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THE SCOPE AND ENFORCEMENT OF ROBINSON-PATMAN ACT CEASE AND DESIST ORDERS

By MARTIN B. LOUIS†

In 1959 the Clayton Act was amended¹ to provide that violations of final² cease and desist orders issued by the Federal Trade Commission would be subject to civil penalties of up to five thousand dollars a day. These amendments were vigorously opposed primarily because of their anticipated effect on cases arising under the Robinson-Patman Act. In such cases, which constitute a majority of Clayton Act proceedings, the Commission followed a judicially approved³ practice of casting its cease and desist orders in the ambiguous language of the Act itself; and it was feared that the combination of sweeping orders and harsh penalties would create an intolerable or unfair situation for persons subject to them.

In 1962 these order writing practices were challenged before the Supreme Court, which suggested in dictum that they might not withstand scrutiny under the 1959 amendments.⁴ This dictum has effected a sweeping reexamination by the courts and the Commission of the drafting of such orders. The inquiry has even intruded into cases arising under statutes other than the Clayton Act and has "been the largest single subject of litigation in the courts since the Supreme Court's decision. . . ."⁵

Despite the recent effort devoted to this problem, it remains in a state of confusion and flux. However, some trends are emerging and a few tentative predictions or conclusions can now be made. Initially, however, it may be useful to examine the historical development and rationale of these changes, not only because of their interrelationship to the drafting of Robinson-Patman orders, but also because of their impact on the process of administrative adjudication itself.


2. The amendments also provided for the first time that an order would become final if respondent failed to file a petition for review or he did and the order was judicially affirmed. 73 Stat. 244 (1959), 15 U.S.C. § 21(g) (Supp. IV, 1963).
I.

Section 11(b) of the Clayton Act, which was originally modeled on an identical provision in § 5 of the Federal Trade Commission Act, provides that the Commission shall issue a cease and desist order if it finds, upon hearing, that the Act has been violated. Originally an order was not final. If violated, the Commission could apply to the court of appeals for a decree affirming and enforcing it. If the decree was then violated, respondent could be cited for contempt. Respondent could petition or cross petition to the court of appeals at any time before a decree of enforcement was entered for a review of the order's validity. If he petitioned for review unsuccessfully, the order would not be enforced unless the Commission also proved it had been violated.

To impose a sanction upon a respondent, the act required proof at three separate proceedings that he had violated the Clayton Act, the Commission's order, and the court's decree. Respondent could, and on rare occasions did, put the Commission to considerable effort and expense to enforce its orders. Judged as an enforcement scheme or compared to the finality of the decrees of the United States district courts, which enjoy concurrent but rarely exercised jurisdiction of such conduct, these cumbersome procedures now seem completely inadequate. However, there is no evidence in the extensive legislative history of the Clayton Act and the Federal Trade Commission Act and in the

8. Ibid. If the Commission suspected the existence of a violation, it would conduct an ex parte investigation and then apply for enforcement. The court would first affirm the validity of the order, since the respondent ordinarily cross-petitioned for review. It then referred the matter back to the Commission to determine at a contested hearing whether a violation had occurred. An affirmative finding was ordinarily accepted by the court, which then entered a decree enforcing the order. Eventually the Commission decided to conduct initially a contested "investigational" hearing whose record and findings are filed with the court. The court was asked to affirm the validity of the order, accept the report and order enforcement immediately. This short cut was approved in FTC v. Washington Fish & Oyster Co., 271 F.2d 39 (9th Cir. 1949); FTC v. Standard Brands, 189 F.2d 510 (2d Cir. 1951).
9. E.g., In re Whitney, 273 F.2d 211 (9th Cir. 1959).
12. E.g., FTC v. American Crayon Co., 352 U.S. 806 (1956). This decision of the Supreme Court resulted in the affirmance and enforcement on February 16, 1957, of the Commission's order to cease and desist entered on December 31, 1940. Proceedings for enforcement began in 1951 as a result of an investigation started in 1948. A portion of the order was enforced on April 20, 1955; the remaining two years were spent determining whether the balance of the order should be enforced. Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary, 86th Cong., 1st Sess., ser. 3, at 37 (1959) [hereinafter cited as 1959 Hearings].
early commentary on the Commission\textsuperscript{15} that this inadequacy was then recognized.

Perhaps stronger enforcement procedures, which were never proposed, would have been premature at that time. Although administrative jurisdiction over licenses, patents and other rights created legislatively by the special favor of the state was then familiar practice, its adjudication of "common rights" historically determined by the courts was novel.\textsuperscript{16} The important exception and obvious model for the Commission was the Interstate Commerce Commission, which was similarly required to apply to a court for enforcement of its orders.\textsuperscript{17} Such judicial enforcement represented an intermediate stage in the historical tendency towards finality for administrative orders.\textsuperscript{18} However, finality was indicative of judicial power and conjured up a host of constitutional difficulties.\textsuperscript{19} In addition many of the proponents of the Commission desired not an enforcement agency but a guide for business through the mazes of the Sherman Act and the rule of reason\textsuperscript{20} and might have opposed more ambitious enforcement procedures.

During the next two decades, the bright hopes for the Commission were not realized and, in fact, it became the object of frequent criticism.\textsuperscript{21} It gained new momentum, however, during the New Deal through the passage of the Robinson-Patman Act\textsuperscript{22} and the extension

\textsuperscript{15} Early criticism of the Act was concerned with the delay in entering an order. HENDRSON, \textit{op. cit. supra} note 14, at 87. The first suggestion that orders should be final when entered was made in 1933. McFARLAND, \textit{op. cit. supra} note 14, at 180. See also \textit{id.} at 74, 106.

\textsuperscript{16} DICKINSON, \textit{Administrative Justice and the Supremacy of Law} 6 (1927). Some agencies concerned with such rights were empowered to act only by investigation and persuasion or publicity. The Bureau of Corporations, which was established by the Act of Feb. 14, 1903, 32 Stat. 827, had no regulatory power. It was the direct predecessor of the Commission, by which it was absorbed. HENDERSON, \textit{op. cit. supra} note 14, at 40.

\textsuperscript{17} The Interstate Commerce Act § 15, 24 Stat. 384 (1887), added by ch. 3591 § 4, 34 Stat. 589 (1906), made all ICC orders effective for two years unless judicially suspended or set aside. However, only violations of rate-making orders were subject to sanction, a penalty provision. Interstate Commerce Act § 5, 34 Stat. 591 (1906). To prevent violations of other orders, the ICC had to apply to the circuit court for enforcement. In 1920 the penalty provision, was made applicable to all orders. Interstate Commerce Act, as amended, ch. 91 § 426, 41 Stat. 492 (1920), 49 U.S.C. § 16(8) (1958).

\textsuperscript{18} DICKINSON, \textit{op. cit. supra} note 16, at 11.

\textsuperscript{19} It was suggested that finality would violate the separation of powers and would be an unconstitutional delegation of judicial power. DICKINSON, \textit{op. cit. supra} note 16, at 17, 75; McFARLAND, \textit{op. cit. supra} note 14, at 5, 7, 12. It is still unclear whether a statute requiring a court to enforce administratively determined sanctions, with or without inquiry into the merits, is constitutional. ICC v. Brimson, 154 U.S. 447, 485 (1894); Note, \textit{Use of Contempt Power to Enforce Subpoenas and Orders of Administrative Agency}, 71 HARV. L. REV. 1541 (1958).

\textsuperscript{20} See note 14, \textit{supra}.


of the substantive reach of the Federal Trade Commission Act in the Wheeler-Lea Act of 1938.23

The Wheeler-Lea Act also contained important changes in the enforcement provisions of § 5 of the Federal Trade Commission Act. It provided that if the person ordered to cease and desist petitioned for review, the court of appeals could enforce the order without proof of a violation thereof.24 Surprisingly, the Commission was no longer permitted to initiate enforcement proceedings. However, if respondent failed to petition for review within sixty days, the order became final,25 and he became liable to the United States for a civil penalty of not more than $5,000 for each violation thereof, to be recovered in a civil action brought in the district court by the United States.26

Little Congressional attention was paid to any part of this novel enforcement scheme,27 and no mention was made of the events which had apparently provoked it.28 Its sponsors merely cited the allegedly analogous provisions of other acts29 and suggested that it would prevent a respondent from "playing fast and loose with the Commission's

26. Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. 15 U.S.C. § 45(1) (1958).
28. The National Labor Relations Board was created in 1935 and given enforcement procedures modeled after the Commission's. National Labor Relations Act § 10, 49 Stat. 453 (1935), 29 U.S.C. § 160 (1958). However, the Board's orders were immediately enforceable without prior proof of their violation. NLRA § 10(e), 29 U.S.C. § 160(e) (1958). The Commission, which is authorized to submit recommendations for additional legislation in its annual or any special reports to Congress, Federal Trade Commission Act § 6(f), 38 Stat. 721 (1914), 15 U.S.C. § 46(f) (1958), immediately requested similar permission and continued to request it. FTC Ann. Rep. 14 (1935); id. at 17 (1936); id. at 15 (1937); id. at 4 (1938).
No one seemed to care who this respondent was, how many like him existed or whether there were other ways of dealing with him.31

The passive acceptance by Congress of these changes was historically meaningful. They gave to the Commission weapons for the exercise of its general jurisdiction over commerce enforcement that theretofore only agencies regulating specific public utilities had enjoyed. Twenty-five years earlier such a pure strain of administrative adjudication had been almost unthinkable. Now it seemed that no one could even remember why. This change in thinking had not happened suddenly and dramatically. Administrative adjudication had simply become acceptable.

