OFFICE OF NATIONAL RECOVERY ADMINISTRATION

DIVISION OF REVIEW

INFORMATION CONCERNING COMMODITIES
A STUDY IN NRA AND RELATED EXPERIENCE IN CONTROL

PART A. MISREPRESENTATION AND DECEPTION

By
Hunter P. Mulford

WORK MATERIALS NO. 38

Work Materials No. 38 falls into the following parts:

Part A. Misrepresentation and Deception
Part B. Standards and Labeling
Appendices I, II and III

Trade Practice Studies Section
February, 1936

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F O R E W O R D

This study on "Information Concerning Commodities -- A Study in NRA and Related Experience in Control" was prepared by Mr. Hunter P. Mulford, of the Trade Practice Studies Section, Mr. Corwin D. Edwards in charge.

The study deals with two distinct types of control, (1) measures designed to prohibit the use of false and deceptive representations of various sorts in the marketing of commodities, and (2) positive requirements for the furnishing of accurate information through the development of uniform product standards and the use of informative labeling. These two types of control are in many respects closely related and interdependent. Various forms of misrepresentation flourish, and are made difficult or impossible to deal with, when there are no agreed standards or definitions of the products concerned against which inaccurate or false and fraudulent statements may be measured. Other forms of misrepresentation, resulting from failure to disclose significant facts concerning the commodity offered for sale, may be met only by specific requirements for the inclusion of such information in the labeling, marking, branding, or even advertising, of the products concerned.

This close connection between the two principal forms of commodity information control has led to their treatment in a single study. However, due to differences in the nature of the fundamental problems involved, the subject has been divided for the purposes of presentation. Part A of the report deals with Misrepresentation and Deception, and Part B with Standards and Labeling.

Since the code provisions prohibiting misrepresentation and deception were largely statements of existing law, the principal matters for study were the manner in which the codes were administered, and the results which were obtained through them. The study examines the code provisions concerning misrepresentation, outlines the typical NRA method of administration, and presents what evidence the central NRA records offer on the significance of these provisions to the industries adopting them. From the available, but not complete, compliance records, and a limited sample of first-hand Code Authority opinion, certain conclusions have been drawn concerning the extent of application of the provisions, their effectiveness in operation, the type of industry principally applying them in practice, and the chief obstacles to their successful functioning. For general comparative purposes various aspects of the work of the Federal Trade Commission in restraining misrepresentative and deceptive practices have been given.

Unlike misrepresentation and deception, standards and labeling are subjects on which there is no general agreement of opinion. The records of code proposal and adoption were therefore of special importance as illustrating the controversial nature of the problems and the various attitudes existing within the industries concerned. These records have proved equally illuminating with respect to the difficulties involved in obtaining reconciliation of the various interests. As to the actual operation of the standards provisions, limitations placed upon field work and the difficulty of obtaining representative expressions of opinion or objective data resulted in only a small body of evidence being secured. However, a number of what are believed to be justifiable conclusions have been drawn.

Summaries of findings and conclusions with respect to each of the two parts of the report have been included at the beginning of the respective sections. Broadly speaking, although only a minority of the industries were seriously concerned with the problem of misrepresentation, the code provisions, when actively administered, tended to produce beneficial results. On the other hand, efforts to apply standards and labeling to the solution of industry problems on a mandatory basis were generally frustrated by conflicts of competitive groups within the industry, or by the apparent irreconcilability of industry and consumer interests, - inevitable difficulties which the tenure of NRA existence was entirely too short to smooth away.

The principal limitations of the report as a reflection of NRA experience have resulted from the great area to be covered, as represented by the number of codes with pertinent provisions, and from the relatively slight opportunity given for the collection of first-hand data and opinion. For further development of the subject extensive field work with former Code Authorities, trade associations, and individual industry members, is of prime importance. Other suggested fields for further inquiry are indicated in the Appendix to the report.

Preparation of the Standards and Labeling section of the report was carried out with the aid of Mr. N. A. Mereness. Various other individuals contributed special industry summaries, as indicated in Appendix II. Special assistance in the development of material for the final report on Misrepresentation was given by Mr. E. S. Tobey.

At the back of this report will be found a brief statement of the studies undertaken by the Division of Review.

L. C. Marshall
Director, Division of Review

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INFORMATION CONCERNING COMMODITIES
A STUDY OF NRA AND RELATED EXPERIENCE IN CONTROL

PART A. MISREPRESENTATION AND DECEPTION

SUMMARY OF FINDINGS

The aim of this first section of study of Commodity Information has been to inquire into the effects of the use of prohibitory provisions written into NRA codes as a method of controlling misrepresentative and deceptive practices in commerce, and to make comparisons with the results attained by other methods aimed at the same end, notably those of the Federal Trade Commission.

The forms of misrepresentation taken as within the scope of the study include inaccurate and misleading advertising; false and deceptive labeling, marking and branding; deceptive packages and containers; misrepresentations concerning competitors or their products; and similar deceptive sales devices.

Since such methods are already accepted as basically unlawful, no question of general policy as to their control arises, as is the case with certain other types of trade practices. The principal subjects for consideration relate to form of law and methods of administration and application.

Three different degrees in the development of a conception of legal control of misrepresentative competitive practices on a national scale have been noted: (1) the common law concept, viewing such practices in terms of invasion of private property right, and offering only the right of individual action for relief of individual injury; (2) the concept embodied in the Federal Trade Commission Act - "unfair methods of competition" declared unlawful, but without statutory definition of the term, and their suppression made a function of public authority, with the public interest an express consideration; and (3) the concept exemplified in the code system created under the National Industrial Recovery Act - unfair methods of competition defined in terms of the individual industry's problems; and the industry, through its Code Authority, made a party with the government in the application of the Code requirements.

Data concerning the operation of the Federal Trade Commission in the restraint of misrepresentative practices were drawn almost exclusively from the published records of that body. Analysis of these records shows that a great deal of valuable work in the field of misrepresentation control has been done by the commission. Through its formal restraining orders and its more flexible stipulation procedure, the Commission has acted effectively to compel the abandonment of questionable practices in advertising, labeling, marketing, branding, and other merchandising methods in a large number of individual cases, principally affecting the consumer goods industries. At the same time it has added materially to the number of specific misrepresentative practices recognized as unlawful, as compared with the previously existing precedents of the common law. Through its Trade Practice Conferences it has encouraged fair dealing by approving rules which restate for individual industries the general prohibitions upon mis-

representations, and set up definitions of product standards by which false representations may be measured.

Obstacles to the most effective functioning of the Commission as an instrumentality for controlling misrepresentations have been found in the dual statutory requirement placed upon it to show both public interest and actual or potential competitive injury as conditions precedent to its jurisdiction; in the extent of judicial review provided and the insistence of the courts upon their right of final interpretation as to "unfair methods of competition"; and in the delays incident to the methods provided for making fully operative the Commission's restraining orders. A certain disparity also appears between the size and relatively centralized nature of the Commission's administrative organization, and the nation-wide scope of the responsibility placed upon it.

For information concerning the effect of the NRA codes in dealing with misrepresentations there have been used the records of code making and code administration in Washington; and, in the degree available, compliance records collected from the State NRA offices throughout the country; data gathered from Code Authorities and trade associations by questionnaire and by field contact; and from consultation with industry members and former Deputies and their staffs who handled the various codes.

More than four-fifths of all basic and supplemental codes approved contained prohibitions upon some form of misrepresentation, principally deceptive advertising, and false marking and branding. The provisions were for the most part broad in phrasing and were more comprehensive than the types deceptive acts already recognized as unfair practice in Federal Trade Commission procedure. As to application of the provisions and their effects in actual operation, the evidence which has been obtained and embodied in this report points to the following conclusions:

Despite the large proportion of codes containing the provisions, misrepresentative practices constituted a serious competitive problem and the prohibitions upon them were sought to be actively enforced in only a minority of the codes, the chief of these being the large retail trade codes.

Where such practices constituted a serious industry problem, an active and capable Code Authority was usually able to apply the provisions for their elimination with a considerable degree of success, and with a minimum of assistance from NRA enforcement agencies or from the courts.

The support of some measure of authority was found essential, however and a chief difficulty claimed to have been encountered by the Code Authorities in securing compliance with the misrepresentation provisions was the progressive loss of prestige by NRA among their industry members, due to delays and uncertainties of enforcement, even in cases of flagrant violation. Especially they complained of the frequent acceptance of certificates of compliance in such cases, in place of the penalties provided by the Act.

Other obstacles encountered by the Code Authorities in administering the misrepresentation provisions included (1) the difficulty in practice of drawing a line between truth and falsity in advertising; (2) loose phrasing of the early code provisions; (3) difficulty of obtaining evidence of viola-

tion; and (4) lack of definite product standards to provide criteria for judging misrepresentations concerning them.

In general, as compared with the Federal Trade Commission, the N.R.A. and its codes, as they were meant to operate, were more comprehensive in their declaration of the law of unfair competition affecting misrepresentation, were under fewer legal restrictions in its application, were more decentralized and direct in their potential machinery of enforcement, and possessed, in the Code Authority system, an informal medium for obtaining compliance only distantly approached by the voluntary cooperation afforded the Commission by some trade associations.

Through its machinery for code amendment and interpretation, also, the N.R.A. provided a flexible and responsible medium for adapting the general law of misrepresentation to the immediate problems of individual industries, with the adequate protection of the interests of industry members apparently afforded, in cases of non-compliance, by the rights of hearing, protest and appeal, with ultimate court review.

With respect to the Federal Trade Commission, various suggestions have been offered for reducing the legal restrictions upon its operation in the field of misrepresentations, and simplifying the procedure for obtaining enforcement of its orders. One of the most recent is that of the Commission itself, advanced in its 1935 annual report, and now substantially embodied in the pending Wheeler-Rayburn bill. This suggested change would make "unfair or deceptive acts and practices in commerce" unlawful as well as "unfair methods of competition in commerce". Such a change, it is argued, would enlarge the Commission's scope in certain desirable directions, with the other terms of the Act and ultimate judicial review still standing to prevent rigid restrictions upon merchandising initiative.

Furthermore, if means could be found to give to the Federal Trade Commission statutory authority to approve Trade Practice Conference Agreements, with power to enforce the rules approved, including those of the Group II (*) type, much that was beneficial in the trade practice work of the N.R.A. codes might be continued.

. . . . . .

(*) Group II trade practices consist of those rules that have been accepted as expressions of the trade but not already recognized by cease-and-desist orders of the commission as unlawful.

INFORMATION CONCERNING COMMODITIES: A STUDY OF NRA AND RELATED EXPERIENCE IN CONTROL

INTRODUCTION

I. THE MEANING OF COMMODITY INFORMATION

The exchange of commodities constitutes essentially that which we term business. Exchange is the central economic fact. Behind it, however, and indispensable to it, lies another exchange - the exchange between seller and buyer of information concerning the commodities which are to be bought and sold. Without this primary interchange of information, which might be termed advertising in its widest sense, the very continuation of a complex industrial system such as our own is hardly to be conceived. And the nature of the information which is so exchanged, its accuracy and completeness or lack of these, must affect in substantial ways the functioning of the system as it touches the interests of all parties concerned.

The means of exchange may be of many kinds - advertising copy in newspaper or periodical, representations on label or wrapper, verbal claims of sales representatives, the suggestion in a skilfully-selected trade name, the apparent bulk of package or container, or a dozen others. Whatever the methods, their total effect is largely to determine whether the public does or does not buy, and which of various competing articles it will choose. For the buyer the adequacy of the information he has received will go far to decide whether in his choice he actually obtains what he intends and wants. For the seller, the practices in supplying such information which prevail in his trade help to set the standards of competition which he must meet.

Both parties therefore have important interest involved in the question of commodity information. The consumer is concerned with more and better knowledge of what he buys in order that he may obtain value for what he spends, and to be protected in his purchases from actual harm. The business man in many cases seeks to be freed from the pressure of certain competitive practices, practices which he feels tend to shake public faith in the integrity of his entire industry, and to disturb its price structure through the debasing of industry products and deceptions employed to conceal what is done. Other interests and aims occur and will be considered in their place, but these are basic and most frequently appear.

The object of this study is to examine the nature of these interests and the methods which are employed to satisfy them through improvement in the quality and increase in the quantity of the commodity information in

current use; in particular, to review the experience of NRA with respect to the subject; and to compare, so far as the facts seem to warrent, the effects of the NRA experiment in this field with the results obtained by other methods of control.

The lines of approach to the problem which have been chiefly followed in recent decades are two. One seeks to decrease the amount of misinformative information with which the purchaser is supplied; the other aims to increase the quantity of soundly informative material provided. The first effort has taken the form of Federal and State statutes prohibiting, either specifically or by general intent, practices such as deceptive advertising, false marking and branding, and misrepresentation in whatever form. The second has been carried on largely through the cooperative efforts of industry organizations and government agencies. It involves the setting up of definite, uniform standards of quality, size, nomenclature, performance, etc., for industry products, and promotion of the use of these standards in labeling, branding, packing and all forms of advertising.

Although opposite in form, the one being negative in its control and the other positive, both of these methods are aimed primarily at the same immediate end, namely, the protection of legitimate consumer and industry interests through the promotion of adequate and dependable commodity information. Furthermore, there is a relation in practice between the two, since as experience of the Federal Trade Commission to be noted later shows, the existence of some recognized form of standards as to the composition or identity of goods is extremely helpful, if not indispensable, in controlling certain types of misrepresentative practices. In fact it may be said that a considerable portion of the work directed toward development of positive standards and their use in labeling has for its principal aim the driving out of misrepresentations otherwise found impossible to reach.

Because of this close connection between the two subjects of misrepresentation and standards they have been combined for treatment in this single study. On the other hand, owing to the different legal questions involved, and the varying problems as to adoption and application of the two types of control, they have been treated in separate sections of this report, Part A dealing with Misrepresentation and Deception, and Part B with Standards and Labeling.

PART A - MISREPRESENTATION AND DECEPTION

CHAPTER ONE

GENERAL BACKGROUND

I. NATURE AND EXTENT OF MISREPRESENTATIVE PRACTICES

The practices here considered include all types of misrepresentation, by whatever means employed, which have the intent or effect to mislead the purchaser concerning the nature of the product itself, or the terms upon which it may be obtained. The latter point, as to terms, while not strictly an aspect of "commodity information" in the sense of providing knowledge of the product itself, nevertheless is so closely related to it in practice that the two are taken together for the purposes of this study.

Inaccurate or misleading advertising, and false or deceptive marking, branding, labeling, packaging, are the forms which misrepresentation as dealt with in this study most characteristically take. On the other hand, by the above definition of the subject as restricted to the commodity itself or to immediate representations concerning it, there are seen to be excluded several types of deceptive practices which figure prominently in the codes and are seemingly matters of serious concern to various industries, but which relate only indirectly or not at all to the products involved. Such practices include rebates and other concealed price concessions which are not misrepresentations to the buyer; false invoicing or other deception as to the facts of a transaction whose intent is rather to deceive competitors than the customer; commercial bribery, seen as primarily a problem of trespass or interference; and imitation of trade marks, viewed as a violation of property right.

Even so restricted, the field is large. Taken only in terms of types, a considerable catalogue of practices may be collected. It would include such matters as plain misstatements of facts concerning the quality, content, composition, or source of the article; extravagant claims or guarantees as to its performance; assertions as to the nature of the seller's business, its affiliations, etc. designed to suggest special advantages in dealing ("factory-to-you" where no factory is owned); descriptive trade names which are unrelated to the content of the product (Butterkrust and Kremelrust breads which are innocent of any connection with these ingredients); similar names based upon microscopic presence of the material indicated ("wool" goods having a 1% content of wool) and so one, bounded apparently only by the limits of the merchandising imagination. (*)

(*) See more extended list in discussion of Federal Trade Commission, Chapter 3, p. 17, below; also, Federal Trade Commission, Annual Report, (Fiscal year ended June 30, 1935) pp. 67-71.

These are the types of practices with which the study is concerned. What the extent of their use may be it is impossible even to estimate in any concrete terms. Obviously figures are not obtainable to show what proportion of the country's total industrial output is characterized in its distribution by deceptive means. That it is sufficiently large to warrant and receive serious consideration seems evident. Eighty-four per cent (84 of a total of 754) of all cases involving unfair trade practices arising under Section 5 of the F.T.C. Act, (other, that is, than anti-trust) ordered against by the Federal Trade Commission from 1915 to 1934, as reported in Volumes 1-18 of its Decisions, involved some form of misrepresentation.(*)

Of 143 industries which prior to NRA cooperated with the Commission developing Trade Practice Conferences, 102 incorporated provisions dealing with misrepresentations in their conference codes.(*) And when NRA came along, the industries presenting 438 of 557 basic codes, and 175 of 200 supplemental codes, did the same.(*) If further proof were needed in support of what is a matter of common knowledge it might be found in the activities of trade associations, business organizations such as the Better Business Bureaus, women's clubs, Consumers' Research, etc., and in a mass of State legislation, municipal regulations and the like, dealing with the subject in various ways.

II. ECONOMIC CONSEQUENCES OF MISREPRESENTATION

The classical economist had no reason in their theory of free competition to recognize such practices as deception and misrepresentation. They habitually assumed a commodity which was standardized in every respect and one about which buyers had complete knowledge. Under their assumed conditions supply and demand determined price at the sellers cost of production; and reward for production efforts varied directly with the efficiency of their effort and the abundance of their results. No individual could visibly affect the market price by withholding his supply; and no individual buyer could affect the market price by withholding his demand. With a standardized product there was little purpose in misrepresentation or little reason for advertising and other forms of sales promotion.

(*) Data drawn from Legal Research Report #94, December, 31, 1934. "Pre-N.R.A. Precedents Concerning Trade Practices." Legal Division File.

(**) Tabulation prepared by Commodity Information Unit, Trade Practice Provisions in F.T.C. Trade Practice Conference Codes, drawn from Federal Trade Commission, Trade Practice Conferences, June 30, 1933, and other F.T.C. sources.

(***) Records of Post Code Analysis Unit, Research & Planning Division. (Misrepresentation File)

Under present-day conditions, however, where there is frequently an absence of commonly advertised standards, grades, and quality identifying labeling and descriptive terms, misrepresentation and deception may yield profitable results. Under these circumstances technically unskilled buyers, especially ultimate consumers, are left at the mercy of unscrupulous sellers, a fact which militates not only against consumer interest but also against the honestly conducted enterprise. Such a situation is incompatible with "fair" competition which requires that there be some direct relation between the economical and abundant production of commodities of good value and the rewards for such effots.

These are the fundamental grounds upon which those who rise to oppose misrepresentative practices generally take their stand. The consumer or his spokesman bases his protest on the plain but sufficient contention that he is being gyped. The industry element which does not employ the practice which is a sore spot in their trade is aroused by the fact that those who do are getting the business and they are not. Simple interest is the primary test. This interest may be extended on the part of the industry members to include concern for the integrity and good-will of their entire trade (*) or fear for the continued effectiveness of a whole medium of sale, such as advertising.(*) But the interest remains, and unfair diversion of trade is the basic issue. Where the unfair practices are employed by those having undue power, and the diversion is sufficient, questions of monopoly and destruction of competition may arise, and there is added the interest of those primarily concerned with public policy.

Whatever the motivating interests, the business history of this century shows a variety of activities directed toward more effective control of misrepresentation as a method of competition.

III. DEVELOPMENT OF CONTROL

The course of development of this control (which is also the course which the discussion of this report will follow) may be briefly summarized here.

