modified findings based thereon. The judgment of the court of appeals will be final, subject only to review by the Supreme Court upon writ of certiorari.

This section is entirely new to the House bill, but it appeared in a somewhat similar form in the Senate bill, and the managers on the part of the House believed it wise to accept the provision in the form in which it now appears.

W. C. ADAMSON,
THETUS W. SIMS,
J. HARRY COVINGTON,
F. C. STEVENS,
JOHN J. ESCH,
Managers on the part of the House.

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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2013, I filed the foregoing document electronically through the Office of the Secretary's FTC E-filing system. The electronic copy sent to the Office of the Secretary is a true and correct copy of the paper original.

I also certify that I caused a paper copy of the foregoing document with an original signature to be filed with the Office of the Secretary.

I also certify that I caused twelve (12) copies of the foregoing document to be delivered to the Office of the Secretary, Room H-113.

I also certify that I caused a copy of the foregoing document to be delivered *via* electronic mail and by hand to:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW, Room H-110
Washington, DC 20580

I also certify that I caused a copy of the foregoing document to be served *via* electronic mail to:

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November 22, 2013

By: _____

Laura Riposo VanDruff
Federal Trade Commission
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