In 1950, in the course of Congressional consideration of the Oleomargarine Act,32 the Senate quietly adopted, on a proposal from the floor,33 a rider that added to the penalty section of the Federal Trade Commission Act the following language:

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

The Commission, which belatedly admitted after subsequent Congressional opposition34 that it had drafted the amendment,35 contended that it was a common statutory provision36 and that the "astronomical" penalties it theoretically permitted would never be sought or imposed.37

The rider was apparently introduced by the dairy interests to make the Oleomargarine Act unattractive38 and was reluctantly accepted by the margarine interests.39 The result was its enactment "with neither notice nor hearing to the affected public and without benefit of serious Congressional deliberation."40

31. Congressman Lea had in fact noted that the Commission was able to settle 95% of the cases "brought before it outside of court procedure." 83 Cong. Rec. 391 (1938).
32. 64 Stat. 20 (1950).
34. 96 Cong. Rec. 2973 (1950) (remarks of Representative Michener).
35. 96 Cong. Rec. 3026 (1950) (letter dated Jan. 12, 1950, from W. T. Kelley, General Counsel, Federal Trade Commission, to Senator George D. Aiken, who had introduced the amendment the same day).
36. The Commission again relied principally upon the Packers and Stockyards Act. It failed to cite the more analogous provision of the Interstate Commerce Act. See note 17 supra.
38. See note 34 supra.
These enactments made changes in the Clayton Act inevitable, and, after a series of unsuccessful efforts by the Commission,\(^{41}\) Congress finally passed the Finality Act of 1959,\(^{42}\) which contained amendments to the Clayton Act identical to those made to \(\S\) 5 of the Federal Trade Commission Act in 1938 and 1950.

In hearings on the Act, the Commission continuously pointed to the inadequacies of the Clayton Act enforcement scheme and the absence of reasons why it should not be made identical to \(\S\) 5 of the Federal Trade Commission Act.\(^{43}\) The history of a single protracted enforcement proceeding\(^{44}\) was chronicled\(^{45}\) to show the burdens of enforcement, and a table of civil penalty cases\(^{46}\) was offered to show the reasonableness of the penalties being assessed.

These changes were sharply opposed by several bar associations,\(^{47}\) which pointed out that it was extremely difficult for respondents to comply with the broad and unspecific orders generally issued by the Commission in Robinson-Patman Act cases, and that the penalty provision would, therefore, place them under a heavy burden. Previously problems of compliance with such orders were so satisfactorily handled by negotiation that the Commission had been required to institute enforcement proceedings in only two cases\(^{48}\) in twenty years. If the burden of such proceedings placed the Commission at a disadvantage at the bargaining table, it never said so.

In rejoinder the Commission contended there was no relation between the drafting and finality of its orders, the terms of which were, in any event, subject to judicial review.\(^{49}\) This argument apparently

\(^{41}\) As early as 1946, FTC ANN. REP. 12 (1946), id. at 13 (1947), id. at 12 (1948), the Commission requested such changes. The Attorney General’s Committee supported its request for finality in 1955, but concluded that “[T]his should be done when the presently exorbitant Federal Trade Commission Act penalty provisions have been reduced and the Commission makes more specific its orders, particularly in Clayton Act Section 2 cases.” ATT’Y GEN. NAT’L COMM. ANTITRUST REP. 374 (1955). The Commission, and subsequently Congress, ignored these reservations and continued to request legislation. FTC ANN. REP. 7 (1958); id. at 7 (1959). The Commission was supported by the President, who recommended such legislation in his Economic Report to Congress for the years 1956–59. 105 CONG. REC. 12733 (1959).


\(^{43}\) 1959 Hearings, supra note 12, at 18.

\(^{44}\) FTC v. American Crayon Co., 352 U.S. 806 (1956), see note 12, supra.

\(^{45}\) 1959 Hearings, supra note 12, at 37.

\(^{46}\) Id. at 28. This table contained only the names of the respondents and the penalties imposed. It did not indicate what amounts had been sought, whether the penalty was a consent figure or which cases were not subject to the 1950 amendment. It was significant that of the 92 respondents listed most were small concerns and only three had national reputations.

\(^{47}\) The Antitrust Section of the American Bar Association and the Association of the Bar of the City of New York submitted statements in opposition. 1959 Hearings 93, 96. A representative of the latter also testified before the House committee. Id. at 87.


\(^{49}\) 1959 Hearings, supra note 12, at 19.
carried the day, but not before the legislative history of the act had been sprinkled with Congressional exhortations to the Commission to draw its orders as specifically as possible.60

The Finality Act has placed business in an unfortunate dilemma. The root of this problem is the basic fact that it is extremely difficult to comprehend the vague standards of the Robinson-Patman Act, which is in addition a model of inept draftsmanship.61 Furthermore, businessmen and their counsel cannot always ponder these requirements at their leisure, because the pressures of competition frequently necessitate hasty, impromptu pricing decisions. Moreover, the margin for error is slim. The difference between a lawful and an unlawful price or allowance can be a single cent, but it marks the difference between healthy and desirable competition and a violation of the Act. An efficient buyer should receive the last penny of cost justification, and a seller should always be permitted to meet competition and usually to maximize his profits. Thus it is economically desirable that a businessman approach the vague line of illegality62 established by the Act, even though violations of the Act will inevitably occur.

The result of this situation is that most substantial concerns eventually violate the Act and become subject to a cease and desist order. Thereafter, unless they are unnecessarily inflexible in their conduct, they will take or contemplate action that, in the opinion of the Commission, violates the order. At first no sanction was involved, and the problem was usually settled informally. Now businesses must resist tremendous pressure to abandon the practice immediately to prevent the filing of a civil penalty suit.63

Presently there is no procedure generally available for definitively settling a compliance dispute64 other than by provoking a penalty suit. The Commission's rules permit a respondent to request compliance advice, but only with respect to proposed conduct.65 Such advice

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52. There is an analog to this situation in equity. Where a defendant, in the operation of a lawful business, innocently creates a nuisance through the emission of light, noise or fumes, and the business cannot be operated without such by-products, courts recognize that a “defendant has an equity to hew to the line and is well entitled, if not to a decree clearly marking out that line, at least to one which will not drive him as far from it as possible.” Note, 19 Mich. L. Rev. 83 (1920).

53. Ordinarily, if the violation is technical or inadvertent and compliance is immediate, the Commission staff will not recommend certification and the Commission will acquiesce in this decision. 1959 Hearings 22.

54. Persons subject to orders that have been judicially enforced may apply to the court for an interpretation or modification. United States v. Imperial Chemical Industries, Ltd., Trade Cas. ¶ 68,325 (S.D.N.Y. 1956); see New Jersey v. New York City, 296 U.S. 259 (1935).

55. 16 C.F.R. § 3.26(b) (Supp. 1964).
apparently cannot be treated as a final order subject to judicial review and does not seem to present a "case or controversy" for the purposes of a declaratory judgment action. 56 Section 5(d) of the Administrative Procedure Act empowers the Commission to issue, at its discretion, declaratory orders 57 that are subject to judicial review. 58 However, the Commission has not adopted rules implementing this authorization.

Unlike other agencies that may, but rarely do, recommend civil penalty actions, 59 the Commission has done so frequently. 60 In recent years it has certified Robinson-Patman actions for very large amounts. 61 In addition, despite representations to Congress that the $5,000 limit was a maximum, 62 it has adopted form complaints for such suits that always request $5,000 for each violation. 63

The threat of such large penalties undoubtedly has a substantial in terrorum effect upon respondents, especially small businesses, which have been the principal target of such suits. 64 Even big business, de-

56. Affirmative exercises of discretion by the Commission and the Attorney General are required before a penalty suit is filed, 1959 Hearings, supra note 43, at 22, and may prevent the existence of a case or controversy. Helco Products Co. v. McNutt, 137 F.2d 681 (D.C. Cir. 1943); Vulcanized Rubber & Plastics Company v. FTC, 258 F.2d 684 (D.C. Cir. 1958).


59. There are no reported cases under the similar provisions of the Interstate Commerce Act or the Packers and Stockyards Act. See notes 29, 36 supra.

60. 1959 Hearings 22.


64. See note 46 supra. Many of these cases end in consent judgments, some of which also enjoin further violations of the order. 1959 Hearings 24. The Commission's civil penalty table showed that twelve such injunctions had been entered against small respondents, id. at 28, who have also been the only recipients in more recent cases. 3 Trade Reg. Rep. ¶ 9711. Consent to such injunctions is required in settlements of less than one thousand dollars. Anderson, Settlement and Compliance Procedures, 14 A.B.A. Antitrust Section Rep. 66 (1959). There is no obvious authority for this practice. The Commission relies on Section 9 of the Federal Trade Commission Act, 38 Stat. 722 (1914), 15 U.S.C. § 49 (1958). This section is not applicable to the Clayton Act and merely authorizes the district courts to issue writs of mandamus to enforce compliance with orders issued under the Federal Trade Commission Act in connection with the examination of documentary evidence and witnesses. The section says nothing about civil penalty suits and accordingly has authorized the Commission since 1914 to enforce its orders in the district court, if the Commission's position is correct. Nevertheless there is dictum supporting the Commission's position. United States v. Universal Wool Batting Corp., Trade Cas. ¶ 70,168 (S.D.N.Y. 1961). Why the Commission seeks such injunctions is not clear. Perhaps it seeks to avoid future violations the right to jury trial, which is available in a civil penalty action but not in a contempt proceeding.