Up and through the first decade of the century, where relief from unfair competitive practices was sought it was to be looked for through the operation of the common law. This law provided (and still provides) only a right of individual action for individual injury, and it imposed requirements in proof which made successful action difficult. Although the common law conception of unfair competition had made some progress in evolution in response to the changing demands of a rapidly developing industrial economy, this progress had been slow, and the concept remained relatively narrow. Misrepresentation as a competitive practice was in the eyes of the common law very largely a matter of "passing off" one's

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(*) Cf. Canning Industry, Appendix II, Exhibit C, of this report.

(**) "Less than 50% of present advertisements are profitably productive. The reason is lack of consumer confidence." Mr. P. A. O'Connell, former President, National Retail Dry Goods Association. (Transcript of Hearings, Retail Code)

goods for a competitor's by some "colorable" imitative means.

Such views were increasingly felt to be inadequate to meet the needs of a more complex economic order, and in 1914 the Federal Trade Commission Act was passed. Although this Act, as interpreted by the Courts, retained the basic common law conception of unfair competition, it did give recognition to the public interest in the question and empowered the Government to act to protect competitors and the public in general without the necessity to prove specific injury or fraudulent intent.

During the years which followed the activity of the Federal Trade Commission was very largely concerned with the curbing of misrepresentative practices in interstate commerce. In the same period there grew up a considerable body of trade association activity directed toward cooperating with the Commission to make these efforts effective. In the local field a great deal of effective work along the same lines was done by the Better Business Bureaus and other groups.

In 1933 came the National Industrial Recovery Act, which in turn sought to carry the conception of unfair competition and the means of its control still farther beyond the common law view than the Federal Trade Commission Act had done.

This main line of development, represented by the common law, the FTC, and the NRA, is the principal subject matter of this study, and each of these will be considered separately and more in detail in Chapters Two, Three and Four which follow.

CHAPTER TWO

THE COMMON LAW AFFECTING MISREPRESENTATION

I. GENERAL BASIS OF THE COMMON LAW OF UNFAIR COMPETITION

Unfair competition at common law, as it concerns this study, consists essentially in "passing off" one's goods as those of another, or by use of other false representations securing patronage which should be the competitors. By whatever means a particular trader's goods are identified, whether by a personal, geographical or descriptive name, a form of receptacle, a style or color of label, or by the appearance or configuration of the goods themselves, if it is shown as a fact that any of these things perform the function of identification, duplication of the identifying element by a rival trader, under such circumstances as to render deception of purchasers a probable consequence, is looked upon as unfair competition by the common law.

The most recent restatement of this doctrine appears in the Schechter decision, declaring the National Industrial Recovery Act unconstitutional, in which Chief Justice Hughes had occasion to say:

> "Unfair competition, as known to the common law, is a limited concept. Primarily, and strictly, it relates to the palming off of one's goods as those of a rival trader. In recent years its scope has been extended. It has been held to apply to misappropriation as well as misrepresentation, to the selling of another's goods as one's own - the misappropriation of what equitably belongs to a competitor." (*)

The modern common law of unfair competition originates out of the necessity for the protection of trade-marks and the development of legal precedents to meet this need. Actions in the unauthorized use of a mark by a rival trader were maintained in the English courts as early as the 17th century, though rarely. The early English cases also established another precedent which has largely held, at least in America, to the present time. This was an unwillingness to grant an injunction against an infringing trader unless fraudulent intent could be proved, or reasonably inferred. (**)

II. DEVELOPMENT OF THE LAW OF UNFAIR COMPETITION IN THE UNITED STATES

The first trade-mark infringement case to appear in the reports of a State court of the United States was in 1837, (***) but with the growth of mass production and the consequent increased importance of trade-mark, the courts built up a considerable body of protective law. The legal remedy against trade-mark infringement, however, was found insufficient to give protection against other developing devices for passing off, and as a result the present law of unfair competition developed, of which the law of trade-mark is but a part. McLean v. Fleming

(*) Schechter v. U. S., 55 S.Ct. 837-850 (1935).
(**) G. Blanchard v. Hill, 2 Atk. 484 (1743).
(***) Thomson v. Winchester, 19 Peak - 214 (Mass. 1837).

may be considered the first case in which the Supreme Court stated the doctrine:

> "Nor is it necessary, in order to give a right to an injunction, that a specific trade-mark should be infringed; but it is sufficient that there was an attempt on the part of the respondent to palm off his goods as the goods of the complainant." (*)

McLean v. Fleming and other cases (**) also set up what the courts and text writers have taken as another fundamental principle - that there can be no action in unfair competition without actual or potential competitive injury. The plaintiff comes into the court to protect his property rights. The private right of action is given, not for any relief of the public which is deceived, although this may be an incidental effect, but because by this deception there is invaded that which is an exclusive property right of the plaintiff.

As far back as McLean v. Fleming, also, the Supreme Court ruled that a showing of fraudulent intent was necessary to obtain injunctive relief against unfair competition. This requirement was again stated in the Elgin Watch Company case, decided in 1900. (***)

This attitude of the Supreme Court is contrary to the weight of opinion of the modern English cases, where honesty of purpose or absence of intent to deceive is no defense. It is also not shared by all American courts, the English rule being followed by the New York Court of Appeals, and the courts of California and Kansas. (****)

While the required fraudulent intent may in any given case be inferred from the circumstances, nevertheless so far as the Supreme Court decisions are concerned such intent is an essential condition for the granting of relief from unfair competition at common law, rather than the actual economic effect upon a competitor of what in itself may have been an innocent act.

The relief which is provided in cases of unfair competition may be obtained by action either at law or in equity. The former is employed where damages are the main end. It is seldom used. The great majority of the cases are brought in equity, and the relief obtainable is two-fold: an injunction to prevent injury through threatened acts of

(*) McLean V. Fleming, 96 U.S. 245. (1877).
(**) Cf. Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U.S. 537
(***) Elgin National Watch Co. v. Illinois Watch Co., 179 U.S. 665(1900).
(****)In the case of Dodge Stationery Co. v. Dodge, 145 Calif. 380 (1904), the court held that it was quite unimportant whether the defendant used the name "Dodge" with fraudulent intent or not. If the necessary result was deception, and the public was being confused, the fact that the defendant used the name with an honest intent will not aid it, and equity will exercise its injunctive powers to prevent a fraud upon the public, even though there may not have been technical fraud upon the plaintiff, due to the absence of fraudulent intent on the part of the defendant.

unfair competition, and an accounting of profits and for damages already sustained if such can be proved.

Briefly, then, the common law of unfair competition provides only a right of private action in protection of a private property right. Actual or potential competitive injury is the indispensable fact to be shown. Deception of the purchaser must also be shown, but only as evidence of such injury. The element of fraudulent intent is required. No right of public action for the protection of competitors as a group is allowed by the common law, and no public interest is recognized. Any protection of the purchaser from deceit is purely incidental to the main end.

Expressed in other words:

> "Fostering competition directly by the provision of a few private remedies for private wrongs, rather than preserving competition by positive measures administered by public authorities, was the burden of legal regulation of competitive practices under the common law." (*)

It is the second of these two contrasted methods, that of "Preserving competition by positive measures administered by public authorities," with the public interest made a specific and essential consideration, which is embodied in the Act creating the Federal Trade Commission, the scope and effect of which are to be considered in the next chapter.

(*) National Industrial Conference Board, Public Regulation of Competitive Practices, Revised. (1929) p. 30.

CHAPTER THREE

THE FEDERAL TRADE COMMISSION

I. LEGAL BASIS OF THE COMMISSION

The Federal Trade Commission Act became law September 26, 1914. Section 5 of the Act declared "That unfair methods of competition in commerce are hereby declared unlawful," and authorized the Commission to take action where there is found to be a "using of any unfair method of competition in commerce, and if it shall appear to the Commission that a proceeding by it ** would be to the interest of the public." Orders of the Commission are made subject to review by the Circuit Court of Appeals, but"the findings of the Commission as to the facts, if supported by testimony, shall be conclusive."

A. The Meaning of "Unfair Competition."

No definition of "unfair competition" was included in the Act. There has always been question as to just where Congress proposed that discretion in deciding what constituted unfair competition should rest, many holding that this was of the very essence of the Commission's intended function. For practical purposes, however, the question was settled by the Supreme Court in the Gratz case:

> "The words 'unfair methods of competition' are not defined in the statute and their exact meaning is in dispute. It is for the courts and not the Commission ultimately to determine, as a matter of law, what they include." (*)

Further in this same case the Court indicated its general conception of the meaning of the phrase:

> "They (the words 'unfair competition') are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly."

This tendency of the courts to restrict the interpretation of the phrase to legal conceptions previously established has been looked upon by many as hampering a necessary broadening of its meaning in terms of social and economic criteria imposed by the evolution of our industrial system. It has had less of this effect with respect to misrepresentative practices, however, since the court's definition plainly includes that idea; and further, because the courts have rejected any pleas that, since the standards of previously existing law are made

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(*) F.T.C. v. Warren, Jones and Gratz, 253 U.S. 421 (1920)

the test, the authority of the Act is restricted to specific practices already ruled unlawful.

> "The commissioners ... are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices which have a capacity or a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common-law cases." (*)

In addition to the common-law criteria imposed by the courts, three conditions precedent to FTC jurisdiction are set by Section 5 of the Act and have been reaffirmed by the Supreme Court. First, the practices complained of must be unfair. Second, they must be methods of competition in commerce. Third, action by the Commission must be in the interest of the public. (**) And, of course, the competition must be in interstate commerce.

Thus, while "the commissioners are not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived" (***) as would have been the case at common law, (****) they still have a double requirement to meet in that they must show that the act complained of has at least "a capacity or a tendency to injure competitors" and that there is a public interest involved. There is carried over in effect the common-law conception that unfair competition is primarily concerned with the rights of competitors, and regards the deception of purchasers only as that constitutes an invasion of such rights. This has stood as a bar to the development of a conception of misrepresentation or deception affecting the consuming public as being unfair competition per se, despite the increasing tendency of the Commission to make this a principal test.

A leading case in which the courts have rejected public protection as a sufficient grounds for Commission action is that of Raladam Co. v. F.T.C. (*****)

(*) Sears, Roebuck & Co. v. F.T.C., 258 Fed. 307 (1919)

(**) Raladam Co. v. F.T.C., 42F (2d) 430 (1930); 51 S.Ct. 587 (1931)

(***) Sears, Roebuck & Co. v. F.T.C. quoted above

(****) Nor is showing of fraud required. "It was not necessary for the commission to establish intent to deceive the purchasing public. For the test of unfair competition was whether the natural and probable result of the use by the petitioner of such words was deceptive to the ordinary purchaser and made him purchase that which he did not intend to buy." Indiana Quartered Oak Co. v. F.T.C., 26 Fed.(2d) 340 (1928)

(*****) Cit. page 15, supra.

This case involved misrepresentations concerning the efficacy of an obesity cure, which was also shown by testimony to be potentially harmful to the uninstructed user. Nevertheless, the Commission's restraining order was overruled by the Circuit Court of Appeals, the Court saying:

> "The general law of unfairness uses the misleading of the ultimate purchaser as evidence of the primary vital fact, injury to the lawful dealer; the Commission uses this ultimate presumed injury to the final user as itself the vital fact."

The Supreme Court in turn upheld the Circuit Court of Appeals, reiterating the requirement that

> "The trade whose methods are assailed must have present or potential rivals in trade whose business will be, or is likely to be lessened or otherwise injured,"

and finding that the Commission had failed to present the necessary evidence of such injury, since all other members of the trade involved employed the same questionable tactics as the respondent. The Court could not bring itself to conceive that Congress had set up the Commission "for the purpose of preserving the business of one knave against another" - nor, apparently, for the purpose of protecting the public against both.

It has been claimed that the Raladam case turned in reality upon the mere technical omission of the Commission to show competitive injury, and that it did not therefore constitute a check upon the liberalizing tendency of the Commission above referred to. As a matter of fact the decision shows that the Supreme Court, at least, weighed the possibility of such injury in the circumstances carefully, and rejected it as insufficient. The case therefore amounts to a firm reiteration of the necessity of this element for jurisdiction under the terms of the Act as interpreted by the courts.

On the other hand, in the Griffith Hughes case which came after Raladam and was somewhat similar to it, but which did not turn upon the point in question, (since competitive injury was shown), the Circuit Court of Appeals in supporting the Commission used the following language in which the element of public protection is particularly stressed:

> "To strike down unfair methods of competition or unfair practices on the public is the duty imposed on the Commission by Congress. The object of the Act is to prevent public deception, and to preserve free competition."(*)

(*) E. Griffith Hughes Inc. v. F.T.C. 63 F. (2d) 362 (1933) (An appeal to the Supreme Court in this case is now pending.)

In the Keppel case, touching the practice of "break-and-take" in candy selling (a form of sale, especially of penny candies, involving lottery or chance), the Supreme Court stated,

> "It is true that the statute does not authorize regulation which has no purpose other than of relieving merchants of troublesome competition, or of censoring the morals of business men."

But the Court goes on to stress the social aspects of a competitive method which "is shown to exploit consumers, children, who are unable to protect themselves", "devices which have met with condemnation throughout the community." (*)

It may be that there is thus being evidenced a liberalizing tendency on the part of the courts which will help to give the Commission's efforts along this line greater effect; nevertheless the wording of the statute as it stands does act as a bar in the way.

The Commission's own sense of this is indicated by recommendations for change in the Act which are put forth in its latest Annual Report. Section 5 of the Act is recommended to be amended as to its first two paragraphs, to read:

> Sec. 5. Unfair methods of competition in commerce and unfair or deceptive acts and practices 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 and unfair or deceptive acts and practices in commerce. (**)

The Commission at the same time offers this explanation of the purposes of the proposed changes:

> "This recommendation is made in order to give the Commission clear jurisdiction over a practice which is unfair or deceptive to the public and is not necessarily

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(*) F.T.C. v. R. F. Keppel & Br. Inc. 291 U.S. 304 (1934) (The Commission was reversed in this case by the Circuit Court of Appeals, on grounds very similar to the Raladam decision, the Court finding that all competitors might, and many of them did, use the device complained of. The Supreme Court, in sustaining the Commission, would appear to have been materially influenced by social considerations.)

(**) Federal Trade Commission, Annual Report (1935), p. 15.

unfair to a competitor. There are times when such a practice is so universal in an industry that the public is primarily injured rather than individual competitors. In such cases it is very difficult, if not impossible, to show injury to competitors, but the injury to the public is manifest."

A bill to amend the Federal Trade Commission Act, embodying the recommended language and certain procedural changes, was introduced by Representative Rayburn in the House of Representatives January 20, 1936, (*) and in the Senate by Senator Wheeler. Should the bill become law, it would unquestionably enlarge the Commission's opportunities for action in certain situations. Probably only the test of court actions would determine whether it would materially add to the number of forms of misrepresentation with which the Commission is already able to deal, as enumerated in the following section of this chapter.

To summarize, what the Federal Trade Commission Act primarily did from the legal view was to set up a public agency having the specific function to prevent and restrain unfair competitive practices; to assert the public interest as one, if not the first, consideration in such actions; and, so far as misrepresentations at least went, to provide a means for adding specific practices to the list of the unlawful more rapidly than the common law, cautiously following precedent, was able to do. Also, in due course, the Federal Trade Commission Act became one of the foundations upon which the NRA jurisdiction over unfair trade practices was sought to be based.

Among the causes which might be adduced for any failure on the part of the Commission to extend more fully its control over unfair competitive practices are, first, the restrictions upon its sphere of action set up in the Act itself, and second, the insistence of the courts upon their right to final definition of what unfair competition includes - not to mention the gigantic nature of the task itself.

B. Types of Misrepresentation Dealt with by the Commission. Despite the various conditions imposed upon it, the Federal Trade Commission, since its inception has been able to take action in many kinds of cases involving misrepresentation, and with a high degree of success. The practices condemned in orders to cease and desist (**) are printed in the annual reports of the Commission, and have been fully outlined and condensed in the following section.

(*) H. R. 10385, 74th Congress, 2d Session.

(**) Federal Trade Commission, Annual Report (1935) pp. 67-71.

C. Classification and Citations of Typical Cases.

For a more concrete presentation of the specific forms of misrepresentation with which the Federal Trade Commission principally deals, there are given below a number of actual Commission cases, classified as to type, and with their case citations: (*)

I. MISREPRESENTATION.

1. As to weight or quantity.

(a) Fictitious weights.

Selling soaked or "loaded" sponges by weight. Cease and desist orders issued in Complaints Nos. 374, 375, etc.

(b) False Packaging.

Packing of butter in cartons of definite size and shape, but with contents less than standard weight. F.T.C. v. Mountain Grove Creamery Co. 6 F.T.C., D. 426 (1923)

2. Composition, quality, condition or character of products.

(a) Composition.

(1) Sale of goods chiefly made out of cotton as wool. F.T.C. v. Winsted Hosiery Co., 258 U.S. 483 (1922)

(2) Advertising a product composed of common salt with its impurities as containing sixteen different chemical and vegetable ingredients:

Guarantee Veterinary Co. v. F.T.C. 285 Fed. 853 (C.C.A. 2d, 1922) (Order affirmed).

(3) Misbranding paint by terming it "Combination White Lead."

Louis Leavitt v. F.T.C., 16 F. (2d) 1019 (C.C.A. 2d, 1936) (Per curiam) (Order affirmed).

(*) Condensed from "Anti-Trust Laws and Unfair Competition", Document of Division of Review, July 20, 1935.

(4) "Satinsilk" as a brand or label for cotton thread.

See Island Thread Co. v. F.T.C., 22 F. (2d) 1019 (C.C.A. 2d, 1927) (Affirmed without opinion.)

(5) Branding imitation leather products as Duraleather."

Masland Duraleather Co. v. F.T.C., 34 F. (2d) 733 (C.C.A. 3d, 1929) (Order modified in an immaterial particular.)

(6) Using term "Good Grape" in connection with an artificially colored and flavored preparation.

Federal Trade Commission v. Good-Grape Co., 45 F. (2d) 70 (C.C.A. 8th, 1930) (Order modified by permitting use of term on condition that artificial nature of preparation be indicated.)

(b) As to quality or condition.

(1) Label bearing pictorial representation showing mattresses with an uncovered end flaring to an exaggerated thickness.

Ostermoore & Co. Inc., v. F.T.C. 16 F. (2d) 962 (C.C.A. 2d, 1927) (Order vacated on ground representation was simply fanciful, not deceptive, and merely constituted the time-honored practice of "puffing" one's wares.)

(2) Representation of "obesity cure" as "scientific"; failure to state that the preparation could not be taken safely except under medical advice.

F.T.C. v. Raladam Co. 283 U.S. 643 (1931) (Order vacated, since jurisdiction of Commission is limited to unfair trade method which affect competition, and there was no evidence that respondent's advertisements injured competitors.)

(3) Selling rebuilt tires as new.

F.T.C. v. H.P. Jones, 1. F.T.C. D. 360 (1932).

(4) Advertising a weak chemical preparation as "ten times stronger as a germicide than undiluted U.S.P. carbolic acid."

F.T.C. v. Ginse Chemical Co., 4 F.T.C. D. 155 (1921)

(5) Re-issue of old films as new releases.

Fox Film Corp., v. F.T.C., 296 Fed. 353 (C.C. A. 2d, 1924) (Order affirmed).

3. False claim to Endorsement or Use.

(a) Official endorsements and recommendations

(1) False statement that product was adopted or purchased by the United States Government.

Guarantee Vetinary Co. v. F.T.C., 285 Fed. 853 (C.C.A. 2d, 1923).