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spite its greater resources for resistance, must certainly anticipate larger penalties and may, therefore, concede questions that are not of major importance or whose outcome is doubtful.

Thus the Finality Act gives the Commission the power to act unreasonably in enforcing its orders. With the stakes at $5,000 a day, few respondents may be timorous or rich enough to risk them, despite the anticipated reasonableness of the courts in assessing penalties.\(^{65}\)

Such a result is most undesirable. The Commission will too frequently be able to impose its position in situations calling for negotiation and settlement or resolution by the courts. Furthermore, persons subject to orders will tend to follow a rigid policy of price making that is inefficient and uncompetitive.\(^{66}\) Obviously there is justification for fencing in persons who would be encouraged by loose enforcement to risk violations, and this possibility justifies a certain amount of interference with competitive freedom. However, the presence of this dilemma here to a degree not generally encountered in the enforcement of the antitrust laws\(^{67}\) suggests that some nice balancing is in order, especially in the positions of the parties at the bargaining table. Instead, the Commission's ability to threaten massive retaliation gives it an overwhelming advantage. It is not a sufficient answer to say that the Commission will wield its oversized power fairly or that the courts will

\(^{65}\) E.g., United States v. Home Diathermy Co., Inc., Trade Cas. \# 69,601 (S.D.N.Y. 1955); United States v. American Greetings Corp., 168 F. Supp. 45 (N.D. Ohio 1958), aff'd, 272 F.2d 945 (6th Cir. 1959). The usual procedure in civil penalty cases, even where the issues of fact have been submitted to a jury, has been for the judge to determine the amount of the penalty. In some cases courts have granted summary judgment on the question of liability in favor of the United States and stated that, as a result, no triable issue of fact remained. See e.g., United States v. Vulcanized Rubber & Plastics Company, 288 F.2d 257 (3d Cir.), cert. denied, 368 U.S. 821 (1961); United States v. Home Diathermy Co., Inc, supra. The Commission distinguishes between compensatory damages and a penalty for which no jury trial is required. In Missouri K. & T. Ry. Co. v. United States, 231 U.S. 112 (1913), which involved a similar type of penalty suit, the Court said: "The statute provides for a penalty not to exceed $500. It is argued that the amount of the penalty was for the jury, the proceeding being a civil suit. But the penalty is a deterrent, not compensation. The amount is not measured by the harm to the employee but the fault of the carrier, and being punitive, rightly was determined by the judge." 231 U.S. at 119. Whether this opinion survives more recent decisions favoring jury trial in certain contempt cases and in cases containing equitable issues is not clear. United States v. Barnett, 376 U.S. 681 (1964); Beacon Theatres v. Westover, 359 U.S. 500 (1959). In United States v. Hindman, 179 F. Supp. 926 (D.N.J. 1960), the court suggested that the jury must fix the amount of the penalty. However, the submission to the jury in that case of a liability question was disapproved by the third circuit in United States v. Vulcanized Rubber & Plastics Company, supra.


\(^{67}\) The existence of any antitrust order sets up a conflict between efficient enforcement and the discouragement of lawful conduct. However, the conduct which might be discouraged by a Robinson-Patman order is generally, as shown above, required by efficiency. This is not generally true with respect to other antitrust violations. Efficiency generally does not require a person to engage in conduct which approaches illegal price fixing, market division or exclusive dealing. Such conduct may be profitable, but it is not required by competition and often, despite its legality, is anticompetitive.
correct any abuses. Neither has always done so, and this possibility gives the threat a sufficient dimension of reality.

Thus it appears that the combination of finality and unlimited penalties is singularly inappropriate here. The Commission needs only a reasonable maximum penalty to police the minor violations that give rise to most penalty cases. For the occasional, serious violation it requires only the power to initiate judicial proceedings to enforce its orders.68 This combination will strike a fairer balance at the bargaining table and should reintroduce flexibility in the enforcement system.

The Finality Act will undoubtedly not be amended in the foreseeable future, and, therefore, the problems it creates will be thrust upon the courts. Ways will probably be sought to obtain declaratory orders from the Commission on compliance questions69 or at least to "firm up"70 compliance advice for declaratory judgment purposes. However, the Commission may be understandably reluctant to issue, in its discretion, favorable declaratory orders arising out of complex, factual situations, since such orders, which would not then be judicially reviewed, are, unlike compliance advice,72 binding upon it. And it may be impossible to create a "case or controversy" for declaratory judgment purposes, even if respondent has actually engaged in the prohibited practice.72 A more feasible, but perhaps unacceptable,78 solution may be a test civil penalty suit in which it is understood that substantial penalties would not be assessed.

Respondents will probably seek judicial review of Commission decisions more frequently to challenge the scope or terms of an order and to obtain the right subsequently to apply to the court for its interpretation. Although violations of final orders that have been judicially affirmed are also subject to contempt proceedings, many respondents

68. See note 28 supra.
71. Commission rules provide that advisory opinions, 16 C.F.R. § 1.51 (Supp. 1964), and compliance advice, 16 C.F.R. § 3.26(c) (Supp. 1964), may be revoked on notice to the affected party. No action will be taken against persons acting in reliance on such opinions.
73. In United States v. Vulcanized Rubber & Plastics Company, 288 F.2d 257 (3d Cir.), cert. denied, 368 U.S. 821 (1961), defendant was subjected to a civil penalty of $6,000 in what was obviously a suit to test a disputed compliance question. Defendant had previously attempted to raise the question, which arose shortly after the Commission's order was entered, in its petition for review in the Court of Appeals, but the Court declined to review the question because "this interpretation may be changed or it may never be enforced." Vulcanized Rubber & Plastics Company v. FTC, 258 F.2d 684, 685 (D.C. Cir. 1958).
would probably prefer 74 to have their violations judged before a court of appeals of their own choice 75 than before a district court chosen by the Commission for a civil penalty action. However, the Finality Act apparently gives the Commission in such cases its choice of enforcement proceeding 76 and therefore, it can probably choose the forum in which respondent will be punished.

As civil penalty suits proliferate, and the amounts demanded increase, greater attention will be focused on the important but unresolved problems they create. What questions are precluded by a final Commission order and what constitutes a change of circumstances justifying reexamination of precluded questions? 77 What is the division of responsibility between judge and jury? 78 What are the standards for assessing penalties? 79 May the court enter either consensual or non-consensual mandatory injunctions? Although these questions should be resolved in conformance with the apparently strict policy of the Finality Act, this strictness may be a factor in obtaining results looking the other way.

Respondents have thus far concentrated their attack on the scope of Commission orders and have, not surprisingly, met with some success. Although Congress was persuaded to consider the Finality Act's merits apart from the Commission's order writing practices, the courts could

74. Despite the ominous sound of a contempt citation, in practice the courts have shown great flexibility and fairness in setting punishment. Jaffe, The Judicial Enforcement of Administrative Orders, 76 Harv. L. Rev. 865, 886 (1963). District judges may be equally generous but they are often not as familiar with the Robinson-Patman Act and its difficulties and may be more inclined to accept Commission recommendations on penalties.

75. Section 11 of the Clayton Act, 38 Stat. 734 (1914), as amended, 15 U.S.C. § 21(c) (1958), permits a respondent to obtain a review of a cease and desist order "in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business. . . ." The breadth of this section gives many respondents a choice of circuits. It is common knowledge that some circuits are more likely to accord less weight to agency findings and discretion. Cooper, The Substantial Evidence Rule, 44 A.B.A.J. 945, 948 (1958). The popularity of the seventh circuit among Commission respondents is a testament to these differences, which are carefully recorded by some law firms in running box scores of affirmances and reversals.


77. This problem has already been extensively considered, but has not been resolved by the courts. FTC v. Ruberoid Co., 343 U.S. 470 (1952); Shniderman, Federal Trade Commission Orders under the Robinson-Patman Act: An Argument for Limiting Their Impact on Subsequent Conduct, 65 Harv. L. Rev. 750 (1952).

78. See note 65 supra; Austern, supra note 63, at 298.

not, since the scope of an order determines which subsequent violations will be subject to penalty.\textsuperscript{80} The story of this development and the direction it will or should take will be explored in the remainder of this article.

II.

In \textit{FTC v. Henry Broch \& Company},\textsuperscript{81} the Supreme Court was presented with its first opportunity to review the Finality Act. Broch, a broker of food products, reduced its regular commission to enable a principal to give a lower price to a buyer for an unusually large sale. The Commission found a violation of § 2(c)\textsuperscript{82} and ordered Broch to cease and desist (1) from selling for any principal to any buyer at reduced prices through reductions in its regular rate of commission and (2), in the language of § 2(c), from “[I]n any other manner, paying, granting or allowing . . . anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof” in connection with any such sales.\textsuperscript{83} The Seventh Circuit\textsuperscript{84} limited both paragraphs to the specific buyer and seller involved, but the broader language was restored by the Supreme Court.\textsuperscript{85}

The higher Court also affirmed paragraph (2) of the order despite its use of the statutory language. However, observing that the order was not subject to the 1959 amendments, the Court qualified its affirmance as follows:

We do not wish to be understood, however, as holding that the generalized language of paragraph (2) would necessarily withstand scrutiny under the 1959 amendments. The severity of possible penalties prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application.\textsuperscript{86}

This usage of the statutory language had been approved by the Court in 1952 in \textit{FTC v. Ruberoid Co.}\textsuperscript{87} Thereafter, the Commission aband-

\textsuperscript{80} Jaffe, \textit{supra} note 74, at 885.
\textsuperscript{81} 368 U.S. 360 (1962).
\textsuperscript{82} The finding of violation had been affirmed in an earlier opinion of the Court. \textit{FTC v. Henry Broch \& Co.,} 363 U.S. 166 (1960).
\textsuperscript{84} \textit{Henry Broch \& Co. v. FTC,} 285 F.2d 764 (7th Cir. 1960).
\textsuperscript{85} Three dissenting justices would have affirmed the Court of Appeals. \textit{FTC v. Henry Broch \& Co.,} 368 U.S. 360, 367 (1962).
\textsuperscript{86} \textit{Ibid.}
\textsuperscript{87} 343 U.S. 470 (1952).
oned other forms of orders and used this Ruberoid type almost exclusively.

Ruberoid orders have usually been assailed on two grounds, their lack of specificity and their undue scope or breadth in that they encompass every violation of the particular subsection of the Act whose language they incorporate. These two objections are actually interrelated. If the offense calls for an order covering all violations, there is no more specific expression of this conclusion than the statutory language. Narrower orders are ordinarily not much more specific, except when they describe the particular violation in detail. However, such limited orders can be evaded easily. Intermediately broad orders would seem to require the use of some of the statutory language and perhaps in addition a vague residuary prohibition of like, similar, substantially similar or related conduct. Such orders would be easier to obey than Ruberoid type orders because they cover fewer practices, whose description is the principal source of ambiguity in orders. But they would not be inherently more specific.

If ambiguity is a necessary byproduct of orders broad enough to discourage evasive practices, it follows that the real objection to the Ruberoid type order is not that it is ambiguous but that it is unduly broad. Conversely its only logical justification is that such breadth is in fact desirable. The case for such breadth is stated in Ruberoid as follows:

Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.

88. For a review of the Commission's prior experiments in order-writing; see Rowe, Price Discrimination under the Robinson-Patman Act 505 (1962); Shniderman, supra note 66.
89. Rowe, op. cit. supra note 88; Hearings, supra note 43, at 87. Examples of such orders, in addition to those in Ruberoid (§ 2(a) secondary line discrimination) and Broch (§ 2(c)) are: Maryland Baking Co. v. FTC, 243 F.2d 716 (4th Cir. 1957) (§ 2(a) primarily line discrimination); E. Edelmann & Co. v. FTC, 239 F.2d 152 (7th Cir. 1956) (§ 2(a) secondary line discrimination); P. Lorillard Co. v. FTC, 267 F.2d 439 (3d Cir. 1959) (§ 2(d)).
This passage makes it clear that narrow orders may often be ineffective and that there is an enforcement advantage in covering every other violation. But it ignores the obvious disadvantages of such a practice traditionally recognized in related administrative\(^98\) and judicial\(^94\) areas; namely, the danger of prohibiting or discouraging innocent conduct and the fairness to a respondent in rendering him subject to contempt proceedings for future violations unrelated to his initial wrongdoing.\(^95\)

*Ruberoid* type orders have often been defended as acts of administrative expertise and discretion in the choice of remedies.\(^96\) This argument may be appropriate in individual cases, but it certainly cannot justify the Commission’s practice of entering such orders consistently and routinely. By contrast, such orders have on occasion been discretionarily limited in scope with respect to a respondent’s products\(^97\) or his business subdivisions,\(^98\) although there is no apparent reason for this difference.

Both *Broch* and *Ruberoid* offered a significant excuse for the all-inclusive order. In *Broch*, after noting that the order was not subject to the 1959 amendments and that respondent was not thereby “acting under the risk of incurring any penalty without further administrative and judicial consideration and interpretation,”\(^99\) the Court said:

> Upon any future enforcement proceeding, the Commission and the Court of Appeals will have ready at hand interpretive tools — the employment of which we have previously sanctioned — for use in tailoring the order, in the setting of a specific asserted violation, so as to meet the legitimate needs of the case. They will be free to construe the order as designed strictly to cope with the threat of future violations identical with or like or related to the violations which Broch was found to have committed, or as forbidding “no activities except those which if continued would directly aid in perpetuating the same old unlawful practices.”\(^100\)

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\(^96\) FTC v. Ruberoid, 343 U.S. 470, 473 (1952).

\(^97\) E.g., Pittsburgh Plate Glass Co., 53 F.T.C. 902 (1957); Goodyear Tire & Rubber Co., 50 F.T.C. 143 (1953).

\(^98\) E.g., Bankers Securities Corporation v. FTC, 297 F.2d 403 (3d Cir. 1961). Frequently product limitations are based on the fact that a discrete economic unit of respondent, solely responsible for the products covered by the order, committed the violation. E.g., Quaker Oats Co. v. FTC Dkt. 8119 (April 25, 1962), Trade Reg. Rep. (1961-63 FTC Complaints, Orders, Stipulations) ¶ 15,858.


\(^100\) Id. at 366.
This passage seems to say euphemistically that an unduly broad order should not be reversed because no sanction could be imposed for its violation; and that in subsequent proceedings a court could ignore its specific terms and punish only for like or related offenses.

This argument may have appealed to those that regarded the strengthening of the original enforcement procedures of the Clayton Act as a proper judicial function. However, it applied with equal force to other scope questions, which were treated differently. Furthermore, it justified the transfer to the courts of the primary burden of determining the proper scope of an order and deprived them of the very discretion and expertise that the administrative process contemplates. An order found to be within the Commission's discretion, and affirmed judicially on that basis, is supposedly something more than a precatory admonition whose terms the court may in its own discretion subsequently disregard. Although courts exercise substantial discretion in the imposition of punishment for the violation of an order, their exercise of discretion with respect to its terms seems to be contrary to the concept of administrative adjudication.

As Broch suggests, the Finality Act made this excuse for the Ruberoid practice untenable. Nevertheless, the Commission has, despite avowed adherence to Broch, continued to follow it. This persistence has, however, been challenged by the courts, which have recently modified a significant number of overly broad post-1959 Commission orders.

The first two cases arose out of the same transaction. Grand Union, an operator of retail food stores, induced Swanee Paper Corporation and other suppliers to purchase advertising on an electric sign permanently featuring its name. The Commission found that Swanee had violated §2(d) and that Grand Union's inducement violated §5 of the Federal Trade Commission Act. In both cases Ruberoid type orders were entered. The Second Circuit affirmed the findings of vio-
lation but limited each order to the particular unlawful practice involved. In *Swanee* the court found that the “breadth of the order issued is not justified by the facts”\(^{106}\) and is “not even limited to related activities.”\(^{106}\) In *Grand Union*, it observed that the finding of a single violation did not permit an injunction against all violations of the statute.\(^{107}\) Both opinions noted that the violations were not serious,\(^{108}\) both made reference to the 1959 amendments and the resulting need for more specific orders.\(^{109}\)

The Commission was soon able to respond to these decisions.\(^{110}\) Vanity Fair, a large producer of household products, had twice granted to a chain store in connection with a special sale or event a promotional allowance of $215 for newspaper advertising and in-store displays.\(^{111}\) Notice of the availability of these allowances, which supplemented respondent’s regular and more extensive cooperative advertising program, had not, in violation of § 2(d), been given to other customers.

The Commission gratuitously reduced the product scope\(^{112}\) of the *Ruberoid* order entered by the hearing examiner, but it refused respondent’s request to limit the order to allowances for newspaper advertising and in-store displays. This denial was not unreasonable but was justified broadly. The Commission agreed that orders under the Clayton Act should be made as definitive as possible, but argued that Section 2(d) of the Act was in itself a very narrow definition of an

\(^{105}\) 291 F.2d 833, 837 (2d Cir. 1961).

\(^{106}\) Id. at 838.

\(^{107}\) 300 F.2d 92, 100. *Swanee* was decided just before *Broch*. *Grand Union*, which was decided just thereafter, merely noted it in passing.

\(^{108}\) In *Swanee* the Court noted that the single violation was not “flagrant or excessive,” that it “occurred in an uncertain area of the law and was discontinued before the complaint was filed.” 291 F.2d 833, 838. In *Grand Union* it noted that the single violation was not flagrant, the application of § 5 was admittedly novel, the arrangement had terminated, “and there is nothing in the record to suggest that Grand Union intends to resume this or any related activity.” 300 F.2d 92, 100.

\(^{109}\) American News Company v. FTC, 300 F.2d 104 (2d Cir. 1962), cert. denied, 371 U.S. 824 (1962), which was decided the same day as *Grand Union*, similarly involved the inducement of special allowances. Although the amount involved was considerable, the Court, without discussion and on the authority of *Grand Union*, limited the order to the specific practice involved, the inducement and receipt of display and promotional allowances.