(b) Endorsement by private individuals.

(1) Publishing testimonials of nationally known characters without disclosing that substantial payments are made.

Northam Warren Corp. v. F.T.C., 59 F. (2d) 196 (C.C.A. 2d, 1932) (Order vacated on ground payment for truthful testimonials deceives no one.)

4. As to Business Status.

(a) Misrepresenting that respondent is a manufacturer.

(1) Trade or corporate name including word "Mills" where respondent does not own or operate a factory in which its products are made.

Federal Trade Commission v. Pure Silk Hosiery Mills, Inc., 3 F. (2d) 165 (C.C.A. 7th, 1925).

(2) By pictorial representations.

Use of pictures of plants and factories on letter-heads and advertising, to indicate respondents own them - ordered discontinued in Complaints Nos. 193, 491, 1104, 1107, 1721.

(b) Misrepresenting commercial rating (Stipulation #645)

(c) [illegible] distribution centers, when in fact it is untrue (Stipulation No. 0137).

(d) Representing respondent was not engaged in in a business for profit.

(1) Trade name "Anti-Tobacco League" implying non-profit organization, when in fact it was; - discontinued in Stipulation No. 0130.

5. As to Origin of Product.

(a) Labeling product made in the United States as "English Tub Soap".

F.T.C. v. Bradley , 31 F. (2d) 369 (C.C.A. 2d, 1929) (Order affirmed).

6. As to Price Reductions.

(a) False representation that usual sale price for product was $30, in sale of two for $10.

Chicago Portrait Co. v. F.T.C., 4 F (2d) 259 C.C.A. 7th 1925), Cert. Den. 269 U.S. 556 (1925) (Order evacated on ground there was no evidence that customers were deceived or competition injured.)

(b) False representation that "loose leaf extension service" for encyclopedia was given free with purchase of books

Consolidated Book Publishers, Inc. v. Federal Trade Commission 58 F. (2d) 942 (C.C.A. 7th, 1931) (Order affirmed).

(c) By means of combination sales.

Selling groceries at a fixed aggregate price, placing theprice of the staple articles below retail price and charging excessive prices for the other articles. Ordered discontinued in Complaints Nos. 349, 352.

(d) Misrepresenting that there was "no extra charge for credit" whereas substantial discounts were given on goods sold for cash. (Complaints Nos. 765 and 766).

(e) Misrepresenting that repairs were free, when in fact the charge was made up by excessive postage and package charges.

(f) Falsely advertising that the sale was below cost (Complaint Nos. 131).

(g) Representing that the price of the product would be advanced (Stipulations Nos. [illegible]1, 463).

(h) Representing that products are offered at "special" or "introductory" prices. (Complaint No. 2010, Stipulations 731, 731, 463, 760, 807).

(i) Fictitious prices.

Marking enhanced prices on fountain pens, to mislead the purchasing public as to the value of the product. (Complaints Nos. 661, 667-68, 670-673).

7. As to Medicinal or Curative Value of the Product.

(a) By means of advertising.

(1) That an electrical device was beneficial for certain ailments and had the endorsement of physicians, when those facts were not true. (Complaints 167[illegible], 1703, 1679).

(b) By means of false brands.

(1) Labeling soaps as containing olive oil, peroxide, palm oil, witch-hazel, medicines or drugs (Complaint No. 373).

8. Misrepresentations in the Sale of Corporate Securities.

(a) Misleading and deceptive statements in advertising, letters, maps, concerning the value of oil leases, properties, assets, and productivity. Ordered discontinued in Complaints Nos. 795, 596, 856, 857.

(b) Misleading announcements and reports in regard to nature and volume of business done. (Ordered discontinued in Complaint No. 873).

An outline of the administrative machinery and methods of procedure by means of which these and other unfair practices are dealt with by the Commission is given in the section following.

II. FEDERAL TRADE COMMISSION ADMINISTRATION AND PROCEDURE

The semi-judicial nature of the Commission's function in the restraint of unfair methods of competition impose upon it rather elaborate procedural requirements, which may be only briefly noted here.

A case before the Federal Trade Commission may originate in several ways. The most common is through complaint by a competitor or from public sources other than the Commission itself. The Commission, however, may initiate an investigation. Once initiated, a case runs some part of the following course. (*)

A. Informal Procedure

An "application for complaint" being received from any of the above sources, the Commission, through its Chief Examiner, considers first its jurisdictional elements, i.e., whether it involves interstate commerce and whether the facts presented are such that prosecution appears to be in the public interest. On the basis of this examination the application may be either dismissed or docketed for complaint. (Approximately two out of three of all cases are dismissed at this stage). (**)

If docketed for complaint, the case is assigned to a Commission attorney to develop the facts by interviews with the respondent, with his competitors, or consumers if necessary, or from any other available sources. The record is then presented to the chief examiner, who will recommend either (1) dismissal, (2) closing of the case by stipulation, or (3) issuance of formal complaint. All proceedings up to this point are confidential, the name of respondent being protected throughout the preliminary investigation.

B. Formal Procedure.

"Only after most careful scrutiny" does the Commission issue a formal complaint. The respondent is given opportunity to answer, and if the case is contested, hearings are held before a Commission trial examiner, who for the convenience of the parties may sit anywhere in the country. The Commission and the respondent are both represented by their attorneys. After report to both sides by the trial examiner, briefs are filed by each, and the case is heard before the full Commission. If the complaint is sustained, the Commission states its findings as to fact and its conclusion that the law has been violated, and issues an order requiring the respondent to cease and desist from the practice. If the complaint is dismissed or closed, an order to that effect is issued. These orders constitute the final functions of the Commission as far as its own procedure is concerned.

(*) Abridged from Federal Trade Commission, Annual Report (1935) pp. 43-46.

(**) See figures presented in Sec. III of this Chapter, page 27 below.

C. Judicial Enforcement and Review.

The Commission has no power to enforce its orders to cease and desist, or to assess penalties for failure to comply. For this it must appeal to the Federal courts. Likewise the respondent may appeal to the courts for review of the Commission's actions. To obtain a decree of enforcement the Commission must prove violation, while for a penalty it must show respondent to be in contempt of the court's decree.

The Commission has sought the courts' aid in enforcement in only a relatively few cases (38 in all). (*) This may indicate that its procedure is effective without specific penalties, or it may reflect the difficulties of the procedure. As to this the Commission itself has said:

> "Punishment for a violation of the law can not be secured until the Commission has proved in its own proceeding that the statute has been violated, has proven before the court that its order has been violated, and has proved that the offender is in contempt for a violation of the decree of the court. The requirement to thrice prove a violation of a prohibitive statute before punishment can be inflicted, and to prove it twice before an injunction can be secured, probably does not have a parallel in our statutes."(**)

In the recommendations contained in its 1935 Report the Commission includes certain changes in the Act designed to increase the simplicity and uniformity of its enforcement procedure.(***) These have likewise been incorporated in the Wheeler-Rayburn bill now pending in Congress.

D. Stipulation Procedure.

A simplification of procedure which the Commission has itself instituted is that of stipulation. This is an informal proceeding whereby a respondent may voluntarily enter into a stipulation of the facts complained of and agree to cease and desist from the alleged unfair practice without issuance of formal order to do so. The stipulation is not a right but a privilege extended by the Commission, and is used only where the offense is considered of a less serious nature. In signing the stipulation respondent agrees that if he ever resumes the practice, the facts as stipulated may be used against him in the trial of a complaint which the Commission may issue.

During the 9½ years in which the stipulation system has been

(*) Federal Trade Commission, Annual Report (1935), p. 87.

(**) F. T. C. Annual Report (1923) pp. 77-78.

(***) F. T. C. Annual Report (1935) p. 15.

employed (to June 30, 1935) a total of 2,257 stipulations have been approved by the Commission, as compared with a total of 1,446 cease and desist orders issued throughout the approximately 21 years of its entire history. Only 14 stipulations have ever been rescinded.(*) As to the results of this form of procedure the Commission has said:

> "The Commission believes that its stipulation procedure is protecting the American consumer from numerous unfair methods of competition which, in the aggregate, are an important consideration, reaching, by reason of the simplicity and economy of the procedure a very much larger number of abuses than the Commission could have reached through proceeding solely under the formal procedure already outlined."(**)

E. Trade Practice Conference Procedure.

The trade practice conference is a method developed by the Commission for fostering voluntary efforts by individual industries to correct their competitive abuses, and to formulate recognized standards of commercial practice. Under it a trade group may develop a "code" of fair practice and submit it for the Commission's approval and support in enforcement, so far as that may be legally allowable. Provisions of the trade practice conference codes are divided primarily into two classes. Group I rules are "affirmatively approved" by the Commission as expressions of existing law. These include declarations that various forms of misrepresentation, commercial bribery, price discrimination, etc. are unfair practices. The Group II rules are merely accepted as "expressions of the trade", desirable but not as yet backed by any legal authority. Such rules include positive standards and packaging and labeling requirements, and other subjects of particular concern to the individual industries. Some 150 of these trade practice conference codes had been approved prior to the passage of the National Industrial Recovery Act.(***)

The general resemblance of the conference codes to the trade practice portions of the NRA codes is obvious. A principal difference - and chief weakness of the former - was that no legal power existed for enforcing the broader, Group II rules, (Rules accepted as expressions of the trade but not deemed unlawful by cease and desist orders) such as was intended to be conveyed by the terms of the NIRA. Furthermore, no official share in enforcement of the conference rules was allowable to the cooperating industries, as was the case with NRA through the Code Authority set-up.

(*) Ibid. p.51.

(**) Ibid. p.50.

(***) For detailed discussion of the Trade Practice Conference system see: Federal Trade Commission, Trade Practice Conferences, June 30, 1933; National Industrial Conference Board, Public Regulation of Competitive Practices, pp.224-241; Geo.B.Galloway, Industrial Control in the U. S. Before NRA NRA Training Section, Feb. 1935, pp. 14-18.

As to misrepresentations, the great majority of the trade practice conference codes contained one or more provision concerning them. These were more or less uniform and for the most part couched in rather general terms, (which in several instances, with minor changes, became the basis for the customary type of NRA code provisions dealing with the same subject). The following are one or two typical provisions:

> "The making or causing or permitting to be made or published any false, untrue, or deceptive statement by way of advertisement or otherwise concerning the grade, quality, quantity, substance, character, nature, origin, size, or preparation of any product of the industry having the tendency and capacity to mislead or deceive purchasers or prospective purchasers and the tendency to injuriously affect the business of competitors, is an unfair trade practice."(*)

> "The false marking or branding of products of the industry, with the effect of misleading or deceiving purchasers with respect to the quantity, quality, grade, or substance of the goods purchased, and the tendency to injuriously affect the business of competitors, is an unfair trade practice."(**)

In some instances the phrase concerning competitors was omitted, though this of course did not affect the obligation of the Commission under the FTC Act to show competitive injury. A few of the Group I rules deal with specific misrepresentative practices. On the other hand, a large number of the trade practice conference codes contain in their Group II rules statements of qualitative and quantitative standards for industry products, designed to aid in the stamping out of misrepresentative practices, concerning them. Although, as previously stated, these rules have no effect of law, they tend to emphasize the necessity of positive definitions of standards for that purpose. With respect to this phase of the work the National Industrial Conference Board has said:

> "The clearest and most substantial advantage from the trade practice conference procedure is in the definition of what amounts to misrepresentation or misbranding of goods in various lines of trade. . . They (trade evils of this type) thrive on the absence of clearly defined and universally recognized trade standards. . . Only the highest commendation can be given the efforts of the Commission to assist various industries in establishing fixed standards of quality or grade for their products."(***)

(*) Rule 1, Group I, Bituminous Coal Operators of the Southwest.

(**) Rule 3, Group I, Cut Tack, Mail and Staple Industry.

(***) National Industrial Conference Board, Public Regulation of Competitive Practices, (1929)., pp. 237-238.

This essential tie between the establishment of specific commodity standards and the adequate restraint of misrepresentations concerning them will find further illustration later, in the discussion of NRA experience. Here it may be also noted that the Commission itself, in certain of its cases concerning misrepresentation of commodities (as white lead paint, fur or wool garments, etc.), has found it necessary to adopt standard definitions of the products in order to provide necessary criteria for showing deception concerning them.

F. Other Considerations.

Perhaps the most striking consideration about the Commission's procedure in general is the very heavy administrative burden which the Commission's semi-judicial character is seen to place upon it in the discharge of its function. While the development of stipulation procedure has doubtless helped materially in this respect, the various necessities of investigation, hearing and review which are inherent in the Commission's regular processes would appear to be a drag upon full effectiveness of operation, especially with the existing limitations upon available staff.

Another point concerning the Commission's organization, and one which is in marked contrast with the later NRA organizations, is its centralization. Though its activity is national in scope, outside of Washington the Commission now maintains regular field offices in 4 cities - New York, Chicago, San Francisco and Seattle. Besides clerical help these offices are staffed by 20 examiners each in New York and Chicago, and 3 to 5 each in San Francisco and Seattle. As noted above, trial examiners may hold hearings in various parts of the country, but all final hearings on formal cases are before the Commission itself. For the performance of all its functions, including those of conducting general investigations, the Commission has at this time a staff of about 600.

A summary of some of the results of the Commission's operation under this set-up, in the field of unfair competition, is given in the section following.

III. RECORD OF FEDERAL TRADE COMMISSION ACTIVITY.

A. General Legal Record.

The official record of the activity of the Commission with respect to unfair competitive practices, as shown by its published cumulative summaries covering the entire period from the creation of the Commission to June 30, 1938, gives a total of 34,757 inquiries instituted during the period, of which 17,465 were dismissed and closed after preliminary investigation. (*) Applications for complaints docketed numbered 9,311. Of these 3,539 were subsequently dismissed "for lack of merit." Formal complaints were issued in 5,734 of the cases docketed, of which 1,436 resulted in orders to cease and desist. Cases settled by stipulation totaled an additional 3,307. Some 634 applications for complaint were pending at the close of the year. (**)

From this it is seen that the Commission was successful in effecting some form of restraining action, either by cease-and-desist order or by stipulation, in 6,703 instances - that is, in approximately 16 percent of all the cases presented to it which were definitely disposed of during the period. At the same time, approximately 21,300 cases were dismissed without issuance of complaint, the great majority after a first investigation.

B. Cases Affecting Misrepresentation.

What the relative success of the Commission may have been in dealing with those dealing with misrepresentation and deception, the particular types of cases in which this study is interested, it has not been possible to determine. We know, as previously noted, (***), that somewhat more than one-half of all the cease-and-desist orders issued (and 94 percent of those arising out of Section 5 of the Federal Trade Commission Act alone - that is, other than anti-trust cases) concerned this general subject. Of the stipulations, it is reported that not less than 85 percent were in the same category. (****)

(*) "Tables Summarizing Work of the Legal Division and Court Proceedings, 1915-38", Federal Trade Commission, Annual Report (1938), pp. 32-38.

(**) Note: The Commission's tabular summaries are rather complicated, due in part to changes in the status of some cases at different stages in the proceedings. For detailed explanation and reconciliation of figures with respect to the Commission's legal operations see the text of the summaries, as cited in note above.

(***) See note, page [illegible], Chapter One, supra.

(****) Misleading representations of the "general" class, plus the special false and misleading advertising type of cases (Data from Office of Chief Trial Examiner, Federal Trade Commission, November 11, 1938).

But we have no way of knowing what proportion of the more than 21,000 dismissed cases had to do with the same subject. The records of these cases, as a group, are held confidential. Without some classification of these cases by subject-matter there is no way of determining whether the number of instances of successful restraining action taken in misrepresentation cases alone was greater or less, in relation to the entire number of cases of this same type, than the 16 percent average for affirmative action in cases of all types, given above.

C. General Reasons for Dismissals.

Without a knowledge of the reasons for dismissal, also, of all or a representative sample of these 21,000 cases, it is not feasible to attempt any appraisal of the grounds for this large proportion of dropped cases or the policy involved in their handling, or to obtain light on the administrative difficulties and practical problems involved in the nature of the cases themselves. The more frequently encountered causes for disposal of the cases without restraining action probably are those listed by the Commission itself in a recent Annual Report:

> "The Commission disposed of 1,597 cases (during the year) for the reason that they were found to be private controversies lacking public interest, that the practices complained of had been discontinued, that the firms or persons complained against had gone out of business, or for lack of jurisdiction, etc." (*)

In its tabular summaries referred to above the Commission offers the following similar explanatory note to its classification of cases "Closed for other reasons" -

> "This classification includes such reasons as death, business or practices discontinued, private controversy, controlling court decisions, etc." (**)

The classification of applications for complaints "dismissed for lack of merit" is offered without further explanation, as is the larger group of preliminary inquiries reported merely as "Closed after investigation".

No data have been found to indicate the causes, specifically, for dismissals of the misrepresentation and deception group of cases, or whether these causes differ materially from the general reasons given above. An analysis to shed light upon this point, as well as upon the extent of dismissal of this type of case, might well prove of value in any consideration of the whole problem of public dealing with deceptive practices.

(*) Federal Trade Commission, Annual Report (1934) p. 4
(**) Federal Trade Commission, Annual Report (1935), p. 83, note.

D. The Commission and the Courts.

As to the Commission's record with the courts, of the 1,446 cease-and-desist orders issued in the period dealt with in the cumulative summaries quoted above, the vast majority were accepted as binding by the respondents without recourse to judicial review. (Only 1,000 of the orders were contested in any degree before the Commission itself, 409 being issued by consent, and 37 by default). In 151 cases, appeals were taken by the respondents to the lower courts, and in 38 cases the Commission petitioned the lower courts for enforcement of its decrees.

In 87 of the 151 appealed cases the Commission's ruling was either reversed or modified; in 46 instances the Commission was sustained; 15 petitions were withdrawn, and 3 are pending. It is pointed out, however, that in several instances where the Commission was reversed, a number of cases in the same industry and turning on the same point were briefed, tried and decided as one case, but given each an individual docket number. If cases actually tried, and not docket numbers, were counted, it is said, the total of decisions adverse to the Commission would be 36, instead of 87. (*) In 58 cases appealed by the Commission or others to the Supreme Court, the Commission has been upheld 34 times, and reversed 10 times; 3 petitions were withdrawn; and in 17 cases certiorari was denied. Out of 38 cases in which the Commission applied to the courts for enforcement of its orders, it was supported in 24 cases and reversed in 4; 8 petitions being withdrawn and 2 pending.

Statistically at least this is a creditable record. Some criticism of the Commission has inclined to attribute the relative infrequency of its judicial reverses to its conservatism, its disinclination to try conclusions in newer, more doubtful fields of jurisdiction. Whatever the justification of such a charge in some areas of competitive practice, it does not appear to apply with respect to misrepresentations. Here the Commission has shown consistent activity, and has inclined to extend its restraint to the limits of judicial approval, and sometimes a little beyond, as its reversals in these cases show.

E. Reasons for Reversals in Misrepresentation Cases.

An examination of the cases involving misrepresentation in which the Commission has suffered reversal at the hands of the courts reveals such cases to have turned principally upon these points: (1) whether the practice complained of was really misrepresentative or deceptive in nature, or constituted merely trade "puffing" (**); (2) whether the public was in fact deceived, or liable to be deceived by the practice, and competitive injury suffered in consequence (***); and (3) whether,

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(*) Federal Trade Commission, Annual Report (1935), Note to Table 5, p. 85.

(**) Ostermoor & Co., Inc., v. F.T.C. 16 F (2d) 962 C.C.A. 2d, 1927.