\(^{111}\) Vanity Fair had twice chosen from a host of options offered by the customer one of the least expensive ones. Its parsimony suggested that it did not participate in such programs willingly and that its failure to proclaim to its customers the availability of such allowances arose from this attitude rather than from any desire to prefer certain customers. Vanity Fair Paper Mills, Inc. v. FTC, 311 F.2d 480, 486 (2d Cir. 1962), cert. denied, 372 U.S. 910 (1963).

\(^{112}\) The order covered “paper products or other merchandise.” Since the record disclosed only that respondent manufactured household paper products, the phrase “or other merchandise” was struck from the order. The Commission, however, refused to limit the order further to “household paper products” because such a limitation would create problems in interpreting the order. Trade Reg. Rep. (1961–63 FTC Complaints, Orders, Stipulations) ¶ 15,796, at 20,610.
illegal trade practice. Swanee was distinguished because it involved only a single violation in an uncertain area of the law.¹¹³

Commissioner Elman, dissenting, argued that the vice of the order was not in its scope but its incorporation of the vague statutory language. He recommended that it should affirmatively require respondent to advise customers of the existence and practice of its policy with respect to special promotional allowances. Such an order could be easily understood and obeyed and would not impose upon the courts the Commission's obligation to interpret and apply it.

The Second Circuit'⁴ affirmed the Commission's refusal to limit the order to the specific practices involved. But, it concluded, "a description of the forbidden conduct in terms of 'advertising or promotional display services or facilities and like or related practices' would, we think, be somewhat better related to respondent's offending while still sufficiently prohibiting 'variations on the basic theme.'"¹¹⁶

Judge Friendly also characterized as "factious"¹¹⁷ the difficulty respondent foresaw in complying with the broad order. He suggested that the disclosure of practices in compliance reports¹¹⁸ would protect it from a surprise penalty suit and the Commission's offices were open for the consideration of new practices. However, he did not consider whether the threat of a penalty suit might permit the Commission to impose upon respondent in such confrontations its view for the indeterminate life of the order and in changing circumstances of what constituted satisfactory compliance. Nor did he consider what respondent should do when there was insufficient time to obtain a ruling. Certainly it is no small matter to require so many businesses to proceed at their own risk or by leave of the Commission.

Soon after, in Quaker Oats,¹¹⁹ the Commission made its position clear. There, the person in charge of sales of the autonomous and geographically-separate cat food division of Quaker Oats had, after being solicited by a personal friend, paid a promotional allowance of $250 to a chain store for a special event.

¹¹³. Ibid. What the Commission means here is unclear. There had been no admission of illegality in the other cases. Nor was there any evidence that respondent had granted any other unlawful allowances.


¹¹⁵. It is not clear what the "like or related practices" language adds to the coverage of the order, since the preceding words are themselves quite broad.


¹¹⁷. Id. at 488. This language was quoted with approval in Giant Food, Inc. v. FTC, 322 F.2d 977 (D.C. Cir. 1963).

¹¹⁸. See note 79 supra.

The hearing examiner, convinced that the violation was only an aberration, entered an order sharply limited in scope to "cat food and related products" and to "a special promotion, event, anniversary or like merchandise plan." The Commission affirmed the product limitation but broadened the practices to payments for "advertising, promotion or display services or facilities," which payments, it argued, were acts "like or related" within the meaning of *Broch* to the actual violation. An order was justified because respondent had previously violated the "equally explicit" language of § 2(c).

Commissioner Anderson dissented on the ground that the facts did not justify the entry of any order. Commissioner Elman also dissented. He reiterated the suggestion in his *Vanity Fair* dissent that the Commission should enter an affirmative order setting forth a compliance program designed to prevent the recurrence of similar violations. Alternatively, he argued that the order should have been drastically limited or, if that was ineffective, no order should be entered at all. Unfortunately respondent failed to seek judicial review of the order.

*Vanity Fair* and *Quaker Oats* apparently evidenced an initial disinclination on the Commission's part to alter substantially its pre-1959 policy.

120. Respondent's other division had refused a similar solicitation by the same person and had advised him of the company's policy against granting such allowances. The company's legal staff, to which such requests were to be submitted for approval, learned of the unauthorized payment only after an inquiry by the Commission. Respondent also took precautions, after the sales manager's retirement, to prevent a recurrence of such violations.

121. This is a specious argument based on the position that § 2(d) is a narrowly defined trade practice. The Commission also argues in the opinion that § 2(c) is "equally explicit," so it would follow that a *Ruberoid* type § 2(c) order would cover only acts like or related to any given violation of § 2(c). The result is clearly contradictory to *Broch*.

122. The case referred to was *Modern Marketing Service, Inc. v. FTC*, 149 F.2d 970 (7th Cir. 1945). In this case *Quaker Oats* and a number of other nationally known manufacturers had paid brokerage fees to a wholesalers' cooperatively owned purchasing agency that paid dividends to its owners. The violations occurred before 1940, only a few years after the brokerage clause was enacted, in a case apparently of first impression. This violation hardly evidenced a propensity to violate the act or required the entry of another order over twenty years later.

123. "If the only order which can justifiably be entered on the record is an exceedingly narrow and limited order which would accomplish little or nothing, it does not follow that the Commission should therefore enter a broad order not justified by the record. There remains another alternative: to issue no order and dismiss the complaint." *Quaker Oats Co., FTC Dkt. 8119* (April 25, 1962), *Trade Reg. Rep.* ¶ 15,858, at 20,654. Commissioner Elman also suggested that after respondent had explained the circumstances of the transaction and taken steps to prevent its recurrence, the Commission might have closed its file. *Vanity Fair* probably could have been similarly settled informally. Why then were substantial resources committed to the litigation of these two cases, when the Commission is usually forced to allocate its limited resources carefully? There is a nagging suspicion here that these two cases were litigated precisely because they offered easy opportunities to obtain orders against two large companies. The Commission's success here is an invitation to it to search out and litigate other penny-ante violations by large businesses. The results of such a program would be statistically impressive but most unfortunate. Such a possibility should be appropriately discouraged by limiting the orders entered in such cases.
practices. Subsequently, however, in *Transogram Co., Inc.*, which involved toy manufacturers that had granted allowances to customer-owned toy catalog companies, and in *All-Luminum Products, Inc.*, which similarly involved catalog and trade-show promotional allowances, the Commission limited the order to the specific kind of advertising involved. Commissioner Elman, who wrote both opinions, emphasized that the violations in these cases arose out of a special kind of activity that furnished no inference that respondents would otherwise seek to violate § 2(d). *Vanity Fair* and *Quaker Oats* were distinguishable because those respondents had acceded to special requests of buyers and "[I]n such a situation there is a danger of the violation manifesting itself in an indefinable variety of ways in the future." 

The Commission has not otherwise changed its practices. It continues to write *Ruberoid* orders in § 2(a), § 2(c) and consent cases. However, the courts have continued to reject broad orders, and further concessions by the Commission are to be anticipated.

These cases must be evaluated cautiously because they involve judicial review of administrative discretion and, of necessity, turn peculiarly on their particular facts and circumstances. None of the opinions purports to find an improper standard or abuse of discretion, which is

127. In *Transogram* the order was limited to payments or allowances for advertising by means of any type of printed buying guide distributed by respondents' outlets or their publishing instrumentalities. In *All-Luminum* the order was limited to payments or allowances for advertising or other publicity services furnished in a catalog, or other publications serving the purpose of a buying guide, or in a trade show.
130. *Rowe*, *PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT* 514 n.174n (1964 Supp.).
131. *Id.* at 514 n.174j.
132. *Id.* at 514 n.174c.
133. R. H. Macy & Co. v. FTC, 326 F.2d 445 (2d Cir. 1964) (unlawful inducement and receipt of payments for institutional advertising — order limited to specific practice); *Country Tweeds, Inc.* v. FTC, 326 F.2d 144 (2d Cir. 1964) (false advertising — paragraph generally prohibiting misrepresentation of the quality of respondent's fabrics struck from order); *Giant Food, Inc.* v. FTC, 307 F.2d 184 (D.C. Cir. 1962) (knowing inducement and receipt of discriminatory display and promotional allowances — order so limited); *Korber Hats, Inc.* v. FTC, 311 F.2d 358 (1st Cir. 1962) (mislabeling violation — residuary cause generally prohibiting misrepresentation with respect to a single product modified); *Colgate-Palmolive Company v. FTC*, 319 F.2d 89 (1st Cir. 1962), 326 F.2d 517 (1st Cir. 1963) (misadvertising — overly broad order rejected). In a few recent cases broad Commission orders have been sustained. *Mueller Co. v. FTC*, 323 F.2d 44 (7th Cir. 1963) (secondary line price discrimination — citation of *Broch* or other recent cases); *Western Fruit Growers Sales Co. v. FTC*, 322 F.2d 67 (9th Cir. 1963) (¶ 2(c) order sustained; *Broch* distinguished on the ground that the second paragraph of the order began "in any other manner," a distinction without substance); *Giant Food, Inc.* v. FTC, 322 F.2d 977 (D.C. Cir. 1963) (deceptive advertising).
supposedly a prerequisite to the modification of an order. 134 None sug-
gests that the Finality Act necessitates a significant shift in the Com-
mission's outlook. Perhaps their uniformity of result requires the
drawing of such an inference, but it would have been preferable if they
had said so specifically. Furthermore, most of these cases involved
orders which were clearly too broad or arose out of what appeared to
be a Commission campaign to stop the sporadic payment and induc-
ment of ad hoc promotional allowances. Subsequent offenders may not
be treated as gently, now that the law is clear.

Therefore, it is possible that a slight shift in the Commission's
posture will be sufficient to restore a friendly judicial climate. The
Broch dictum established, after all, only a countervailing principle to
those relied upon in Ruberoid, and it could easily be disregarded in
future cases. Furthermore, only the Second Circuit has spoken exten-
sively on this question, and other circuits may view the matter with less
concern. 135

Despite these limitations, it can be said that the courts will no
longer tolerate the routine use of Ruberoid type orders, that they will
examine orders more carefully than before and that they will require
from the Commission a specific justification in the record for a broad
order. As Commissioner Elman has observed:

If the Commission is relying on its special or generalized exper-
ience and expertise, such reliance should be explicit and reasoned.
The practice of entering broad orders in the terms of the statute,
routinely and automatically without citing need or justification
thereof is indefensible as a matter of law and sound administra-
tion; and I would assume it to be a thing of the past. 136

There is also an implication in the decisions that the Commission
must now make out a stronger case than before to obtain a broad order,
but the extent of this requirement is unclear. Although the Second
Circuit usually limited the order to the specific unlawful practices,
those cases involved novel questions of law and limited violations.
Perhaps in more serious cases there will be a tendency towards the use

134. There is a suggestion in Note, Permissible Scope of Cease and Desist Orders;
Legislation and Adjudication of the F.T.C., 29 U. CHI. L. REV. 706 (1962), that the
entry of statutory orders by the Commission is an adjudicative, rather than a legisla-
tive, function, the exercise of which courts may review more closely. Such formalistic
distinctions do not seem useful here and tend to create unnecessary rigidity, incon-
venience and injustice if pushed too far. Jaffe, The Judicial Enforcement of Adminis-

135. This is unlikely. The second circuit has in the past been less inclined than
most other circuits to reverse discretionary administrative determinations. Cooper,
The Substantial Evidence Rule, 44 A.B.A.J. 945, 948 (1958). But cf. Western Fruit
Growers Sales Co. v. FTC, 322 F.2d 67 (9th Cir. 1963).

of intermediately broad orders, such as the current practice under § 2(d) of describing the services or facilities for which the payments have been made.\textsuperscript{137}

The "like or related to" approach used by Judge Friendly in \textit{Vanity Fair} may not have been useful there,\textsuperscript{138} but it makes possible compromises in cases where the order seemingly can be written only quite narrowly or in the general statutory language. For example, a compromise order could have been written in \textit{Broch} by dropping the second paragraph and prohibiting "like or related" practices in the first.

This approach may also be useful in cases under § 2(a), which like § 2(c) cannot be parsed as readily as § 2(d). Thus, where the cost justification of a discount system is rejected because it contains an improper grouping or classification, the order could prohibit discriminations in price arising from a price or discount policy based upon the improper classification,\textsuperscript{139} or "like or related" classifications.

This approach will not make orders more specific. The "like or related" language is itself ambiguous. But such orders can be complied with more easily because they reduce the number of practices covered by the order. They are also broad enough to prevent "variations on the theme." Thus, they offer the possibility of an accommodation between the demands of enforcement and fairness in an area where polar positions predominate and no other solution has been proffered.

No case has yet followed Judge Friendly's lead.\textsuperscript{140} However, \textit{Broch} and many of the other opinions espouse the principle that orders should ordinarily prohibit only conduct like or related to the actual violation.\textsuperscript{141} Even the Commission has embraced it.\textsuperscript{142}

In many recent cases the Commission has entered compromise orders: a limitation on the products covered and the use of the full statutory language.\textsuperscript{143} The converse and less ambiguous approach — products defined broadly and practices defined specifically — is rarely

\textsuperscript{137} Such orders range from the carefully tailored orders in \textit{Transogram} and \textit{All-Luminum Products, Inc.}, to the "advertising, promotion or display services or facilities" of \textit{Quaker Oats} and \textit{Vanity Fair}, to "all services and facilities." See Rowe, op. cit. supra note 130, at 514 n.174g, n.174i.

\textsuperscript{138} See note 115 supra.

\textsuperscript{139} In a brief filed with the Supreme Court in 1962 the Solicitor General of the United States proposed such an order limited to a "price or discount policy based upon a classification of its customers into chain stores or independent stores." Brief for United States, p. 50, United States v. Borden Co., 370 U.S. 460 (1962).

\textsuperscript{140} Commissioner MacIntyre, dissenting in \textit{All-Luminum Products, Inc.}, FTC Dkt. 8485 (Nov. 7, 1963), 3 Trade Reg. Rep. (New FTC Complaints, Orders, Stipulations) ¶ 16,665 would have entered this form of order in that case.

\textsuperscript{141} The cases usually cited for this principle are \textit{FTC v. M"{a}ndel Bros., Inc.}, 359 U.S. 385 (1959) and \textit{NLRB v. Express Pub. Co.}, 312 U.S. 426 (1941).


\textsuperscript{143} E.g., \textit{Quaker Oats Co.}, supra note 142; see Rowe, op. cit. supra note 130, at 514 n.174e.
used. Ostensibly the Commission prefers the former because the order is easier to draft. However, it also seems to believe that such an order will more probably cover future violations than the converse order. Thus, it was suggested in *Quaker Oats* that the respondent would be unlikely to commit the same violation, even in connection with different products; but it was anticipated that it might commit a different violation of the same subsection, even in connection with the same products.\(^{144}\) Such reasoning seems to be based on the assumption that an order should concern itself less with the prevention of the specific wrongs that occasioned it and more with the ability to punish less-related future conduct. This assumption is unacceptable, and, therefore, such compromise orders should be carefully scrutinized.

Commissioner Elman’s proposals for affirmative orders detailing a program of compliance have attracted no vocal adherents\(^{145}\) and some critics.\(^{146}\) It is also possible that the Commission is not authorized to enter them.\(^{147}\) However, they can be more specific than regular orders\(^{148}\) and therefore, merit some consideration.

\(^{144}\) *Quaker Oats Co.*, *supra* note 143, at ¶ 20,649. This probability cannot be conclusively demonstrated. However, most respondents will usually take steps to avoid their former unlawful practices, for which the Commission will be watching and punishment will be swift. To the extent they wish to get around the law, they are wiser to try a different practice, therefore. If the second violation is inadvertent, the law of averages suggests that it will result from a different practice.\(^{145}\) Judge Friendly has remarked that such experimentation would seem “useful,” but is not “required.” *Vanity Fair Paper Mills, Inc. v. FTC*, 311 F.2d 480, 488 (2d Cir. 1962), *cert. denied*, 372 U.S. 910 (1963).

\(^{146}\) The rest of the Commission has characterized this approach as a bureaucratic intrusion into the control and direction of corporations. *Quaker Oats Co.*, FTC Dkt. 8119 (April 25, 1962), Trade Reg. Rep. (1961–63 FTC Complaints, Orders, Stipulations) ¶ 15,858, at 20,650. This is an overstatement. Such orders would only require affirmative action that any firm desiring to comply with an order would take voluntarily. In fact, respondent would probably be required to come forward with an appropriate order. *Quaker Oats Co.*, *supra* at ¶ 20,652.

\(^{147}\) Section 11(b) of the Clayton Act, 38 Stat. 734 (1914), 15 U.S.C. § 21(b) (Supp. IV, 1963), authorizes the Commission only to issue an order requiring respondent “to cease and desist from . . . violations.” This language may not permit the issuance of affirmative commands, even if they are artfully couched in the familiar language of a cease and desist order. Commissioner Elman has optimistically said: “At all events, it is now clear that the Commission, no less than a court of equity, has ample power to provide such relief as may be necessary and appropriate, whether under Section 5 or under the Clayton Act.” Address, Third Antitrust Conference of the National Industrial Conference Board, New York City, March 5, 1964. He relies upon cases requiring certain advertising disclosures. *E.g.*, *Kelee Hair & Scalp Specialists v. FTC*, 275 F.2d 18 (5th Cir. 1960). However, these cases are based upon the definition of false advertising, which includes the failure to include facts material in the light of representations in the advertising. He also relies on Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963), which holds that the Civil Aeronautics Board, may, under provisions similar to § 5 of the Commission Act, issue an order requiring divestiture. However, the Supreme Court has held that the Commission may not do this. *FTC v. Eastman Co.*, 274 U.S. 619 (1927) (Stone and Brandeis dissenting). These cases are also distinguishable. The CAB has full regulatory power over airlines, which must obtain its consent to all mergers. The Commission has no such power. See General Inv. Co. v. New York Central R. Co., 23 F.2d 822, 824 (6th Cir. 1928).