(***) Berkey & Gay Furniture Co., v. F.T.C., 42 F (2d) 427; Chicago Portrait Co. 4 F (2d) 259 (C.C.A. 7th 1925).

in spite of admitted deception of or possible injury to the public, there existed any competitor liable to suffer from the practice. (*) In certain cases, also, the Commission's orders were modified to permit the respondent to continue the practice complained of, but with modifications designed to remove the likelihood of misleading. (**)

F. Types of Industries Affected by Trade Commission Action.

To obtain some idea of the types of industries which, in practice, have been most frequently affected by action taken by the Federal Trade Commission with respect to misrepresentation, a check of cases contained in the Commission's official reports was made. (***) Both the type of commodity dealt in by the respondent, and the form of his business - whether manufacturing, wholesale, retail, etc. - were noted, where it was felt that these points were sufficiently indicated by the data given in the reports.

A total of 550 cease-and-desist orders covering misrepresentation cases were so tabulated, with the results shown below:

Product	No. of Cases	Product	No. of Cases
Paint, Varnish, Shellac, etc.	50	Hosiery	28
Foods (General	41	Outerwear	27
Cutlery, Silverware, Novelties, etc.	36	Underwear	27
Furniture and Rugs	36	Toilet Articles & Notions for Beauty & Health	26
Schools & Institutes of Health	32	Bedsprings, Mattresses, etc.	6
Building Material - Glass, Roofing, etc.	21	Auto Accessories, Batteries, etc.	5
Publishers & Printers	20	Tires and Rubber	5
Cotton Textiles & Lace	18	Rope	5
Chemicals, Stain Remover, Disinfectant, Soap	17	Medicinal Products and Drugs	5
Fountain Pens & Pencils	16	Coffee	4
Cigars	12	Leather & Imitation Leather	4
Electrical Appliances (Health, Beauty, Household)	11	Shoes	4
Candy	11	Hats	4
Merchandise (General)	10	Machinery - Oil Burns, etc.	3
Lumber	10	Music - Pianos, Phonographs	3
Oil, Gas, & Gas Revivers	9	Coal	3
Business Equipment (Typewriters, check-writers, etc.)	8	Sporting Goods	3
Jewelry & Eyeglasses	8	Photographs	1
Seeds	7	Motion Pictures	1
Sponges	7	Fur Coats	1
Shirts	7		

(*) F.T.C., v. Raladam Co. 283 U.S. 643 (1931).
(**) F.T.C., v. Morrissey, 47 F. (2d) 101 (C.C.A. 7th, 1931); M. Fluegelman & Co., v. F.T.C., 37 F (2d) 59 (C.C.A., 2d. 1930).
(***) Vols. 1-13, June 30, 1915-1935.

Form of Business	No. of Cases
Manufacturer	294
Wholesaler	90
Retailer	72
Mail order and other correspondence selling ;	64
Broker, Importer, Agent, etc. . . .	35

Some questions as to exact classification arose in the preparation of the above, but the results clearly indicate the principal conclusion to be drawn, namely that the great majority of Trade Commission actions as to misrepresentation are in connection with consumer goods industries. Also, a very considerable proportion of the cases deal with elements of the distributive system in direct contact with the ultimate consumer, despite the fact that the great bulk of retail trade lies outside the jurisdiction of the Commission through limitations of the interstate commerce clause.

G. General Summary

In general as to the work of the Commission, there is no doubt that a large share of its attention and activity has been directed toward the stamping out of misrepresentative and deceptive practices, and that in a numerous body of cases it has acted effectively to that end. Whether, over a period of some 20 years, a total of perhaps 3,500 restraining actions (stipulations and cease-and-desist orders combined) effected in this field represents a reasonably sufficient policing of this problem in the sphere of national commerce might at first glance arouse a question.

Whatever inadequacy there may be felt to be must be attributed in large measure to the various limitations placed upon the Commission's work, by the interstate commerce clause, by the other legal conditions specifically imposed by its organic Act, by the interpretations of the courts, and by the extent of the task itself in relation to the physical facilities provided for handling it. The Commission itself, by the recommendations for amendments to its Act which have been previously mentioned, has indicated its own sense of the need for an increase in its scope of activity through relaxation of some of these restrictive conditions.

Furthermore, the extent of the influence of the Commission in discouraging deceptive practices and encouraging a more wholesome tone in advertising and other marketing methods is not to be measured by number of orders issued alone. Such orders deal with individual cases, but they also serve in a measure to set precedents which have widespread restraining effect upon others in the same lines of trade employing, or who might be inclined to employ, similar tactics. Through these orders also, and in the informal stipulations entered into, a considerable body of decisions as to the nature of misrepresentation has flowed from the Commission which have never been carried to the courts, and which have contributed

materially to an enlarging law merchant in this country.

The Commission has particularly sought to keep abreast of the development of practices in the advertising field by its Special Board of Investigation functioning in the newspaper, periodical and radio fields. (*) These efforts are claimed to have met with very considerable success. Finally, through its Trade Practice Conference work the Commission has assisted in cooperation with the individual trades in emphasizing the restriction of deceptive practices, and has given assistance, to the extent of its powers, in the formulation of positive trade standards looking to this result. Altogether, it seems probable that with respect to this type of unfair competition, fully as much as any other falling within its sphere, the Commission has fulfilled the aims and expectations with which it was established.

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The nature and work of the Federal Trade Commission have been dealt with at considerable length in this chapter because in certain respects it was the forerunner of the trade practice work embodied in the NRA codes. As the first agency set up for coping with misrepresentative practices in commerce on a national scale, also, it furnishes the chief available basis for comparison with the work in this field achieved under the NRA codes, which is to be considered in the chapter following.

(*) Federal Trade Commission, Annual Report (1935), pp. 101-104.

CHAPTER FOUR

N.R.A. EXPERIENCE IN THE CONTROL OF MISREPRESENTATION

1. GENERAL VIEW OF THE CODE PROVISIONS

The National Industrial Recovery Act became law on June 16, 1933. Section 3 (a), of Title I of the Act provided:

> "After the President shall have approved any such code, the provisions of such code shall be the standards of fair competition for such trade or industry or subdivision thereof. Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act, as amended;"..

This was in effect the next step beyond the Federal Trade Commission Act. The codes were to supply the specific definitions of the practices constituting "unfair methods of competition" which had been omitted from that Act. Furthermore, by use of the phrasing "in or affecting interstate or foreign commerce" it was proposed to avoid the limitations involved in a strict interpretation of the interstate commerce clause of the Constitution to which the Federal Trade Commission was subject.

A. Frequency of Misrepresentation Provisions in the Codes

Prohibitions upon misrepresentations were among the most frequently-appearing of all trade practice provisions in the codes. Slightly more than four in five of the total number of codes, both basic and supplemental, which were ultimately approved included in their schedule of unfair practices one or more methods of misrepresentation or deception. Specifically, the principal types of provisions so included were: (*)

Prohibition of misrepresentation in general (widely inclusive provision).	356	codes and supplements
Misrepresentation of products . .	148	" " "
Misrepresentation of prices . . .	74	" " "
Misrepresentation of, or deceptive credit terms	22	" " "

(*) From "Trade Practice Provisions in Codes of Fair Competition", Daniel Gerig and Beatrice Strasburger, Division of Review, NRA, December 20, 1935. Table I.

Frequency of Misrepresentation Provisions in the Codes (Continued)

Misrepresentation of services, form of business, affiliations, etc.	35	Codes and supplements
Inaccurate advertising	494	" " "
Deceptive labeling, branding, marking or packing	416	" " "
Deceptive "selling methods". . . .	57	" " "
Deceptive offers, orders, agreements, etc.	425	" " "
Misrepresentation of competitors or their products ("defamation").	529	" " "
Inaccurate or persistent underselling claims	19	" " "
False measures	19	" " "
Lotteries	67	" " "

B. Form of the Code Provisions.

Numerous variations in the form of these provisions are found, particularly in the earlier codes. (*) Later they tended to become more standardized in form and legalistic in phrasing. In many instances the language followed closely, if not verbatim, the text of the similar provisions appearing in the voluntary trade practice conference codes of the Federal Trade Commission.

The forms in which several of the frequently appearing provisions were included in the NRA "model code" are as follows: (**)

Misrepresentation (General)
Inaccurate Advertising

"No member of the trade/industry shall publish advertising (whether printed, radio display or of any other nature), which is misleading or inaccurate in any material particular, nor shall any member in any way misrepresent any goods, (including, but without limitation, its use, trade-mark, grade, quality, quantity, origin, size, substance, character, nature, finsih, material, content or preparation) or credit terms, values, policies, services, or the nature or form of

(*) See text accompanying the tabulation of trade practice provisions, (op.cit. supra, for discussion of the method of tabulation followed, variations in the form of the provisions, overlaps, etc.

(**) NRA Office Manual, PP. 1800-1831.1.

Misrepresentation (General) (Continued)
Inaccurate Advertising

the business conducted."

Deceptive Marking, Branding or Packing

"No member of the trade/industry shall brand or mark or pack any goods in any manner which tends to deceive or mislead purchasers with respect to the brand, grade, quality, quantity, origin, size, substance, character, nature, finish, material content or preparation of such goods."

Defamation of Competitors

"No member of the trade/industry shall defame a competitor by falsely imputing to him dishonorable conduct, inability to perform contract, or questionable credit standing, or by other false representation, or by falsely disparaging the grade or quality of his goods."

The code provisions dealing with misrepresentation were generally broad in their phrasing, and added little if anything specific were more comprehensive than the types of practices which had already been recognized as unfair competitive methods in Federal Trade Commission procedure. For the most part also they provided little in the way of criteria for determining just what might be considered misrepresentative or deceptive in any given case with respect to any of the points enumerated in the provisions.

In some instances there was simply a flat prohibition: "Misbranding, mislabeling, and false, deceptive, and misleading advertising are prohibited by this code." (*) "Misrepresentation or misbranding of merchandise is an unfair practice.... No person shall enter into any false or misleading advertising." (**) A more usual form added the qualification "with the intent or effect of deceiving the purchaser". (***)

The model provision as to marking and branding given above employed the form "which tends to mislead or deceive purchasers", doing away with any requirement of proof of intent or actual deception as matters of fact. For misrepresentations in advertising the qualification "in any material particular" was used in the model clause, and in numerous codes, apparently to avoid drawing the rein on the merchandising imagination too tight. In many other instances however it is simply stated, "No member shall use advertising methods which have capacity or tendency to deceive or mislead the customer or prospective

(*) Paint and Varnish Code, Part 2, Art. XII. Codes of Fair Competition, Vol. II.p. 178.
(**) Underwear and Allied Products Code. Art.VI. 4, ibid. Vol.1.p.322.
(***)Retail Solid Fuel. Art. VI.3, ibid, Vol. VI. p.483.

Defamation of Competitors (Continued)

customer," or the equivalent.

As previously stated, practically no attempt was made in the code provisions themselves to provide definite criteria to guide the administrative authorities in deciding just where the line between truth and deception in advertising runs, or what are the permissible boundaries of "trade puffing". This apparently was left to their discretion in the particular circumstances, with the shadow of the courts in the background for passing of final judgment. There is little evidence, also, of effort on the part of the Code Authorities to set up any general standards of guidance for themselves in these matters. Apparently they dealt with such questions in piecemeal fashion, and more or less by rule of thumb, as the individual cases arose.

Such a system was flexible and perhaps well adapted to deal with the specialized problems of the individual industries. Had the NRA continued in effect long enough for a body of precedent to be built up through the actions of the different Code Authorities, no doubt more specific rules could have been drawn. At least there would have evolved lists of the particular practices barred in the several industries, similar to that of practices condemned by orders to cease and desist already quoted from the Federal Trade Commission.

In one code, that for general Retail Trade, a series of interpretations were in fact adopted defining and clarifying the meaning of the advertising provisions with respect to certain merchandising practices of the industry. (*) And an effort was made by a special Advertising Committee set up by the Coffee Code Authority to formulate a code of advertising ethics for use in deciding as to borderline cases, this Code Authority apparently having been particularly alive to the complexities of the subject. (**)

As far as the physical qualities and characteristics of the commodities themselves were concerned, certain criteria for determining misrepresentation were provided in those codes which set up some form of product standards or labeling requirements. These are dealt with in detail in Part II of this report.

C. General Comparison with the Federal Trade Statute.

What was essentially significant about the codes as a whole, from a comparative legal point of view, was that they carried their own definitions of what constituted unfair competition, as a matter of law; this was not left for a court to decide. The acts were for the most part branded as unfair in themselves, thus freeing the code law from the hampering double requirement to show both competitive injury and public interest, as in the case of the Federal Trade Commission Act, (although as a matter of practice those points were usually plead for the purpose of strengthening the cases presented by

(*) See pages 50-53, below
(**) See pages 57, 58, below

General Comparison with the Federal Trade Statute (Continued)

NRA for litigation). What was essential to be shown was that the code had been legally adopted and contained the provision in question (evidenced usually by affidavit), and that violation of the provision had taken place.

Furthermore, the NRA law was also, theoretically at least and to some degree in effect, free of the necessity to show that the act complained of was directly in interstate commerce, by grace of the "in or affecting" clause already referred to, (*)

Finally, violations of the standards of unfair competition embodied i the codes were made misdemeanours by the NRA Act and (again, theoretically at least) immediately subject to criminal prosecution and penalty, as contrasted with the restraining procedure of the Federal Trade Commission Act with its penalties only upon action in contempt where violations of the restraining orders of the Commission and the courts had occurred. (**)

(*) That is, the Code Authorities were able to obtain a considerable amount of compliance, as in the retail code, without the interstate commerce issue being raised. On the other hand, "...every time that we filed a suit for enforcement of a code provision, the defendant presented first a denial of the constitutionality of the NIRA as a whole; second, the allegation that the delegation of authority to the Administrator had exceeded the powers of Congress; and third, that the business involved was not interstate commerce and Congress had nothing to do with it." Wm. H. Davis, former Compliance Director, Bulletin of Crushed Stone, Sand & Gravel Code Authority, Feb. 20, 1935.

(**) The points noted in the preceding three paragraphs apply only to legal proceedings undertaken by or on behalf of NRA itself in conjunction with the District or State Attorneys and the Department of Justice. A rather complicated dual system of legal enforcement was in fact set up, involving criminal prosecutions as above on the one hand, and action by the Federal Trade Commission on the other. By the terms of NIRA, violations of the codes became unfair methods of competition "within the meaning of the Federal Trade Commission Act", thereby giving the Commission jurisdiction; but that jurisdiction was in turn still restricted to the terms of the F.T.C. Act itself, as in ordinary cases of unfair competition. Further,the President by Executive Order, gave a right of appeal to the Federal Trade Commission from the action of any Federal agency, except the Department of Justice, in cases of alleged code violations involving promotion of monopoly or discrimination against small enterprises; but the order also instructed the Commission to turn over to the Department of Justice all such appeals where the practices complained of were found to be not contrary to section 5 of the F.T.C. Act, or sections 2,3, or 7 of the Clayton Act. (Executive Order of January 20, 1934)

D. Limitations in Practice of the NRA Provisions.

The somewhat larger legal scope for enforcement allowed by the Recovery Act had its limitations. Many cases were settled by the signing of a certificate of compliance by the offender, which amounted to a promise to obey the code in the future, unaccompanied by any present penalty and/or increased hazard of future penalty in case of continued violation*.

As long as public opinion demanded display of the Blue Eagle, violators were very anxious to have the insignia restored to them and this condition aided administration agencies in the adjustment of the code violations without the necessity of resorting to the usual court procedure. However, the Administration was hampered in its efforts to obtain compliance and/or enforcement by the very nature of the complaints themselves; because of the incompleteness of the preparation of the cases, the insufficiency of the supporting evidence and the bias which frequently accompanied the data submitted by the Code Authorities when demanding action.

Greater experience and proficiency on the part of the Code Administering bodies in discharging their own responsibilities as well as complete cooperation from the complainants and the prosecuting officials would doubtless be required in order to make a system of code administration function with a high degree of efficiency.

The general nature of the machinery of administration which was employed to give effect to the code provisions is outlined in the succeeding pages.

(*) Compare FTC stipulation procedure, page 23, below

II. NRA ADMINISTRATION OF THE CODE PROVISIONS

The NRA machinery for obtaining compliance with the Code requirements and restraining violation of the Code law took its most characteristic pattern from the conception of cooperative control by industry and government which was basic in the National Industrial Recovery Act.

A. The Code Authorities

On the industry side were the Code Authorities, often with local and regional Sub-Authorities of various sorts, composed of industry members supposedly representative of all competing groups, and with public representation through an Administration member. These Authorities, by the terms of their codes, received various powers for their administration, subject in most instances to NRA approval in their actual performance.

For the more adequate dealing with trade practice questions, Trade Practice Complaints Committees were set up in conjunction with the Code Authorities of most of the codes, the personnel and methods of procedure of these being required to be passed upon by the central NRA organization. These Committees were authorized to receive and investigate complaints of violations of the code's trade practice provisions, or initiate such action of their own; and to endeavor by education, persuasion, arbitration, etc., to obtain compliance from the violator without recourse to NRA or the institution of legal proceedings. Where no such committees were set up the corresponding functions were commonly performed by the Code Authorities themselves.

Such a mechanism, closely in contact with industry conditions and familiar with industry problems, was expected to prove a responsive and effective means for dealing with these. When properly operated it did, in fact, provide a flexible, informal, useful and often speedy means of making the codes effective. (*)

B. NRA Compliance Agencies.

Cases where compliance could not be obtained by the Code Authorities were referable to the NRA compliance machinery, the first stages of which comprised the State and Regional Compliance offices, and the Regional Compliance Councils. Here, also, effort would be made to settle the controversies by adjustment rather than through court proceedings; neither the Code Authorities nor the NRA Compliance agencies having the right to subpoena witnesses (as could the Federal Trade Commission), or to issue legal processes of any kind.

Cases which still remained obdurate might be referred to the Com-

(*) For discussion of the organization and functioning of the Code Authorities see Administrative Studies, NRA, Division of Review.

pliance Division in Washington, and finally to the Litigation Division to be prepared for prosecution.

Legal enforcement provided by the NRA Act was of two kinds, first by means of criminal proceedings instituted through the various District Attorneys' offices, and second, through the Federal Trade Commission, in cases subject to the Commission's jurisdiction under its own Act.

Though generally, power to assess penalties was only granted Code administration agencies by liquidated damage provisions, which had been agreed upon by members of industry, the compliance division penalized non-recalcitrants by removal of the Blue Eagle. The penalty thus achieved was of course the most severe when consumers and the public in general shunned those who had been penalized by the removal of the insignia. When such action did not bring the required result it became necessary in many sections to bring the offenders before the several District Courts in the respective areas. The point to be noted is, that the Act itself permitted violators to be brought before the courts at once and charged with the offense, in case the compliance agencies could not cope with the situation.

C. Some Comparisons With Federal Trade Organization.

The foregoing outline indicates some points both of comparison and of contrast between the NRA administrative set-up and that of a body such as the Federal Trade Commission.

Compared to the rather closely centralized organization of the Commission the NRA was widely decentralized, both on a geographical and on an industry basis. NRA Compliance Offices were operative in every state for the purpose of cooperating with the code authorities, State and local agencies, and the public itself in seeing that the codes were properly put into effect. In its Code Authority organization the NRA possessed a medium of direct administrative contact with the individual coded industries only remotely approached by the link ea between the Trade Commission and those organized industries which had presented Trade Practice Conference codes.

On the other hand, the entirely official character of the Federal Trade Commission enables it to retain an objective position with respect to industry interests which the Code Authority set-ups under NRA were not often able to attain.