\(^{148}\) In cases involving the abatement of a nuisance arising from the emission of noise, fumes or light by a lawful and useful business, courts have frequently issued specific, affirmative decrees. *E.g.*, *Collins v. Wayne Iron Works*, 227 Pa. 326, 76 Atl.
A respondent subject to and in compliance with such an order apparently would not be subject to sanction for any violations arising out of the practices covered by it. This dispensation might encourage him to be careless. Although "accidental" violations could be discouraged by the threat of subsequently entered regular orders, the Commission might be understandably reluctant to allow some persons another free violation. On the other hand if a regular order is also entered, an inadvertent violation of it would apparently subject respondent to sanction, even though respondent had faithfully complied with the affirmative part of the order. Such compliance would undoubtedly mitigate the penalty imposed. However, similar mitigation would be expected if respondent had adhered, under a regular order, to a similar, self-imposed scheme of compliance. Although the incorporation of the scheme into the order would prevent the Commission from sharp-shooting its provisions, the same protection could probably be achieved by disclosing it in compliance reports.

In *Vanity Fair* and *Quaker Oats* the violations were occasioned principally by failures to act: in the former, to give notice of special allowances and in the latter, to supervise properly a subordinate executive. In such cases, affirmative commands might be appropriate. However, where the violation is primarily the product of misfeasance, such orders would not seem to be useful. Since the latter situation undoubtedly occurs more frequently, this approach does not appear to be an alternative for the usual run of cases.

III.

In the preceding section the standards for reviewing Commission orders were considered. It is now appropriate to evaluate the criteria considered by the Commission in drafting an order. These processes are distinguishable:

Granted that the Commission has undoubted power to formulate a remedy adequate to prevent repetition of the violation found, an analysis of the nature of the violation is still necessary to a decision of how that power should be exercised. What the Commission may do — i.e., has authority to do — and what it ought to do in

24 (1910); Payne v. Johnson, 20 Wash. 2d 24, 145 P.2d 552 (1944). In some cases courts have issued experimental decrees providing for a period of time in which to test the efficacy of certain affirmative procedures or devices. E.g., Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907).

149. Cf. Northwood v. Barber Asphalt Paving Co., 126 Mich. 284, 85 N.W. 724 (1901) (continuation of nuisance found to be contempt of decree generally enjoining nuisance, although defendant had complied with affirmative devices and procedures also prescribed by the decree).

150. For this reason perhaps Commissioner Elman did not raise the question of affirmative orders in *Transogram* and *Al-Luminun Products.*
a particular case are related, but nonetheless different questions. Many courses may be open in the sense that, if followed, they will not be reversed on appeal. Choosing the best of these courses is not merely the Commission's statutory prerogative; it is also the Commission's statutory duty.\textsuperscript{151}

The primary question is the scope of the order, particularly the scope of the practices to be covered, and the starting point is an analysis of the record.

The reason for the Commission's reference to the facts in each case is simple. The purpose of an order is to prevent statutory violations, the occurrence of which in the future appears likely on the basis of reasonable inference from events that have already taken place. This does not mean that the Commission is so tightly bound to the facts that it must draft its prohibitions so narrowly that only the precise acts previously undertaken by a respondent are proscribed for the future. (It does mean that our objective in drafting orders must be to restrain unlawful acts and practices "whose commission in the future, unless enjoined, may fairly be anticipated from the [respondent's] conduct in the past").\textsuperscript{152}

Many of the innumerable situations that may give rise to a violation occur frequently, and the facts relevant to a respondent's potential recidivism can be catalogued. However, evaluating or weighing them is difficult and often arbitrary because they are so "equitable" in nature and often cut both ways. As a result, commentary tends to reduce itself to comparisons between black and white situations. Nevertheless such a compilation may offer some insight into the Commission's task. The following list is not exhaustive. However, it does represent a fair sampling of the considerations which the Commission and the courts have recently found relevant to the question.

1. \textit{Was the violation reckless or intentional?}

The Commission may properly find, as a court does, that a person intends the natural and probable consequences of his acts.\textsuperscript{153} Both, however, must recognize distinctions in entering judgment. It is one thing to engage covertly in manifestly unlawful conduct. It is another to engage openly in conduct that is of uncertain legality\textsuperscript{154} or represents a long-standing, industry-wide policy never seriously questioned.\textsuperscript{155} Such

\textsuperscript{152} Id. at ¶ 20,905.
\textsuperscript{153} See United States v. Masonite Corporation, 316 U.S. 265, 275 (1942).
\textsuperscript{154} E.g., Grand Union Company v. FTC, 300 F.2d 92 (2d Cir. 1962).
\textsuperscript{155} Transogram Company, Inc., FTC Dkt. 7978 (Sept. 19, 1962), Trade Reg. Rep. (1961–63 FTC Complaints, Orders, Stipulations) ¶ 16,080. "We do know that
violations do not readily suggest a propensity to engage in other unlawful activities. This is not to say that business is generally unaware of the possible illegality of its practices. Many corporate executives have learned to spot antitrust problems, and counsel will usually be aware of long-standing practices. In fact, the files of the company or its attorneys will usually contain a legal memorandum evaluating the question.

But business cannot eschew all doubtful practices, especially since their legality can be resolved only by doing the acts and waiting for the Commission to act. Perhaps such practices should be disclosed to the Commission and an advisory opinion sought, but some consideration should be given to the understandable reluctance of business to stir up trouble.

Often infractions are the product of carelessness, nonfeasance, reluctant acquiescence to the demands of a powerful buyer or a good faith but unsuccessful attempt to comply with a difficult requirement of the law. Here too some consideration may be appropriate. However, the standard is more than honesty or good faith stupidity. Employees must be properly supervised and taught the requirements of the law. A company must take affirmative action clearly required by the Act, and, if it seeks to avail itself of exceptions or defenses, it must do so with care and ability. Large corporations with sophisticated counsel may even be held to a higher standard because they are more aware of the law's subtleties.

There are, however, some infractions for which even the most sophisticated are deserving of sympathy. The cost justification and catalogue advertising has been common practice in the industry. We know also that it is difficult to obtain a declaratory judgment that conduct does not violate the antitrust laws. Helco Products Co. v. McNutt, 137 F.2d 681 (D.C. Cir. 1943). Such relief is available only in unusual situations. E.g., FTC v. Nash-Finch Company, 288 F.2d 407 (D.C. Cir. 1961) (suit to determine the effect of a Commission press release that orders would become final unless petitions for review were immediately filed). Even if a case and controversy is established, relief may not be granted because the Commission has primary jurisdiction of such matters. Pub. Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 246 (1952).

156. It is difficult to obtain a declaratory judgment that conduct does not violate the antitrust laws. Helco Products Co. v. McNutt, 137 F.2d 681 (D.C. Cir. 1943). Such relief is available only in unusual situations. E.g., FTC v. Nash-Finch Company, 288 F.2d 407 (D.C. Cir. 1961) (suit to determine the effect of a Commission press release that orders would become final unless petitions for review were immediately filed). Even if a case and controversy is established, relief may not be granted because the Commission has primary jurisdiction of such matters. Pub. Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 246 (1952).

157. Commission rules permit non-reviewable, revocable advisory opinions "where practicable," if the course of action involved is not yet being followed and is not under investigation. FTC Procedures and Rules of Practice § 1.51, 16 C.F.R. § 1.51 (Supp. 1964).


160. Ibid.

meeting competition defenses have been interpreted so narrowly and technically that few have invoked them successfully.\textsuperscript{162} Yet both represent exceptions to the Act that are required by efficiency.\textsuperscript{163} A relaxation of the substantive requirements of these defenses is really necessary. Meanwhile, the Commission should be tolerant whenever they are invoked in good faith\textsuperscript{164} and narrowly fail.\textsuperscript{165}

The Commission may consider whether the respondent has previously violated the Act, but such inquiry is subject to abuse.\textsuperscript{166} Most businesses, especially large ones, inevitably do. Counting up previous violations, therefore, is not enough. The attitude or intent they manifested, their resemblance to the present violation and the intervals between violations must all be taken into account.\textsuperscript{167}

Often violations are committed by persons struggling to survive in a market characterized by overproduction, declining demand and fierce competition. Such violations do not necessarily indicate the existence of a mind dedicated to unlawful conduct.\textsuperscript{168} Generally the entire industry is engaged in similar practices and it is impossible to separate the initial wrongdoers from those who acted defensively.\textsuperscript{169} In such situations, the cure will be the ravages of competition, not the efforts of the Commission. If it acts, it should be against the entire industry.\textsuperscript{170} Sporadic enforcement may unfairly burden the ability of a few to survive without discouraging others, and the orders entered in such cases, being permanent, may last long after the economic conditions occasioning them have disappeared.\textsuperscript{171} Furthermore, the eco-