In their method of operation the Code Authorities themselves bore some degree of resemblance to the Commission. They could, in their own particular fields, receive or initiate complaints of unfair practices, make investigations concerning them, collect evidence, decide the issues, and call upon those found to be in violation of the code to desist from their practices. Like the Commission, they could dismiss cases found to be "without merit", or close others upon informal agreement to abandon the practice complained of; but like it again they had no power to enforce their orders by imposition of any direct penalties. Unlike the Commission they could not apply to the courts

in their own names for enforcement of their orders, but were required to seek this through the regular channels of the NRA.

As an administrative agency the NRA had the operation of hundreds of diverse trade practice laws, with varying jurisdictions, to oversee, as compared with the two basic charters of the Federal Trade Commission in this field. The NRA moreover, under its original concept, possessed the authority and responsibility, in conjunction with industry, to determine the specific constituents of its own trade law, a power denied to the Federal Trade Commission in its Trade Practice procedure.

So long as its legal basis stood, also, the NRA had in its machinery for amendment and interpretation a flexible medium for altering and adjusting code law to meet the experienced needs of industry and changing circumstances, as contrasted with the established and relatively inflexible legal precedents under which the Commission was largely compelled to operate.

The next section of this chapter will set forth some of the results in the field of misrepresentation achieved under this system, as the NRA's own records of operation, and the comments of various Code Authorities and other industry groups, reveal them.

III. RESULTS OF OPERATION OF THE MISREPRESENTATION PROVISIONS

A. General Sources of Information

For the information necessary to cast light upon the question of how the code provisions concerning misrepresentation operated in actual practice the following sources of information were used: the records of code adoption and administration in the NRA files in Washington; the compliance and enforcement records both in that city and as collected from the State and Regional Compliance Offices throughout the country; questionnaires directed to officers of the former Code Authorities; field contact, through the State offices, with representatives of the former Local and Regional Code Authorities of codes which were organized upon that basis; and some direct contact with individual industries.

In comparison with the very large number of codes which contained one or more forms of misrepresentation provision, a relatively small amount of significant information concerning either their genesis or operation was found in the NRA file records. In all but a handful of cases - the most notable of which was the General Retail Trade Code - the provisions were, so far as the transcripts of code hearings reveal, adopted almost wholly without discussion or controversy, as desirable general objectives or the expression of existing law. Little more concerning them is found in the file records of code administration.

For data as to operation of the provisions as revealed by the compliance records, the Washington compliance files for more than 400 individual codes, including those covering the 60 largest codified industries, were searched. Only 61 of these codes showed any misrep-

resentation cases whatever referred for action, and in nearly half of them not more than two or three cases each.

Composite compliance figures concerning trade practice violations for 115 representative industries, gathered from the State Compliance Offices throughout the country, show a total of 23,611 cases concerning all types of trade practice provisions, of which only 1,619, or less than 7 per cent, represented all types of misrepresentation violations of interest in this report. Moreover, four-fifths of the total number of misrepresentation cases were contributed by 9 retail codes. Forty-six of the entire 115 codes reported showed no misrepresentation cases, and 42 others showed five or less such violations each. (*)

Two general conclusions might be drawn from the foregoing facts, either, first, that in the great majority of industries, the retail trades excepted, misrepresentations constituted no problem, or at least not one actively sought to be controlled; or, second, that the Code Authorities of these industries had been largely able to deal with their misrepresentations problems by means of their code provisions without calling upon NRA for compliance or enforcement aid.

In the following sections there will be considered, in order, (1), the data concerning misrepresentation for a group of industries largely representative of those with a story appearing in the NRA files; (2) results obtained from a questionnaire largely circulated among former Code Authorities; (3) data obtained by field contact with Local Code Authorities in a selected group of industries; and (4) further analysis of the data presented by the compliance and enforcement records.

(*) Detailed figures are presented on pp. 92, 93, below

B. Operation of the Provisions in Selected Industries

In the pages following there is presented the story of the operation of the misrepresentation provisions in a group of selected industries. The industries included are for the most part those in which control of misrepresentation in some form was a recognized industry problem, usually making its appearance in the very beginning of the code making, and continuing as a matter of concern in the administration phase. Taken together they are illustrative of most of the circumstances connected with the misrepresentation problem which the NRA experience served to emphasize.

The data presented for these codes was obtained very largely from the various NRA file records in Washington, supplemented by conference with former Deputy Administrators in charge of the codes, and to a limited extent by correspondence and personal contact with Code Authority and industry representatives. The codes follow:

1. Retail Trade (Code No. 60)

This is probably the largest and most important code in which the question of misrepresentation, including particularly the definition of false or misleading advertising, was a matter of major concern. From the inception of the code the subject aroused a controversy, first with respect to "underselling claims", and later as to "free deals", which came to be only second in importance to that which surged about the "loss leader" question.

The general retail trade code, covering a wide variety of commodities, including retail drugs, was presented to NRA for approval by 10 sponsoring national retail trade associations on July 29, 1933. The code was designed to cover a combined business comprising approximately 300,000 establishments, employing 1,070,000 workers, and having net sales aggregating some $8,600,000,000. (*)

a. The Proposed Code Provisions.

The code as originally proposed contained the following provisions touching upon deceptive advertising and other misrepresentative practices:

(a) "No member of the retail trade shall use advertising, (whether printed, radio, display or of any other nature) which is inaccurate and/or in any way misrepresents merchandise, (including its use, trade-mark, grade, quality, quantity, substance, character, nature, origin, size, material content or preparation), or credit terms values, policies, or services, nor shall any member of the trade use advertising or selling methods which tend to

(*) Estimates of Research and Planning Division, NRA, for 1933.

deceive or mislead the consumer, including 'bait' offers of merchandise."

(b) "The term 'Bait offer of merchandise' as used herein means the practice whereby a member of the trade through an appeal by price, brand, description, or other means, attracts prospective customers into his store and then through inadequate or disparaging sales presentation or through the quantity available, or through other means places obstacles in the way of the purchase of the advertised merchandise and forces upon the prospective customer's attention other merchandise upon which a greater profit is to be realized."

(c) "No member of the retail trade shall use advertising which refers directly or by implication to any competitors or their merchandise, prices, values, credit terms, policies or services."

And the following: "The use of, participation in, publishing or broadcasting of, any statement or representation that lays claim to a policy or continuing practice of generally underselling competitors, is an unfair and uneconomic practice." (*)

A public hearing was held August 24-26, 1933, at which a great deal of time was given to discussion of the trade practice provisions to be adopted. Of 203 speakers who presented their views the record indicates that only one seriously opposed the advertising provisions.(**) This was Mr. Percy S. Strauss, President of the R. H. Macy Company, New York, who presented his company's views in opposition to the "underselling" clause given above.

b. The Underselling Claim Problem.

According to the testimony offered the sales policy of the R. H. Macy Company has been developed and widely advertised over a period of years. All merchandise is sold for cash and it is the company's claim that they are, because of cash sales, able to sell for six per cent less than their competitors. They have consistently followed this policy and claim to be always ready to sell six per cent below any competitive price. It was further developed at the hearings that the Macy Company owns the Bamberger Store, Newark, N. J., and two or three other stores which do not operate on a cash basis. It has been the contention of the R. H. Macy Co., that because of their intimate knowledge of sales cost under the two systems they were able to judge and know the exact advantage which they were able to offer the consumer.

The general opposition of the trade to the advertising of such a general policy may be summed up in the terms of a brief subsequently submitted by the National Retail Dry Goods Association, which held that:

(*) Text of original draft of code submitted. Code Record files.
(**) See Transcript of Public Hearing, August 24, 1933, Vols. 1-12.

(1) "The claim to undersell all competitors never has been and cannot be sustained."
(2) It is therefore inherently misrepresentative to the public.
(3) Such claims "break down public confidence in advertising, are detrimental to sound business, and are unfair and uneconomic."
(4) "The loss-limitation provision of the Code establishes a fixed point beyond which no merchant can go in an effort to undersell his competitor, and therefore he should not be able to claim his ability to do so."(*)

In defense of his firm's position Mr. Strauss cited the conclusions reached by the Federal Trade Commission in its investigation of the operations of their business. He stated:

> "Several years ago interested parties filed application with the Federal Trade Commission to prohibit the advertising by Macy of its cash policy statement. The commission made a thorough and exhaustive examination which occupied over two years. Macy produced its records. The Commission also examined records of Macy competitors. The Commission found neither unfair competition nor false and misleading advertising in connection with Macy's cash policy statement and concluded its investigation by denying the application.
>
> "We oppose any attempt to prevent any merchant from presenting to the public in any form of appropriate words his economically justifiable claim that generally lower cost operation, whether by reason of cash sales exclusively or otherwise, permits economies which are passed on to his customers.
>
> "The only restriction upon such sales would be their truthfulness.
>
> "That economies resulting from cash sales exclusively are possible and exist cannot fairly be denied." (**)

The Consumers' Advisory Board supported the Macy contention, in the general interests of truth of statement.

> "The Board also opposed the provision that, 'No retailer shall use advertising which lays claim to a policy or continuing practice of generally underselling competitors'. This provision may make it an offense to tell the truth, and that resembles the ancient and now discredited doctrine that 'the greater the truth the greater the libel'." (***)

(*) Brief presented by T. E. Moeser, Vice President, National Retail Dry Goods Association, July 27, 1934. Deputy Files.
(**) Transcript of Hearings, page 593.
(***) Volume A-1, Memorandum to A. D. Whiteside, Deputy Administrator, September 29, 1933.

The difficulty apparently lay in the fact that while the Macy example admittedly might have given rise to much improper advertising of a similar nature by other industry members, there was no way to prove that an underselling policy could not be truthfully claimed and honestly carried into effect.

C. The Code Provisions as Approved.

Nevertheless, the Code as finally agreed upon by the sponsors did not recognize the Macy position, and the trade practices were forwarded to the Administration for approval with the underselling clause in its original form. The code was approved October 21, 1933, to become effective October 30.

The Code thus approved was not in several respects the code which had originally been presented by the sponsoring trade groups, nor was it precisely as finally agreed upon by them; and there was considerable outcry in the industry. Article IX, 1-c, as actually approved read: "No retailer shall use advertising which inaccurately lays claim to a policy or continuing practice of generally underselling competitors." The "bait" advertising clause had disappeared, and in place was a provision simply against "switching". (Art. IX, 1, c) The clauses concerning inaccurate advertising and disparagement of competitor had been qualified by the addition of the phrase "in any material particular." The text of the entire misrepresentation provision as approved is as follows:

> "Section 1. Advertising and selling methods.--(a) No retailer shall use advertising, whether printed, radio, or display or of any other nature, which is inaccurate in any material particular or misrepresents merchandise (including its use, trade-mark, grade, quality, quantity, size, origin, material, content, preparation, or curative or therapeutic effect) or credit terms, values, policies, or services; and no retailer shall use advertising and/or selling methods which tend to deceive or mislead the customer.
>
> (b) No retailer shall use advertising which refers inaccurately in any material particular to any competitor or his merchandise, prices, values, credit terms, policies, or services.
>
> (c) No retailer shall use advertising which inaccurately lays claim to a policy or continuing practice of generally underselling competitors.
>
> (d) No retailer shall secretly give anything of value to the employee or agent of a customer for the purpose of influencing a sale, or in furtherance of a sale render a bill or statement of account to the employee, agent or customer which is inaccurate in any material particular.
>
> (e) No retailer shall place obstacles in the way of the purchase of a product which a consumer orders by brand name by urging upon the consumer a substitute product in a manner which disparages the product ordered." (Article IX)

There were other changes in the code, the net results of which were to cause the industry at large to feel that it had been "let down", and to create a mental reservation which later tended to weaken the support which the code obtained. (*)

When the Darrow report appeared these changes were further castigated. The clauses, it was claimed, had been "unwarrantably amended". The changes were characterized as

> "startling and most disquieting. The elimation of reference to 'bait offers', or 'loss leaders' largely cancels the purpose of the paragraph. The addition of the phrase 'in any material particular' virtually wrenches from the paragraph any degree of effectiveness. The change that allows 'accurate' reference to competitors completes the same emasculation of the reform of this evil . . . It is a matter of public concern to know how and by whom the codes thus prepared for public protection and the welfare of the industry are in this stealthy manner ruined." (**)

In July 1934, the National Retail Dry Goods Association sought to reopen the question of general underselling claims, and in a brief, whose substance has been previously quoted, (***) urged deletion of the word "inaccurately". No action was taken upon this.

With respect to the whole subject, Mr. R. N. Neustadt, Managing Director of the National Retail Code Authority, stated that while the "Macy policy" problem was a sore spot in parts of the Northeast, it did not present great difficulties elsewhere. While other department stores did attempt the same tactics, they were not so careful nor so thorough-going as the original, and the Local Code Authorities were able to curb the improper advertising. Many stores were glad to stop a practice which they found they could ill afford. (****)

d. Proposed Amendments.

A public hearing was held on May 4, 1934, for the purpose of considering various proposed amendments to the Retail Code, several touching upon misrepresentation.

(*) Opinion of Mr. Richard N. Neustadt, Managing Director, National Retail Code Authority, expressed in conversation, November 5, 1935.

(**) Report of the National Board of Review, May 10, 1934, p. 23. This Board, under the chairmanship of Mr. Clarence Darrow, was set up by the President to receive testimony and report concerning certain controversial aspects of NRA operation, particularly with reference to their effect upon the smaller units of industry.

(***) Page 63 supra.

(****) Opinion expressed in conversation with representative of Commodity Information Unit, November 5, 1935.

The question of "bait" offers, which had been dealt with in the code as originally proposed, was again considered but it was concluded that the loss-limitation provision would sufficiently restrict the practice. (*)

An amendment concerning the advertising of Installment Payment Plans was considered, the proposed text reading -

> "Advertisements offering merchandise for sale in installment payment plans shall clearly and unequivocally indicate all terms and charges which must be complied with in order to obtain the merchandise so advertised."

This amendment was favored by the National Retail Code Authority and the Consumers' Advisory Board. Expert testimony, however, developed the fact that the problems of installment selling were so intricate that a simple statement in an advertisement would not suffice adequately to explain the sales terms. The question was referred for further study.(**)

c. The "Free Deal" Problem

On the question of free goods advertising Mr. Peterson, Chairman of the National Retail Code Authority said:

> "We wish to inform you that there have probably been more complaints filed with local and with the National Retail Code Authority on unfair practices involving the use of the word 'Free' or its synonyms than any other class of trade practice." (***)

Accordingly the following amendment was proposed:

> "No retailer shall use the word 'free' or any word or words similar import with reference to any article or service, when the delivery of such article or the performance of such service is contingent upon the purchase of another article or service."

The amendment was held for further changes, and finally was sent to the Advisory Council for a policy ruling. The Council in a memorandum signed by Willard Thorpe, January 17, 1935, (****) discussed the various concepts of "free deals" and recommended that the proposed

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(*) Transcript of Public Hearings, May 4, 1934, "Proposed Amendments".
(**) Transcript of Hearing, p. 9.
(***) Transcript of Hearing, p. 60.
(****) Memorandum, Advisory Council, Deputy File, Folder "Free Amendment".

amendment be disapproved as fundamentally in conflict with Office Memorandum No. 316.

Office Memorandum No. 316 provides in part:

3. "Although there should be no general prohibition against the use of premiums or 'free deals', the use of premiums or 'free deals' in the following way may be prohibited:

(e) "The use of premiums or 'free deals' in ways which involve misrepresentation, or fraud, or deception in any form. It should be noted that the use of the word 'free', 'gift', 'gratuity' or language of similar import in connection with premiums or 'free deals' cannot be declared deceptive in and of itself. It will be proper, however, to prohibit the use of this or any other language with intent to deceive, or in such a way that it does in fact mislead or deceive customers in some material particular."

The Industry would not accept the provision in any other form to cover the use of the word "free". Division Administrator Carr suggested that evidence of widespread abuse of the word "free" in advertising be collected to support the recommendation for a change in NRA policy on the point.

Meanwhile, on March 15, 1935, Mr. Edwin L. Davis of the Federal Trade Commission presented the Commission's attitude on the subject of "free" deal advertising.

"The Commission, through the medium of orders to cease and desist and stipulations, has forbidden, in connection with the interstate sale of various commodities, representations to the effect that such commodities are free, unless they are sent to the prospective customers without requiring the payment of any money, the rendering of any service, or the purchase of any merchandise. Its action is predicated upon facts which disclosed that the so-called 'free' goods or services were not free at all, but that their price was included in the purchase price of the combination offer; in other words, that there was, in fact, a misrepresentation.

"It has been the experience of the Commission that there have been comparatively few instances of bona fide 'free' goods or services. By your amendment, the use of the word 'free' is prohibited when used in connection with the delivery of an article or the rendering of a service, even though, if the article be purchased or the service rendered, no additional charge is made. Hence, it is not necessary to establish, as a violation of the Code (as proposed to be amended), that the cost of the alleged 'free' article or service is a part of the purchase price of the article concerned. The Commission and the Courts, as far as I am aware, have not passed upon this precise question." (*)

(*) Letter to Assistant Deputy R. C. Rogers, March 15, 1935. Deputy file, Folder "Free Amendment".

Additional evidence in the shape of various "free" advertisements was submitted to the Deputy's office by the National Code Authority, which tended to bear out the Commission's statement that few such offers were really "free". No final action on the subject was taken, however.

A side light on the possible results to be derived from the inclusion of this amendment in the Code, is shown in a statement of the Secretary of the Code Authority, that when he attempted to collect "free advertisements" as evidence he had difficulty in finding them. This he attributed to the fact that members of the industry, being aware of the proposed amendment and believing it was soon to be approved by the NRA, had stopped the insertion of the "free" types of advertisement.

There was approved on August 23, 1934, Amendment 3 to the Code, which provided in part:

> Art. IX, Sec. 1, (f) "No retailer shall sell or offer for sale any merchandise upon a condition which involves a lottery, gamble, or element of chance, similar to what is commonly known as a 'Suit Club Plan', provided, however, that this sub-section shall not apply to non-profit organizations not definitely constituted to carry on retail trade."

The objection to these practices was in considerable part the misrepresentations which appear to be inseparable, in practice, from them; in particular the use of fraud in the conduct of drawings and awards.

f. Interpretations of Misrepresentation Provisions.

While no great success was had with obtaining approval of amendments extending the scope of the false advertising provisions, a number of interpretations of these provisions were issued by the Administration which set up definite criteria for determining the fact of misrepresentation in various situations, and which amounted so far as this code was concerned to marked extensions of the law of the subject. Because of their significance in this respect, as well as their intrinsic interest, the essential rulings of these interpretations are given below. All relate to Art. IX, Sec. 1 or 2. (*)

Administrative Order No. 60-18D, March 6, 1934:

"Clearance Merchandise"

> "If the merchandise is segregated from all other merchandise, and clearly identified with signs as clearance merchandise, it need not be individually marked. Clearance Merchandise may be intermingled with other merchandise but if so intermingled, each piece must be individually marked and clearly identified as

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(*) See text of provision, p. 46 supra.

clearance merchandise."

Administrative Order No. 60-18G, March 6, 1934:

"Retailers as Wholesalers or Manufacturers"

"A retailer shall not represent himself as other than a retailer or represent his establishment as other than a retail establishment; provided, however, that this interpretation shall not prevent a retailer performing another separately economic process, from presenting himself as a retailer and/or his establishment as a retail establishment in combination with such steps, if, indeed, such is the case; for example 'Retailer and Wholesaler', 'Retailer and Manufacturer'."

Administrative Order No. 60-59, April 20, 1934:

"Discontinuance-of-business Sale"

"It shall be considered as false, inaccurate and misleading advertising, and a violation of the Code for any retailer to advertise a sale as a closing out sale, a going out of business sale, a bankrupt and/or receiver's sale or any sale of a like nature, without disclosing, if such be the fact, that additional merchandise, except such as may be in transit, on order, or under firm contract, is added to the stock of merchandise on hand at the beginning of said sale."

Administrative Order No. 60-65, April 26, 1934:

"Factory to You"

"No retailer shall use a statement in advertising such as 'Factory to You', 'Direct to You', 'Buy from the Wholesaler', or similar phrases or statements, unless such phrases or statements refer to all the merchandise illustrated and/or advertised and/or otherwise offered for sale in connection with such phrase or statement, or unless the merchandise sold, illustrated and/or advertised, is clearly segregated in the advertisement or statement in such a manner to show clearly just what merchandise is intended for sale under the conditions specified therein.

Administrative Order No. 60-66, May 29, 1934:

"No Down Payment"

"It shall be considered an unfair trade practice for any retailer subject to the provisions of this Code, in any advertisement and/or other form or forms of selling publicity, to use the phrase 'no down payment', and/or other phrases of similar or like meaning, unless each item in the entire stock or class of merchandise offered for sale, to which the said advertisement and/or publicity is directed, may be purchased without any form of initial payment whatsoever, in every case, whether such payment be termed a 'deposit', a 'down payment', an 'interest charge', a 'cost of delivery' arrangement, an 'advance on the first payment', an arrangement whereby the purchaser is obliged to open an account and pay a fee or charge for such service, or any other form of initial payment on or before the date of delivery.

"Whenever the retailer desires to limit the above terms to any specific article or articles of the entire stock of merchandise for sale, this limitation must be set forth in a manner to clearly segregate and identify the items of merchandise so advertised."

Administrative Order No. 60-68, April 26, 1934:

"Bankrupt Sale"

"It shall be inaccurate and misleading advertising and a violation of the Retail Code for any retailer to use such statements as 'save one-half', or 'one-fourth off', or 'bankrupt sale', or 'fire sale', or 'removal sale', unless such statements apply to all merchandise in the advertisement or section of the advertisement in which said statements are made."

Administrative Order No. 60-113, June 25, 1934:

"Deferred Payment Plan"

"It shall be an unfair trade practice under Article IX, Section 1 (a) of the Code, for a retailer to advertise or offer for sale any merchandise with a statement or representation that the merchandise may be purchased on any deferred-payment plan, of whatever nature, without charge for such deferred payment, interest, services, privilege, or other comparable designation, when, in fact, discounts from quoted or marked prices are given on identical goods sold for cash or when differentials between prices for cash and prices for installment are quoted, marked or made available for identical merchandise, at any time during the period in which such merchandise is on sale or offered for sale."

Administrative Order No. 60-357, February 5, 1935:

"Budget Sales"

"It shall be a violation of Article IX, Section 1 (a) for a retailer, in connection with any offer of sale on a deferred, 'budget' or installment payment plan, whether in advertising matter or direct to the consumer or otherwise to quote or to fix a price or solicit deferred, 'budget' or installment payments of any kind without at the time definitely, if such is the case, that additional financing or other charges will be made or imposed."

g. Informal Interpretations.

Besides these general interpretations issued by the Administration there were several informal interpretations made by the Deputies to cover specific cases. In response to a request from the United Drug Company for a ruling on a contemplated "Factory to You" sale the Deputy Administrator stated that the advertising of "Factory to You" in the proposed sale would not be considered misleading provided the goods covered by the advertising was actually made by the United Drug Company or its totally owned subsidiaries. (*)

Although no formal interpretation was issued with regard to the controverted question of use of the word "free", a complaint of the Local Code Authority of Knoxville, Tennessee against the Lane Drug Store of that city, gave rise to an informal interpretation on the point as follows:

(*) Letter of A.S. Donaldson to E. T. Clark, Vice President, United Drug Company, March 16, 1935. Code History.

"The use of the word 'free' or a word or words of similar or identical meaning in an advertisement of premiums, which are in fact gifts contingent upon the purchase of other merchandise, shall not be in itself construed as inaccurate or misleading to the consumer, so long as the advertisement clearly and plainly states that the gift of the premium is contingent upon the purchase of other merchandise, and so long as the advertisement is not inaccurate in its description of the premium, the merchandise, or the price thereof." (*)

An unofficial "interpretation" or definition adopted at the original hearing on the code provided:

"Reference to the value of an article shall mean that such merchandise cannot be purchased elsewhere in the normal course of business, at a price less than the value quoted." (**)

h. Compliance Results.

The procuring of compliance with the provisions of the Retail Code was in the hands of a large number of Local Retail Trade and Retail Drug Authorities in all parts of the country. It appears that in general they performed their task with a very slight reliance upon either the enforcement machinery of NRA, or the National Code Authorities. A compilation of figures totaling complaints for the first year of operation of the Retail Trade Code, prepared by the National Code Authority from data of the 278 Local Code Authorities that made reports, show 17,600 trade practice complaints, of which 12,129 were adjusted by the Locals, 4,621 were dismissed as without basis, 644 were referred to the National Retail Code Authority, and 115 were referred to NRA. (***)

A similar report on Retail Drug Compliance, dated April 10, 1935, but not showing the period covered, gives 14,095 less limitation complaints received and 12,637 adjusted by the Local Code Authorities; 1,605 "other trade practice complaints" received, and 1,449 adjusted. (****)

(*) Letter of Assistant Deputy Earl Merrell, to R. B. Creech, Secretary, Retail Drug Code Authority, Knoxville, Tenn., July 23, 1934. Deputy Files, "Code Authority-General No. 1".

(**) Transcript of Hearings, August 24, 1933, Vol. 1, p. 85.

(***) Code Administration Study, Research and Planning Division.

(****) Deputy Files. "Compliance".

This would seem to indicate that in the handling of general trade practice violations the Local Code Authorities achieved a considerable degree of success, and there appears to be no reason to suppose that the advertising provisions did not fare at least as well as the rest.

Further indication that the Local Retail Trade Authorities were in fact able to make the code provisions effective in suppressing misrepresentations is found in the results of field contacts made with Local Code Authorities all over the country, to be presented later in this report. (*)

On the other hand, that compliance in general declined during the later code period, due in part to the spread of cynicism over the code as approved and in part to the difficulties of obtaining NRA administrative action in enforcement, is the opinion of the Managing Director of the National Retail Code Authority. (**)

i. Effect of the Provisions.

As to the general results achieved by the limitations placed upon misleading advertising and other misrepresentations by the code the following expressions of opinion, from the NRA and the Code Authority points of view, may be offered.

Deputy Administrator A. S. Donaldson, reporting on the results of the retail codes, gives this summary of the situation:

> "It may be said that the entire 'truthful advertising' features of the Retail Code are primarily in the interest of the consumer. Prior to the adoption of the Code, in an atmosphere of cut-throat competition, the most outlandish claims were made by stores to lure the consumer into the store at any cost. 'Sensational Sales', 'Greatest Value of all Times', 'Free Goods', '$10 Values for $2.95', and all such advertising claims bewildered and misled the consumer. The advertising provisions of the Code definitely placed a brake on such advertising and even more stringent rules have been applied by amendment and interpretation of the Code since its inception. Thousands of untruthful advertising complaints have been settled satisfactorily to the great gain of the consumer, as well as to honest merchants. The use of the 'Loss Leader', which was no better than a bait to draw customers into the store, has been greatly reduced by the 'Loss Limitation' provision of the Retail Code. It appears in each case that Trade Practice provisions of the Retail Code which have protected the consumer are the same as those which have protected the honest advertiser.

(*) See pages 77-80 , below.

(**) Mr. R. N. Feustadt, in conversation, Nov. 5, 1935.

"The National Better Business Bureau has made the statement that retail advertising is at the present time on a much higher plane and naturally had automatically reduced the number of cases where the consumer is subject to being misled, than before the adoption of the Code." (*)

Mr. Neustadt stated (**) it to be his opinion that if the Intersta question could be settled the industry would be practically unanimous in desiring a code; that the former code with only minor changes would be acceptable; and that the trade practice provisions covering advertising would be especially desired, as a great deal of benefit had resulted from these provisions.

There is no evidence at hand as to trends in advertising practices in the retail trades since the lapse of the code.

j. Summary

This code experience is of particular interest because of the size and importance of the industry, and the significance of the problems of misrepresentation both to the 300,000 industry members and to the vast mass of the purchasing public. The industry grappled with specific forms of deceptive practice in formulating its code and employed amendments and interpretations as mediums for expanding and clarifying the conception of code law concerning them. Practices connected with questionable price competition appear to have been of principal concern. Active efforts seem to have been made by the majority of the Local Code Authorities to enforce the misrepresentation provisions, and, so long as the prestige of NRA held, apparently with a considerable degree of success. Little demand was made upon NRA by the Local Authorities for help in effecting compliance, and little complaint was heard that in applying these provisions discriminatory tactics were employed. It is believed that both the trade and the public were benefited, and that this aspect of the operation of the code offers an illustration of the possibilities of the basic NRA conception of a code authority system as a medium for effectuating cooperative industrial control

2. Coffee Industry - (Code No. 265)

This Code, sponsored by the Associated Coffee Industries of America, was submitted August 18, 1933 and approved on February 6, 1934. The Code Authority was a Coffee Industries Committee composed of 9 members generally elected, the Managing Agent of the Code Authority being the Secretary of the trade association. A Trade Practice Complaints Committee was approved on January 9, 1935, but was practically identical in composition with the Code Authority.

(*) "Economic Importance and Effectiveness of Retail Codes", June, 1935. p. 5.

(**) In Conference, November 5, 1935.

a. Provisions Concerning Misrepresentation

The Code as approved contained general provisions prohibiting misrepresentation, false advertising, and defamation of competitors. (Article VI, 1, 2). No protests of these provisions are recorded in the Transcript of Code Hearings, although subsequently a recommendation was made that the practice of "dating" coffee be prohibited as misrepresentative. (*) No action was taken upon this.

A special provision aimed to prevent misrepresentations through failure to label products to show the content of ingredients other than coffee was adopted, largely at the suggestion of the Consumers' Advisory Board, and Consumers Counsel of AAA. (Article VI, 3.) One protest was recorded against this, claiming that it struck at those providing a cheap but satisfactory beverage for the poor man. (**)

Despite this meagre record concerning adoption, the organized industry appears to have been much interested in the provisions, and the Code Authority active in making them effective. Because of this interest, and "because the problems raised by these (advertising) complaints were complicated and required extended discussion and study by men experienced in the methods and problems of advertising", (***) a special Advertising Sub-Committee of the Code Authority, composed of three members, was formed, apparently early in 1935, to give particular attention to this subject.

b. Compliance Results

Compliance records show only three cases of advertising violations reported to NRA and only one of these referred for action. The reason is indicated by the following:

> "No cases (sic) on advertising were referred to the NRA for action, and the cases were either satisfactorily adjusted or continued in the hope of adjustment without reference to NRA. . . Having had extensive experience with the impossibility of securing NRA cooperation for actual enforcement, we limited our efforts to securing compliance." (****)

The nature of the violations dealt with is indicated by another extract:

> "Complaints centered mainly on alleged false disparagement of competitors products (Note: chiefly by manufacturers of coffee substitutes, apparently), and misrepresentations concerning the nature or handling of a product. A leading example is the advertising of coffee as a 'Blend with Mocha and Java' when these coffees are only a small percentage of the total." (*****)

(*) Letter to Deputy Administrator from Nosaba Mills, Saint Louis, Mo., February 5, 1934, Deputy's Files.
(**) Letter of Wm. Schotten Coffee Co., August 27, 1933, Deputy's Files.
(***) Letter from J. Rosenthal, Asst. Secretary, Associated Coffee Industries of America, October 18, 1935. Commodity Information Unit File.
(****) Trade Association letter of October 18, 1935, referred to above.
(*****) Idem.

The case referred for NRA action concerned claims of Chase & Sanborn by radio that all its "dated" coffee was sold on a system whereby "no pound remains on our grocer's shelf for more than ten days". Evidence showed that in various rural communities the date stamped covered a thirty day rather than a ten day period. The case was closed by Standard Brands signing a certificate of compliance and agreeing to date its coffee only in accordance with its advertising, although the Deputy Administrator considered this a case of trade puffing rather than substantial misrepresentation. (*)

Compliance Report No. 378, September 1, 1934 - April 4, 1935, shows out of a total of 95 trade practice complaints, 11 concerned with misrepresentations by false labeling, principally failure to show the required data concerning adulterants. Seven of these cases were closed by the signing of certificates of compliance. One was referred to the Federal Trade Commission and dismissed by it as not involving interstate commerce. (**) There is no record of the disposition of the other three.

c. Effectiveness of the Provisions.

As to the general effectiveness of the provisions and the work of the Code Authority in administering them, Mr. W. F. Williamson, Managing Agent of the Code Authority, stated:

> "Commenting on the administrative problems involved under the fair trade practice section of the Code, during the life of the Code the Coffee Industries Committee worked consistently to bring about an improvement in the advertising practices within the industry . . . The work of the Committee resulted in a material improvement in conditions, especially in securing modifications of advertising copy used by coffee substitutes and by some of the larger advertisers of package coffees . . . In the main . companies answering complaints against them under these sections of the code exhibited an honest and sincere desire to cooperate with the Committee in the elimination of objectionable advertising." (***)

d. Criteria for Determining Misrepresentation

One difficulty encountered was with respect to criteria for judging as to the fact of misrepresentation. Mr. Williamson wrote on this point:

> "The Committee encountered some difficulty in drawing an exact line between advertising that might be considered as legitimate trade puffing, and advertising which clearly fell under the provisions of the Code." (****)

(*) Deputy's Files, Compliance Folder.
(**) Complaint in re: New England Tea and Coffee Co., Docket No. 2299, February 19, 1935.
(***) Letter to Assistant Deputy C. T. Estes, June 6, 1935. Deputy's Files.
(****) Letter quoted above.

The Advertising Committee took steps to have formulated by the industry "a specific Code of Advertising Ethics as a standard and guide with which to handle all such border-line cases", but with what success is not known.

Problems presented by difficulties in obtaining adequate cooperation in matter of compliance from NRA have been suggested in an earlier quotation from the industry. More specifically, on this point Mr. Williamson stated:

> "The most embarrassing phase in the Code Authority's efforts to obtain compliance has developed as a result of the Administration permitting a violator who through his violation has gotten a large amount of business, to avoid conviction through acceptance of his certificate of compliance and promise of obedience in the future. By that time the damage has already been done. . . .The industry felt that the trade practice provisions could have been more effectively enforced if NRA had prosecuted violations . . ." (*)

Other difficulties reported encountered included "lack of a clear-cut decision as to the Committee's authority over coffees manufactured and sold exclusively intrastate" and "lack of uniformity in enforcement procedure as between various Regional Officers of the NRA."(**)

"If the Code authority had actually had the authority it was presumed to have had under the code it would have been possible to eliminate entirely (certain practices) . . and the administrative problem would have been relatively simple." (***)

The pre-code history of the industry shows effort to cope with the problem of misrepresentative practices both by a voluntary Code of Ethics and by cooperation with the Federal Trade Commission. There is no record as to post-code tendencies in the matter of advertising or labeling practices.

e. Summary

In this instance we have a very complete expression of Code Authority attitude and experience with respect to misrepresentations from which the following points appear: Special interest was taken in the subject through formation of an Advertising Committee of the Code Authority. The difficulty of drawing a line between deceptive and legitimate advertising was recognized and efforts were made to formulate basic principles for guidance.

(*) Quoted in Memorandum from Robert M Beattie, Administration Member on Coffee Code Authority, to C. W Dunning, Deputy Administrator, March 21, 1935, see also memorandum from Code Authority to C. T. Estes, June 6, 1935.

(**) Letter to C. T. Estes, quoted above.

(***) Same.

The compliance efforts of the Committee resulted in "material improvement" in advertising conditions in the industry. In the main, respondents to compliance cooperated willingly in the elimination of objectionable copy. Difficulty in administering the provisions resulted largely from failure of NRA enforcement, specifically from the practice of closing complaints with certificate of compliance and no penalty, after the offender had reaped the profit of his act. No quality standards were set up in this industry, but the requirement of labeling to show ingredients furnished a factual basis for a number of complaints as to this type of misrepresentation.

3. Dog Food Industry - (Code No. 450)

This Code presents another instance of an industry in which misrepresentations by means of advertising or labeling appear to have been considered of primary importance, and to have received active attention from the Code Authority to secure compliance, with considerable success.

The industry, which has developed largely since 1926, has enjoyed very rapid growth, industry statistics for 1933 as estimated by the Code Authority, (*) showing number of concerns 170, number of employees 2,500, dollar value of products $38,000,000, of which $20,000,000 was represented by canned dog food. As to the industry's marked expansion, and the effect of this on competitive practices, the Code Authority stated:

> "The Canned Dog Food Industry, as a comparatively new industry, has developed into a large national business. Because of its youth and amazing success the industry has become involved in practices as to composition, labeling and advertising which make necessary new corrections to protect the purchasing public and assure fair competition." (**)

Nothing more specific is shown as to the reasons for the development of the practices referred to. Apparently, however, the industry because of its youth had attracted little outside regulation, and the rapid influx of concerns interested in the profits promised by rapid expansion had made difficult any orderly development of standards of practice by the industry itself.

Prior to the Code only one court decision existed with respect to the industry under the Pure Food & Drug Act. In this case, (***) judgment of condemnation and forfeiture was entered against the defendant, the goods being labeled "Tuna for pets, not intended for human consumption", and having been found to be composed of decomposed animal substances.

(*) In conference with R. S. Scott, Assistant Deputy in charge of Code.
(**) Code Authority Bulletin No. 57, October 23, 1934.
(***) U. S. v. 620 case of canned tuna (California Sea Food Co.) District Court, Western District of Washington, 1931.

The court held that the same standards applied as those prescribed under the act for food for human use. Prior to the Code, also, no complaint or stipulation had ever been issued by the Federal Trade Commission in a dog food case.

The Code was originally submitted to the AAA in September 1933, by the National Dog Food Manufacturers Association. It was transferred to NRA in January 1934, and approved May 31, 1934. The Code as adopted contained provisions prohibiting four types of misrepresentative practice - inaccurate advertising, false labeling, disparagement of competitors, and deceptive containers. (*)
The transcript of hearing records no controversies with respect to the adoption of the provisions, and there is no evidence of subsequent complaints. No Trade Practice Complaints Committee was ever approved, and there were no amendments, exemptions, stays or interpretations pertinent to this study.

The Code Authority, however, filed with the NRA what appears to be a complete record of the individual complaints of violations of the misrepresentation provisons which were handled by the Authority itself, together with the action taken with respect to them. (**) This record shows a total of 29 cases; 10 dealing with misleading advertising, 4 with false labeling, and 15 with disparagement of competitors' products. The complaints in these cases were initiated in some cases by competitors and in some cases by the Code Authority itself. Numerous forms of deception are complained of, the principal ones involving (1) misstatements of fact, as "from choise cuts of meat"; (2) extravagant claims requiring scientific proof - "complete food for dogs", "balanced diet", "proved biological value", etc.; and (3) indirect reflections on the nature or value of ingredients used by competitors. (***)

(*) Dog Food Code, Article IX, 12-15. Codes of Fair Competition, Vol. XI, pp 106-107.