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\item 163. Standard Oil Co. v. FTC, 340 U.S. 231, 249 (1951).
\item 164. See FTC v. A. E. Staley Mfg. Co., 324 U.S. 746 (1945) (after the fact defense of basing point system as good faith meeting of competition).
\item 165. American Oil Co., FTC Dkt. 8183 (June 27, 1962), Trade Reg. Rep. (1961-63 FTC Complaints, Orders, Stipulations) ¶ 15,961, at 20,793 (dissenting opinion), \textit{rev'd on other grounds}, 325 F.2d 101 (7th Cir. 1963) (meeting competition defense rejected because of an unlawful price, despite careful reductions only after equal reductions by major competitors).
\item 167. See note 122 supra.
\item 169. Id. at ¶ 20,793 (respondent alone enjoined from granting competitive price allowances to its dealers during gasoline price wars, although this practice was common in the industry).
\item 171. American Oil Co., FTC Dkt. 8183 (June 27, 1962), Trade Reg. Rep. (1961-63 FTC Complaints, Orders, Stipulations) ¶ 15,961, \textit{rev'd on other grounds}, 325 F.2d 101 (7th Cir. 1963). Respondent was the only company of the many involved that was charged with a violation. As Commissioner Elman noted in dissent: "The order there operates as a broad, floating, punitive restraint on respondent's pricing activities in every market in the United States in which it engages in business in competition with other sellers. But respondent alone is now being subjected to such order, drastically limiting its ability to compete effectively." \textit{Id.} at ¶ 20,796.
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nomic conditions may affect only a particular market, and, if an order is entered, it may be appropriate to limit it accordingly.\(^{172}\)

2. \textit{Was the violation the product of a deliberate, carefully conceived policy, a hastily conceived policy or act responsive to a new competitive situation or an unauthorized act of an individual?}

Generally, the more regular company action is, the more severe the punishment for its illegality should be. There is time to obtain necessary data or information, to consult with counsel or other persons and, if necessary, to seek an advisory opinion from the Commission. The unauthorized act of a person in authority is not necessarily pardonable, of course. He may not have been properly supervised\(^{173}\) or educated and his aggressive proclivities may have been known. On the other hand, he may have acted without the required approval of a superior, who, upon learning of his actions, took steps to prevent their recurrence.\(^{174}\)

Rapid but illegal responses to new competitive conditions must be studied carefully. There may have been some time for study or consultation. The amount of business involved and the chances of losing it may not have been sufficient to justify the adoption of questionable practices.

The source of the infraction within the corporate hierarchy is often used to determine what products, areas or business divisions the order should cover. Ordinarily everything subject to the authority of the person authorizing the unlawful conduct is included.\(^{175}\) More may be included but probably nothing less.

3. \textit{What is the scope and economic impact of the violation?}

In drafting orders the Commission tends to concentrate on the anticipated recidivism of the wrongdoer and not upon the magnitude of the violation. This point of view, which is based upon the philosophy that orders are preventive and not punitive,\(^{176}\) favors the routine entry

\(^{172}\text{Ibid. (order limited by Commission to gasoline, the only product involved in the price war).}\)

\(^{173}\text{E.g., Quaker Oats Co., FTC Dkt. 8118 (April 25, 1962), Trade Reg. Rep. (1961-63 FTC Complaints, Orders, Stipulations) \$ 15,858.}\)

\(^{174}\text{Ibid. (failure to obtain required prior approval of company legal department).}\)

\(^{175}\text{Bankers Securities Corporation v. FTC, 297 F.2d 403 (3d Cir. 1961) (all merchandise sold by a department store covered, but not affiliated companies, as a result of a rug advertisement authorized by the store's own advertising department); Forster Mfg. Co., Inc., FTC Dkt. 7207 (Jan. 3, 1963), Trade Reg. Rep. (1961-63 FTC Complaints, Orders, Stipulations) \$ 16,243, \$ 21,088-89 (all products covered because person responsible for predatory pricing responsible for all company pricing).}\)

\(^{176}\text{FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952).}\)
of broad orders in cases involving plainly illegal but economically insignificant violations. But it is an accepted principle elsewhere that punishment ought to bear a reasonable relation to the seriousness of the crime, and the reasons for this principle would seem to apply generally to violations of regulatory laws, even when the punishment can be euphemistically described as preventive because only future violations are subject to sanction.

Courts have frequently noted in mitigation that only a single violation or isolated transaction was involved, that the duration of the activity was brief and has been abandoned or that it related to a limited product group or trading area. Conversely, a stronger order may be appropriate if the violation was monetarily significant, long standing and nationwide in scope and harmful to competition. The Commission, unlike the courts, apparently may not enjoin lawful activity related to the violation in order to assure a return to competitive conditions. However, a broad order may have a similar beneficial effect.

The scope of the violation often will indicate appropriate ways of limiting the order. However, unlawful conduct in one area may call for prohibitions in another if identical situations and responses can be anticipated.

The burden of assembling evidence pertinent to this inquiry is not the Commission's. Counsel supporting the complaint will supply much of it in making out a violation and respondent properly has the burden of offering evidence in mitigation.

177. Of course a finding of violation requires a finding of an injury to competition, but the requirements for proving such injury have been substantially diluted. Rowe, op. cit. supra note 162, at 422.


180. Country Tweeds, Inc. v. FTC, 326 F.2d 144 (2d Cir. 1964); Grand Union Company v. FTC, supra note 179; Swanee Paper Corporation v. FTC, supra note 179.

181. Bankers Securities Corporation v. FTC, 297 F.2d 403 (3d Cir. 1961) (order covering all respondent's subsidiaries and affiliates limited to single store in which violation occurred).


183. The Commission may only require respondent to "cease and desist from such violations." 38 Stat. 734 (1914), 15 U.S.C. § 21 (Supp. IV, 1963); cf. FTC v. Eastman Co., 274 U.S. 619 (1927). However, the Commission is pressing for such power and may obtain it. See note 147 supra.

184. American Oil Co., FTC Dkt. 8183 (June 27, 1962), Trade Reg. Rep. (1961-63 FTC Complaints, Orders, Stipulations) ¶ 15,961, rev'd on other grounds, 325 F.2d 101 (7th Cir. 1963) (respondent enjoined from discriminating in price generally because local conditions giving rise to violation were present everywhere — order might have been appropriately limited to discriminations in price caused by the granting of competitive price allowances to dealers engaged in local price wars, since there was no evidence that respondent otherwise might discriminate).
Ideally the Commission should enter an order adequate to deal with the violation in light of all the facts revealed. As Commissioner Elman has stated:

In formulating the terms of an order to cease and desist, the Commission is not concerned with whether the order should be "broad" or "narrow" as such. The significant question, rather, is what kind of order will be most effective to "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance." . . . If an order coextensive in breadth with the statutory prohibition appears to be required for effective relief, it is the Commission's duty to enter such an order. That might be appropriate where, for example, the respondent's conduct was such as to support an inference that his violation of law might be repeated in a variety of ways, difficult to anticipate precisely, in the future. On the other hand, where the record in a particular case does not show a danger that the specific illegal act or practice found will recur in some other or difficult-to-define forms, a relatively narrow and specific order may suffice . . . Whether a "broad" or "narrow" order will be most effective depends, therefore, on the particular circumstances and needs of the case. For these reasons, the order entered in the instant case is not to be regarded as a general model or precedent for orders in other cases involving different circumstances and needs.185

Unfortunately the members of the Commission differ widely in their evaluation of the needs of a given case. Until recently a majority believed that almost any violation required a broad order. However, even if values could be assigned to each of the relevant factors discussed above, and the severity of every violation could be numerically expressed, the translation of these values into appropriate orders would still provoke wide disagreement.

At the present time three types of orders are being used: the Ruberoid order, the like or related order and the order covering specific violations.186 They conform roughly to a relative scale of values in terms of scope, broad, medium and narrow; recidivism, likely, questionable and unlikely; and seriousness, serious, run-of-the-mill and minor. Theoretically a wider group of alternatives is possible, but it is doubtful that cases or orders can be more finely distinguished. Some carefully tailored orders may defy classification in terms of these three


186. There is a rarely used fourth alternative, the entry of no order at all when a limited order would accomplish very little. See e.g., Eugene Dietzgen Co. v. FTC, 142 F.2d 321 (7th Cir. 1944); Argus Cameras, Inc., 51 F.T.C. 405 (1954); Wildroot Co., Inc., 49 F.T.C. 1578 (1953). Such a disposition was recommended by the dissenters in Quaker Oats. See note 123 supra.
choices,187 which are, of course, merely starting points subject to alteration to reflect the special circumstances of a case. Variations in product or market scope will also affect the choice of starting point. Nevertheless, it would seem useful for the Commission to work within such a structure. This one is not complicated and is based upon existing decisions, which offer a convenient reference point or standard of comparison.

It is not important that the Commission label each case. The type of order entered will usually identify its conclusion. What is important is that it recognize that there are three alternatives, that the average case presumptively falls within the middle one and that the cutoff points should be set so that a reasonable number of cases fall within each. This is not a simple task. It calls for a fair acceptance by the Commission of the judicial conclusion that the reach of orders should be curtailed. It also calls for a true exercise of judgment and expertise. But that is the Commission's task and the reason that courts defer to its conclusions.

Once the questions of scope have been resolved, the drafting of the order should not be difficult. Initially, counsel supporting the complaint may be fearful of allowing loopholes in limited orders and may seek the security of boilerplate. However, with experience will come confidence and ability.188 In the meantime, the Commission may correct any egregious errors through its ability to modify orders.189

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187. The practice in § 2(d) cases of limiting the order to the uses to which the payments have been put is a ready example. See note 137 supra.
188. The attorneys in the antitrust division of the department of justice have shown through experience substantial ability to draft orders carefully fitted to the facts of each case. Austern, supra note 170, at 321.
189. FTC Procedures and Rules of Practice § 3.28, 16 C.F.R. § 3.28 (Supp. 1964).