(**) Report of Code Violations, Folder of Charles Wesley Dunn, Secretary, in Deputy's Files.

(***) Details of the individual cases are included in the report noted above.

All the reported cases dealing with advertising and disparagement were settled by respondents agreeing to discontinue the objectionable practices when notified to do so by the Code Authority. As to its success in this respect the Code Authority stated:

> "As to labels and advertisement representations which are patently false and deceptive, it suffices to say that we have vigorously acted against each as it has come to our attention. And, to date, the industry has satisfactorily responded to our corrective action along the aforesaid lines. I do not recall a single instance of defiance in this respect. And the manufacturers to whom we have written have voluntarily acquiesced upon the basis that the requested corrective action is inherently right and should be taken." (*)

In appraising this statement it should be noted that it is addressed to industry members as part of a general statement evidently designed to encourage compliance, and so may contain an element of optimism. Nevertheless, taken in connection with the factual record of enforcement given above, it has weight in indicating a successful compliance performance.

It is also to be noted that the code contained enabling provisions (**) calling for development and adoption of positive standards for industry products, and labeling regulations based upon these. Serious efforts were made to carry this provision into effect, and considerable progress was achieved (***), although no standards were actually adopted before lapse of the codes. It was evident, however, that the industry felt the necessity of definite product and labeling standards in order to cope adequately with the varied misrepresentations, both in advertising and labeling, which seem to have been prevalent in this industry.

Two cases of misrepresentation in labeling and advertising were referred to the Federal Trade Commission. These involved unsupported assertions of "U. S. Government Inspection", and inaccurate claims as to the nature and proportion of the meat ingredients contained. One case was settled by stipulation and agreement to cease and desist. (****)

(*) Code Authority Bulletin No. 57, quoted above.

(**) Dog Food Code, Article VII, Codes of Fair Competition. V.IX p.104.

(***) See under Dog Food Industry, Part II of this report, Standards and Labeling.

(****) Vaughan Packing Company, Inc., Stipulation No. 1385, April 4, 1935.

In the other the respondent is reported as having quite recently agreed to accept a consent decree to cease and desist subject to the Commission's approval. (*)

One false labeling action was referred to the State of Kentucky for prosecution as being primarily a violation of the State law requiring a marking of percentage of fat, fibre and protein on the label of the product. (**)

No information is available as to the course of events with respect to misrepresentation practices since the Code, although the National Dog Food Manufacturers Association reported earlier in the year that "The Federal Trade Commission is now broadly investigating the labeling and advertising of dog food." (***)

4. Plumbing Fixtures Industry - (Code No. 204)

Misrepresentation of products became a problem in this industry during the building boom which followed the World War. The demand for increased production caused manufacturing standards to be lowered, and large quantities of second grade or "cull" ware were marketed, much of it in the guise of first grade material. When building slackened, the competition of this cull ware became a serious matter to sellers of regular grades. The matter was further complicated by development of direct-to-you and mail-order methods of plumbing fixture distribution, which threatened the traditional manufacturer-wholesaler-master plumber channels, and which furnished a particularly ready outlet for cull types of material. (****)

The industry's concern over this situation was based upon (1) the effect of such misrepresentation on the competitive price situation within the industry itself, and (2) the injury to the consumer through deception and possible delivery of unsanitary wares. The first consideration seems to have been much the more important.

a. Pre-Code Efforts at Regulation

Attempts were made by the industry to remedy the condition, and to eliminate the confusion resulting from general unstandardized nomenclature and grading of industry products, by cooperation with the National Bureau of Standards. A series of Commercial Standards were approved, most of which provided for grade marking and labeling, as a means of eliminating uneconomical and fraudulent selling practices.

(*) Old Trusty Dog Food Company, Docket No. 2527, formal complaint dated August 21, 1935.

(**) Continental Packing Company, Covington, Kentucky. Case referred April 30, 1935. There is no record of the outcome of this case.

(***) Bulletin No. 63.

(****) The material presented here is summarized from a detailed and documented treatment of the subject of standards in this industry, Appendix 2, Exhibit A, of this report, q.v.

These efforts were greatly limited in effectiveness by the fact that the standard requirements did not have the force of law, but depended upon voluntary acceptance by the industry. Indirect evasion of the labeling requirements was also achieved by placing the labels in illegible locations, and by removal or obliteration of grade marks.

b. Regulation in the Code

When NRA came, the industry in its code sought drastic measures to deal with the problem, by prohibiting entirely the sale of "cull" grades within the continental United States. (*) Sponsors of the provision asserted its necessity on the grounds that labeling alone was inadequate to control the misrepresentative practices. Considerable testimony was given, however, claiming that a more immediate aim of the provision was to eliminate the competition of the lower grade products, and their producers, entirely.

The provision was opposed in various quarters, including the Research and Planning Division of NRA, and the Consumers' Advisory Board, on grounds that it constituted unlawful restraint of trade, that it was discriminatory between competing groups in the industry, and that it deprived the consumer, under guise of protecting him, of the right to purchase a grade of goods for which there was a legitimate market in the lower-price field. The provision was, nevertheless, approved.

c. Failure of the Provision

The Code Authority found itself unable from the first to obtain satisfactory compliance with the provision. As a matter of fact its ostensible aim of controlling misrepresentation appears to have been largely ignored; and the issue developed into a contest between industry interests. Producers using older types of equipment, which turned out a larger proportion of culls, campaigned actively against the restriction and refused to be bound by it. By a series of steps which need not be detailed here (Cf. Appendix B, Exhib. A) the provision became practically inoperative, and was finally officially stayed.

d. Alternative Effort At Control.

Following the break-down of the prohibition upon sale of seconds, or culls, an effort was made by the Vitreous China Division of the industry to revise its Commercial Standard CS 20 to provide for the marking of culls with a non-removable label placed in a position to be readily legible after installation, and to embody this provision as a mandatory requirement in the code. A Committee was appointed, and a draft of the proposed provision was presented to NRA for approval. The codes were terminated before action could be taken.

e. Summary

The experience of the Plumbing Fixtures Industry with its attempts to control misrepresentative practices illustrates the dif-

(*) Plumbing Fixtures Code, Article VIII, , Codes of Fair Competition, Volume V, p. 139.

ficulty of making such control effective by merely voluntary labeling rules, even when definite product standards have been developed. It also indicates the tendency of industry interests to take ascendency over consumer interests, and the possibility, where mandatory controls are involved, that a movement to cure a generally unfair practice may merge into an attempt to promote a special competitive interest. It is to be regretted that the method of mandatory grade labeling, without other marketing restriction, was not used by this industry sufficiently early in its code history to provide a comparative test of results.

5. Canning Industry - (Code No. 446)

a. Pre-Code Situation as to Misrepresentation

A condition of general confusion, and a certain amount of actual misrepresentation, as to the quality and grade of the products sold by this industry had existed for some time prior to the NRA code period. The effect of this had been an increasing dissatisfaction on the part of the consuming public, which, together with growing competition from fresh fruits and vegetables, had come to constitute a threat to the industry's markets.

The unsatisfactory situation probably resulted less from deliberate intent to mislead the public through inexact labeling and advertising than from the lack of definite commodity standards and labeling requirements, by which the public could be guided in its buying. Under the McNary-Mapes amendment to the Food and Drug Act the Department of Agriculture was empowered to prescribe minimum quality standards for canned goods, and require that grades below this be labeled "Below U. S. Standard-GoodFood - Not High Grade". For goods above these minimum standards, however, there were no requirements as to marking for grade. Each producer might designate and label his product according to his own "standards". At the same time, severe price competition in the industry had supplied a strong incentive to the general lowering of quality of industry products. (*)

b. Consumer and Industry Attitudes

The resulting situation, from the consumer point of view, may be summarized as follows from testimony offered by consumer representatives at public hearings on the Canning Code:-

Consumers have no guide in buying canned goods in general since price is no sure indication of the quality which will be received. At least 80 percent of the canned merchandise on display is totally unmarked as to grade. There is often a wide variation of quality found in a single brand. Quality of brands does not remain uniform from season to season. Many can labels contain extravagant and misleading brand names which the quality of the contents fails to justify. Tests have indicated that widely or nationally advertised canned goods are not necessarily superior to the products not so advertised. The tests have also shown that buyers of goods in the lower price range

(*) For full discussion of standards and labeling in this code see appendix II, Exhibit C, of this report.

frequently receive either first, second or third grade merchandise, and that the same holds true for even the highest price ranges.(*)

The industry in turn was genuinely concerned to meet the rising tide of consumer criticism, but, as the code experience demonstrated, it wished to do so in a manner quite satisfactory to itself.

c. Experience under the Code.

Owing to inability of the industry and the NRA to agree upon a standards program prior to adoption of the code, no provision dealing with the subject was incorporated in the code as approved. The following general provision as to misrepresentation was incorporated:

> "Section 9 - False Label or Advertisement or Container - No member of the industry (a) shall sell a product of the industry falsely or deceptively labeled or marked; or (b) falsely or deceptively advertise a product; or (c) use a deceptive container or give short weight or measure or count." (Article VIII) (**)

In view of the unreconciled controversy on standards mentioned above, the terms of this provision were evidently a little indefinite for practical effect.

However, in his Executive Order approving the Canning Code(***) the President required the industry to designate a committee to cooperate with NRA in the formulation of standards and labeling requirements. This cooperative effort resolved itself into a contest between NRA and consumer advocacy of a system of simple A, B, C, D or equivalent grade labeling, and the insistence of the industry upon a more elaborate and lengthy method of "descriptive" labeling, which the consumer group held would be little more enlightening to the purchaser than the methods already in use. (****) As in the pre-code period, no agreement between the views was obtained, and the code lapsed, through the Schechter decision, with the controversy still largely unresolved. There is no available evidence of any particular effort made by the Code Authority to make effective the broad prohibitions upon misrepresentation contained in Article VII, Section 9, of the code quoted above.

d. Summary

The experience of this code is chiefly illustrative of two points: (1) the difficulty of dealing with borderline misrepresentations with respect to the physical quality or characteristics of consumer goods without specific quality standards or product definitions; and (2) the ineffectiveness of "cooperation" between NRA and industry to achieve amelioration of the situation in the interest of the consumer except upon terms satisfactory to the industry, irrespective of other opinion as to the suitability of these terms.

(*) See "Testimony on Standards for Consumer Goods at Canning Industry Hearings, Feb. 8-9, 1934", Consumers' Advisory Board, Index #1767.

(**) Canning Industry, No.446, Codes of Fair Competition, V.XI, p.43.

(***) Codes of Fair Competition, Vol. XI, p. 25.

(****) See Appendix II, Exhibit C, for details of this controversy.

6. Macaroni Industry - (Code No. 234)

This industry, also, prior to the code had suffered from destructive price-cutting effectuated largely through adulteration and debasing of industry products, and from various misrepresentative practices in labeling, packaging and advertising. Here, however, a very comprehensive group of standards provisions and labeling rules were incorporated into the code as approved.

The principal practices which had been complained of included use of inferior flours, principally soya bean flour, for higher grade ingredients normally used; use of artificial coloring matter to simulate egg content; wrapping in yellow coverings for the same purpose; inaccurate labeling of packages as to content and weight.

a. Code Provisions Concerning Misrepresentation

The code provisions forbade the use of artificial coloring or deceptive wrappings; set a minimum egg content for noodles; required labeling to show the content of various ingredients of all products by weight; and imposed a substandard labeling requirement upon products failing to meet a minimum ash test. (*) The provisions had received the approval of a committee from the Food and Drug Administration.

The macaroni industry is distributed over the entire country, though centering largely in metropolitan districts. Individual units vary from numbers of small family establishments catering to local trade only, to large up-to-date factories having a substantial output and competing through channels of inter-state commerce. According to figures submitted in connection with the 1934 code budget, the industry was composed of 383 concerns employing 5,498 employees exclusive of executives and salaried employees.

The industry in general seems to have approved, or least not contested, the code provisions. Complaints of violation were frequent, however, due in part at least to the numbers of small, local concerns engaged in the industry. The Code Authority appears to have been active in its effort to secure compliance. The records compiled from reports of the State Compliance offices show an unusual number of violations of this type of provision referred to NRA for action.

b. Compliance Record

Cases concerned with mislabeling and misbranding so reported total 50, and false advertising cases 9; as compared with 34 complaints of failure to file prices, and 46 of failure to adhere to prices so filed. Of the 50 misbranding cases, 25 resulted in findings of violations and were adjusted; in 19 no violation was found, 1 case was dropped, and 5 were pending when the code lapsed. Adjustments were made in 7 of the advertising cases, and 2 were dropped.

The specific types of violation principally complained of

(*) Macaroni Code, No. 234, Codes of Fair Competition, Vol. V pp.532,33.

were (1) not disclosing on the label the farinaceous contents of the product, (2) labeling products as being made from pure seminola when in truth the product was made of an inferior flour, generally soya bean flour colored with artificial coloring to imitate the true seminola product, and (3) though less frequently, inaccurate marking of net weight, or not showing weight at all.

There is no complete record available at this time of the method of disposition of the misbranding, false advertising cases which were adjusted. In two instances, however, the records of the Compliance Division in Washington show that the cases were closed upon respondents agreeing to relabel their products. The Code Authority Chairman, Mr. G. G. Hoskins, is reported to have been much concerned at the settling of one case in such fashion without fine or punishment, feeling that "one example of punishment would deter other members from similar violations." (*)

c. Effects of the Code Provisions

As to the general effect of the provisions, Mr. Hoskins stated (**) that during the early life of the code the rules concerning false advertising, misbranding, standards of identity and quality, and labeling requirements, performed an excellent function for a limited period, raising the standards of ingredients, temporarily doing away with artificial coloring, and going far to prevent palming off upon the consumer inferior products advertised as composed of the best ingredients.

Later however, according to Mr. Hoskins, during the summer and fall of 1934, artificially colored soya bean flour came to be extensively used to simulate fine grade seminola. The Code Authority attempted to correct this under the code without success, and finally enlisted the aid of the Food and Drug Administration, which made a number of seizures of the soya flour.

In general it appears, from the same source, that the industry felt that the code fell short of its objectives largely because of failure on the part of NRA to back up the provisions forcefully and promptly. What seemed to the industry the dilatory tactics of the Litigation Division, and failure to assess penalties tended, it is claimed, to undermine confidence and discouraged the industry, which "came to the conclusion that no real effort was being made to effect compliance with the trade practice requirements."

(*) Code Administration Study, Macaroni Industry, pp. 50-51.
(**) In conversation with Assistant Deputy Administrator Scott, Macaroni Code.

Since the lapse of the code, it is further reported, there has been complete abandonment by the industry of the standards and labeling regulations which the code sought to put into effect.

d. Summary

This industry furnishes another instance of a situation where positive product standards and labeling requirements were felt to be necessary in order to curb misrepresentative ppractices injurious to both the industry and the consumer. The code enabled such provisions to be put into operation, apparently with a considerable degree of success so long as the authority of NRA gave the code requirements force. Later, failure of the provisions became general; due, again - in the view of the Code Authority - to the weakness of NRA compliance and enforcement.

7.Other Industry Summaries

In addition to the individual industries dealt with in the preceding pages, the code experiences of nine other industries, primarily from the standpoint of their standards and labeling provisions, are presented in Appendix II, following PART II - STANDARDS AND LABELING, of this report. In each of these some indications of the collateral effect of these provisions upon different forms of misrepresentation will be found. These additional industry exhibits include: Mayonnaise, Wood Cased Lead Pencil, Hosiery, Preserve and Maraschino Cherry, Fertilizer, Agricultural Insecticide, Paint & Varnish, and Cleaning & Dyeing.

In the pages now immediately following are summarized the general situation as to misrepresentation, and the effects of the code provisions, in a representative group of industries, as reported by the Code Authorities which administered them.

C. Data Developed by Code Authority Questionnaire.

Owing to the limited scope of the opportunity for field work which was finally allowed the trade practice studies, an attempt was made to elicit necessary information as to code operation by means of a questionnaire. A combined form, dealing with both open price filing and misrepresentative practices, was sent out to the former Code Authority secretaries of 330 industries. There are available for this analysis a total of 49 replies, in questionnaire or letter form, which are sufficiently definite, either positively or negatively, to be included here.

1. Sizes and Types of Industries Replying.

Twenty-four of the 49 industries which replied included in their responses an answer to a general question as to estimated industry output in 1934. The aggregate reported production of these 24 amounts to approximately $243,000,000. Of this total, however, $75,000,000 was accounted for by a single industry (Scientific Instrument). Of the remaining 23, 2 reported $15,000,000 each, 8 reported from $10,000,000 to $15,000,000, and 10 reduced less than $5,000,000 each during the year.

It thus appears that the industry sample represented by the questionnaire returns is composed largely of industries in the smaller size groups.

Probably not more than 13 of the 49 industries may be definitely included under the head of consumers' goods industries. The remaining 36, while perhaps preponderantly classifiable under heavy machinery and equipment, or building materials and operations, nevertheless cover a very wide range of products. Two or three distribution codes appear, but no retail trade is included among these.

As to selection of the industries to be covered by the questionnaire, this was done upon the basis of interest to the open price filing study, misrepresentation provisions of one kind or another being so generally distributed through the codes that it was felt special choice might be waived. The result is that the returns constitute, from the standpoint of misrepresentation, a genuine random sample of the entire body of codes.

2. Nature of Information Requested

The misrepresentation section of the questionnaire consisted of the following questions:

"Indicate which of the following kinds of misrepresentation (deceptive advertising, false marking or branding, deceptive packaging) or others were a serious problem in this Industry before the NRA code. Also indicate whether such misrepresentative practices were still of a serious nature during the code and after the code.

"Please explain briefly the nature of the above practices which were or are a serious problem to this Industry during any of the above periods.

"Did the provisions in your code prohibiting misrepresentations serve materially to lessen the prevalence of practices of the kind which you have indicated(above)?

"Was the Code Authority able to obtain compliance with such provisions without recourse to NRA enforcement?

"What were the chief obstacles encountered to effective functioning of the code provisions concerning misrepresentations of the kind you have indicated?"

The questions propounded were deliberately restricted to the above scope because of the necessarily extended nature of the open price filing queries, and from a desire to avoid overstraining the responsiveness of those to whom they were directed.

3. General Analysis of the Returns

In 20 of the responses, or 40 per cent of the entire 49 received, no information whatever is given with respect to the subject-matter of this study.

In 16 instances it is definitely stated that misrepresentations do not constitute a serious problem of the reporting industry.

In 12 cases misrepresentation is shown to be an industry problem. In 11 of these the operation of the code is credited with having served in some degree to lessen the difficulty. In one case it is asserted that the code did not help. In all 11 of the above cases, also, the Code Authority is reported to have obtained compliance with the misrepresentation provisions of the code wholly or largely without recourse to NRA.

In 1 case (Canning & Packing Machinery) a general statement is made by letter that "The trade practice provisions of this code were quite extensive and were enforced, with the result that many unfair practices were discontinued and a better feeling engenered among the members of the industry."

The 20 industries whose replies gave no information whatever with reference to misrepresentation include: Commercial Stationery & Office Outfitting, Hardwood Distillation, Chemical Engineering Equipment, Hoist Builders, Saw Mill Machinery, Shovel Dragline & Crane, Valves and Fittings, Insecticide and Disinfectant, Marking Devices, Folding Paper Box, Small Arms and Ammunition, Secondary Aluminum, Ingot Brass and Bronze, Electrical Contractors, Fly Swatter, Dental Goods and Equipment, Reduction Machinery, Boiler Mfg., Wood Cased Lead Pencil, and Felt Mfg.

In some instances these industries replied by questionnaire, but more often merely by an explanatory letter. In several cases information was supplied with respect to open price filing, and none with respect to misrepresentation. In the greater number of instances, however, the Code Authorities in this group reported themselves unable to supply any information whatever, giving as reasons, among others - "code never operative" (Small Arms & Ammunition, Wood Cased Lead Pencil); "code approved too late",

or effective period otherwise too short, to provide a sufficient history (Fly Swatter, Dental Goods & Equipment, Commercial Stationery); code records returned to NRA, destroyed, or otherwise dispersed (Ingot Brass and Bronze, Valve & Fittings); "so little business during the period" that no data of value resulted (Hoist Builders).

The 16 returns which reported no serious misrepresentation problems in their respective industries include: Marble Quarrying, Rolling Mill Machinery, Wholesale Hardware Trade, Asphalt & Mastic Tile, Concrete Mixer, Marble Contracting, Household Ice Refrigerator, Talc and Soapstone, Transparent Materials Converters, Roller and Silent Chain Mfg., Card Clothing Mfg., Wholesale Monumental Marble, Road Machinery, Scientific Apparatus, Power and Gang Lawn Mower, and one unidentified. (*)

The following are the 12 industries which reported misrepresentation in some form to be a problem: Batting and Padding, Metal Tank, Metal Window Motor Fire Apparatus, Pulp and Paper Mill Wire Cloth, Sheet Metal Distributors, Warm Air Furnace, Water Meter Mfg., Cutlery, Manicure Implements, etc., Slide Fastener, and 2 unidentified.

4. Types of Misrepresentative Practices Complained of.

In most instances the returns reporting misrepresentation as an industry problem gave some details as to the form of misrepresentation in question. These are not greatly illuminating, but they may be summarized as follows:

Deceptive Advertising - "Over-optimistic advertising and sales talks a common fault." - Water Meter Mfg.

Deceptive Advertising, False Marking - "Misrepresenting size and capacity of product." - Warm Air Furnace Mfg.

Deceptive Advertising - (in the case of one or two small companies only). - Pulp and Paper Mill Wire Cloth Industry.

Defamation of Competitor's Product - Motor Fire Apparatus.

False Marking or Branding - "Using materials of lighter gauge than specified or generally furnished by most manufacturers. - Metal Tank Industry.

False Marking and Branding - Second-hand materials. - Batting and Padding Industry.

(*) Information supplied by questionnaire is kept unidentified for the purposes of these reports in certain cases where this was requested by those supplying the data.

Misrepresentation of Rating of Capacity - (Unidentified)

Misrepresentation arising from "unlimited variety of quality standards." - ("Not very much misrepresentation in the industry.") - Cutlery, Manicure Implements, etc.

Departure from Agreed Standards - Metal Window.

"Every known form of unethical competition is practised in this industry." - (Unidentified)

In addition to these forms of misrepresentation which fall within the scope of this study the questionnaires also reported various types of deception which have been excluded from it by definition, e. g. secret rebates, consignment shipping without publishing fact, unjustified quantity discounts, selling new machines as used, and other devices for evasion of price provisions. Industries reporting these have been included in this analysis of the questionnaires only where they also reported practices properly within the scope of the study.

5. Effect of NRA in Checking the Practices.

As already stated, 11 of the 12 industries (*) which reported misrepresentation an important concern with them indicated that conditions with respect to it had improved as a result of NRA. The one return in the group which stated unequivocally that the code had not improved the situation was that for the Sheet Metal Distributors.

The question asked was whether the code provisions served "materially to lessen the prevalence of the practices." The 11 affirmative replies were given with varying degrees of emphasis. In five cases there was a simple "yes", or its equivalent. Some of the variants, both up and down the scale of enthusiasm, are as follows:

"Yes - very much so." - Batting and Padding Industry.

"Most decidedly so - they practically disappeared." - Metal Window Industry.

"Some effect noted; difficult to say how much." - (Unidentified)

"Very largely" (with respect to one practice); "to some extent" (as to another). - Motor Fire Apparatus.

"Yes, very materially." - Warm Air Furnace.

"Not enough to get excited about - but the condition was being improved a bit." -Water Meter Mfg.

*) See list in last paragraph of section 3, "General Analysis of the Returns", page 71.

6. Success of the Code Authorities in Effecting Compliance.

The question asked here was "Was the Code Authority able to obtain compliance . . . without recourse to NRA enforcement?" All 11 of the replies which admitted misrepresentation as a problem, and found the codes helpful, were also in agreement as to the results being obtained practically without aid of NRA enforcement. Six of the 11 answered a flat "yes" to the question. Most of the others indicated very slight NRA participation.

"Yes, to a certain extent. Reference of complaints to NRA did not help in enforcement." - Metal Tank Industry.

"In about 75% of the cases. NRA successful in about 5% only of the cases referred to it." - Cutlery, Manicure, etc.

"Not in all cases, but in a very great many." - Batting and Padding.

"Did not resort to NRA enforcement methods; what was accomplished was through voluntary means - except in a few cases where NRA Regional setups were employed." - (Unidentified)

"The only compliance we received was through Code Authority. NRA was too hesitant to act." - Warm Air Furnace.

7. Obstacles to Functioning of the Misrepresentation Provisions.

Two of the replies (Metal Window, 1 unidentified) indicated that no obstacle to effective functioning of the provision had been encountered. Various difficulties were listed by the others, the one most frequently voiced having reference to failure of NRA enforcement and the uncertainties of the underlying situation. Difficulties of proof, and the importance of definite product standards, are also stressed. Some of the quotations follow:

"Our code would have been 100% effective had we been able to secure definite compliance through NRA against one member in the early days of the code period; only one definite conviction was necessary." - Metal Tank Industry.

"Industry members did not believe codes could be sustained in court. If the legality had been sustained there would have been no further trouble." - Batting and Padding.

"Failure of enforcement program, with consequent psychological effect on members." - (Unidentified)

"Members attorneys advising members that fair trade practice rules could not be enforced . . NRA was too hesitant to act." - Warm Air Furnace Industry.

"Difficult to procure evidence in support of complaint (of defamation of competitor's products)" - Motor Fire Apparatus.

"Takes a considerable period of time to nail these things down, as they are difficult to prove". - Water Meter Mfg.

"Pure stubbornness of one individual." - (Unidentified)

"Lack of uniformity in standards." - Cutlery, Manicure, etc.

"Misrepresentation was not a factor .... after code inauguration led to adoption of uniform standards of quality." -Metal Window Industry.

A single note of somewhat unusual strain appears when one Code Authority (also unidentified) lists, in addition to the failures of NRA enforcement, "Certain errors of omission or commission on this side of the fence", as among the obstacles to smooth functioning of their code.

8. General Conclusions to be Drawn from the Questionnaires

To whatever extent the data presented in the preceding pages may be taken as having general or representative significance, the following conclusions based upon them appear to be warranted:

(1) A total of 12 codes in which misrepresentation was viewed as a serious problem, as compared with 16 in which it was expressly stated not to be such, and 20 others in which no mention of the subject was made, tends strongly to support the suggestion previously advanced that the number of industries in which misrepresentation was viewed as a matter of importance was much smaller than the number of codes containing provisions concerning it would indicate. In fact it is believed that the figures above represent a much nearer approximation to the truth namely, that the industries in which this type of provision was given serious attention in practice were in the minority.

(2) In practically all instances where misrepresentation was reported as constituting an industry problem the codes helped, often very materially, to mitigate it.

(3) Compliance with the misrepresentation provisions was effected almost wholly by the Code Authority themselves, with a minimum of recourse to NRA enforcement agencies; the latter being due not to any reluctance to invoke assistance but to belief that such assistance was ineffectual.

(4) The most serious obstacle to successful administration of the provisions, in the view of the Code Authorities, was the basic legal weakness of the NRA and the failure to attempt vigorous enforcement which sprang from it.

(5) The Code Authority system, as originally designed, with firm backing of NRA would, it was felt, have resulted in very satisfactory control by the reporting industries of

their problems of misrepresentation - at least so far as competitive interest was concerned.

(6) Lack of uniform product standards was found in some instances to be another obstacle to the obtaining of satisfactory compliance with the misrepresentation provisions; and adoption of such standards operated, in at least one instance, to eliminate the difficulty.

(7) There is no clear correlation observable, from these questionnaire returns, between the type of industry reporting and the existence of misrepresentation as an industry problem.

With respect to the questionnaires in general it is felt that they represent a very reasonable return from the total mailing and that, except for the absence of any retail code, they offer a representative random sample of the codes as a whole. Furthermore, the conclusions which they indicate will, in general, be found to be supported by the evidence presented elsewhere in this report.

A very considerable expression of the retail trade point of view as to the misrepresentation provisions will be found included in the data from Local and Regional Code Authorities presented in the section following.

D. Field Work With Local and Regional Code Authorities.

In order to increase the amount of direct evidence tending to throw light upon operation of the code provisions, arrangements were made for direct contact work between representatives of the NRA State and Regional Offices, and the former local code authorities of a group of industries which had employed a decentralized system of code administration.

The questions propounded were designed to bring out the facts concerning the compliance effort of the code authorities in general, and that affecting misrepresentative and deceptive practices in particular. Originally a coverage in the areas of all the State Offices had been intended. The work was only partially completed when the field staff was terminated.

A considerable amount of data relative to misrepresentations was, however, secured from representative groups of local authorities in several industries, notably the large retail trades, and in various lesser degrees from a number of others. These industries include:

Retail Trade	Crushed Stone, Sand & Gravel
Retail Drug	Farm Equipment Mfg.
Retail Food & Grocery	Graphic Arts - Commercial Relief Printing
Motor Vehicle Retailing	
Wholesale Confectionery	Household Goods Storage & Moving
Retail Monument	Paper Distributing
	Wholesale Monumental Granite

The information specifically requested with respect to misrepresentation included: (1) what, if any, misrepresentative practices had been a problem with the industry in that area; (2) what efforts had been made to correct them prior to NRA, and with what success; (3) specifically, had the aid of the Federal Trade Commission been invoked; (4) did the NRA code serve effectively to check the practices, and what principal difficulties of administration were encountered; (5) explain the definite procedure employed for dealing with violations.

The replies received are summarized, code by code, in the sections following. (*)

1. Retail Trade (Code No. 60)

Interviews with 47 Local Retail Code Authorities were planned in order to cover this field. Returns from 27 of these were received. Three of the reports were without definite information of any sort, so far as misrepresentative practices were concerned, leaving a usable total of 24, an approximately 50 per cent coverage. The returns were very well distributed, geographically, as the following list of cities represented shows. A wide population range is also included.

(*) Original reports in files of Trade Practice Studies Section, Division of Review, NRA.

Albany, New York	Louisville, Kentucky
Atlanta, Georgia	Manchester, New Hampshire
Augusta, Maine	Memphis, Tennessee
Casper, Wyoming	Milwaukee, Wisconsin
Charleston, South Carolina	Minneapolis, Minnesota
Dallas, Texas	Norfolk, Virginia
Hartford, Connecticut	Philadelphia, Pennsylvania
Helena, Montana	Providence, Rhode Island
Houston, Texas	Richmond, Virginia
Indianapolis, Indiana	Santa Fe, New Mexico
Jackson, Mississippi	Sioux Falls, South Dakota
Los Angeles, California	Topeka, Kansas

The following is an analysis of the infromation as furnished to the field workers by representatives of the Local Code Authorities which operated in these cities.

a. General Results of the Questions.

Twenty-one of the 24 replies tabulated stated that misrepresentative practices of some kind constituted an industry problem. Manchester, New Hampshire, found "No misrepresentation or deception in trade evident;" Helena, Montana, reported no particular problem; and Providence, R. I. indicated that the Better Business Bureau had the situation well in hand.

In 20 of these 21 cases the NRA was reported as having served to improve the situation.

Prior to NRA, attempts to cope with the practices had been made in 15 instances, in 12 of these with some measure of success.

In only 2 instances had cooperation with the Federal Trade Commission been attempted, in both cases successfully.

b. Types of Practices Complained Of

The question put to the code authorities had enumerated the following unfair practies: inaccurate advertising, deceptive labeling or packaging, price misrepresentations, misrepresentations concerning competitor or his goods. Eight of the 21 affirmative responses stated that "all" of these practices were indulged in in their territory. In 10 other cases false advertising was specified; in 8, price misrepresentations; in 8, misrepresentation of competitors; and in 2, deceptive labeling. False advertising was thus a factor in 18 of the 21 territories, and misrepresentations of price or competitor in 16 each. No specific instances of the form in which any of these were encountered were given.

c. Efforts at Control Prior to NRA.

The mediums reported employed to check the practices prior to NRA were: Better Business Bureaus (in six instances), trade associations (twice), local Chamber of Commerce, State advertising laws (Minnesota) State and local ordinances (Connecticut). Of the 12 instances where some success was reported obtained, 4 were only "fair".

The Better Business Bureaus appear as most frequently successful. "Friendly cooperation", a Chamber of Commerce, and in one case a Better Business Bureau, were credited with total failures.

d. Effect of NRA Operation.

Twenty of the 21 local authorities which found misrepresentation a problem reported that NRA helped the situation, but with various qualifying expressions - "usually", "largely so", "very helpful", "yes, but not very effective", "moderately", "substantially", "as much as could have been expected", and so on.

The one response which flatly denied any benefit from NRA gave as its reason "lack of enforcement from Washington."

Other obstacles encountered include: the difficulty of securing of proof, difficulty of drawing a proper line between true and misrepresentative advertising, opposition of one or two large violators, "so many items they could keep on misrepresenting - a different article each day" (perhaps a commentary on the practice of settling violations by signing of "certificates of compliance").

e. Methods of Effecting Compliance.

Fourteen of the local authorities reported having some established procedure for determining and dealing with violations. Some of the particular devices mentioned follow. Two stated that they used the Better Business Bureaus, nine employed shoppers to make purchases, 2 employed regular investigators, 2 regularly checked on the local retail advertising, one made a practice of photographing misrepresentative window displays, one employed a detective agency, two relied principally on affidavits and other evidence supplied by complainants.

One statement of method and attitude in the matter of compliance may be quoted verbatim:

> "By far the great bulk of our work was done informally. To handle the great bulk of cases that are involved in trade practice procedure it is impossible to handle them in a formal manner; that is, by following some judicial procedure such as the Federal Trade Commission. This can be done for the particularly difficult and incorrigible case. We collected evidence through shoppers and if we felt the case was sufficiently serious and might involve later controversies, we got our information in affidavit form." (Indianapolis, Indiana, Code Authority).

f. Conclusions.

The following conclusions appear to be indicated by the information summarized above:

1. Misrepresentations of various types were widely prevalent in retail trade throughout the country.

2. Deceptive advertising, and misrepresentations as to price and competitors' goods, were the forms most frequently encountered.

3. No generally adequate method of dealing with the practices existed before NRA.

4. NRA, through the local code authorities, was successful in nearly every area queried, in abating in some degree the use of such methods.

5. The local retail code authorities were on the whole active and effective in securing compliance with the misrepresentation provisions of their code, generally without recourse to NRA.

6. The complaint of failure of NRA enforcement, heard so frequently elsewhere with relation to this subject, is noticeably absent, with one exception, from these reports.

2. Retail Drug Trade

Twenty-two out of a projected 45 reports were received from the Local Code Authorities of this industry. The geographical coverage was very largely the same as for the Retail Trade inquiry, for the reason that the work for both these industries (and for the Retail Food & Grocery Trade which is considered below) was in the main done concurrently in each area, so that where there is a return for one there is usually, though not always, a return for each.

In the present case St. Louis, Denver, San Francisco, Wilmington, Del., Essex County, N. J., and Nashville, Tenn. are added to the list shown under Retail Trade above, while Albany, Augusta, Me., Casper, Wyo., Indianapolis, Jackson, Miss., Louisville, Ky., Manchester, N.H., Memphis, Providence, Sante Fe, and Sioux Falls, S.D. do not appear.

The questions concerning misrepresentation out to the local authorities were the same.

a. Summary of Results

The general picture presented by these returns is very similar to that already outlined for the general Retail Trade. Twenty-one of the 22 reporting authorities found misrepresentation a source of trouble in their areas. Eight reported "all" of the types in question as present, while 8 others specified false advertising, 9 specified price misrepresentation, 5 deceptive labeling, 3 defamation of competitor, 1 deceptive packaging, and 1 substitution for standard brands.

Less effective work apparently had been done in dealing with the subject prior to NRA than in the general retail trade, only 8 returns reporting any prior activity, with results negative in two instances, "fair" in four, and good in only two. The Better Business Bureaus were reported influential in only two instances. Other factors given help were the Virginia Trade Law, and the Wisconsin State Department of Markets. The Federal Trade Commission had been invoked in two instances, without success in either.

In 18 of the 21 reports the effect of NRA was stated to have been helpful. In 2 cases it did not help, and in 1 the authority felt the record was not sufficient "for an intelligent answer." There are the usual qualifications, running the gamut from "excellent results", "decided aid", to "fairly well", "not much - no help from Washington". This latter note begins to appear more frequently. "The principal difficulty of enforcement was the delay in getting any action from NRA in Washington and red tape connected with the administration." "It appeared in every case we failed because NRA officials seemed to think they were all border-line cases, and violators soon found this out." Also two more to the same general effect.

A considerably smaller proportion of the retail drug authorities reported any definite form of compliance procedure than for the general retail trade. The same general methods are mentioned - checking of ads, shopping with witnesses, affidavits as to purchases, photographs of displays, etc.

b. Conclusions.

Again it is to be concluded that misrepresentations were a general problem of the trade, and that in the large majority of cases NRA was effective to a greater or less degree in restraining the practices.

The retail drug trade appears to have been less generally active before NRA than the retail trade in combating the use of misrepresentations; and perhaps there was somewhat less effort put forth by the local retail drug code authorities during the period of code administration.

There is an increased complaint of the failure of NRA encorcement to back up the code authority compliance effort, which may or may not be indicative also of an increased tendency to lean upon the NRA agencies in the handling of the job.

3. Retail Food and Grocery Trade.

Returns from the local authorities in this trade number 25, out of a possible 47. The cities represented all fall within the two groups already given for the two proceeding trades, with the single addition of Bismarck, N.D. The identical questions concerning misrepresentation were employed.

a. Summary of Results.

Results were approximately the same as those already reported for the general retail and drug trades. Twenty-one of the retail food and grocery authorities attested the general presence of the misrepresentation problem, with much the same proportion of specific types of practice noted. The score in favor of NRA was somewhat smaller here, 17 affirming with varying emphasis that its effect had been good, 4 stating unequivocally that no benefits had accrued.

Complaints of the failure of NRA enforcement continued: "There was a complete breakdown of the trade practice provisions. This was entirely due to lack of enforcement by NRA in Washington. Neither this agency nor the State Office were supported in the prosecution of a single case." "No action taken by NRA, such as prosecutions." "No difficulty as long as we had them bluffed. Broke down completely when retailers found there were no teeth in the law."

On the Other side of the picture the following may be quoted from a State Office's contribution to one of the returns:

> "The....Local Retail Food and Grocery Code Authority, like most others with which this office had experience, practically ceased to function after organization, with the exception of the collection of assessments.
>
> "There is no evidence that the Code Authority handled any Trade Practice complaints after the State NRA Office was set up in early 1934. All such complaints were brought to the State Office by members of the trade or of the Code Authority. It was impossible to get the Code Authority to take any action on complaints, and the burden of compliance was taken up by the State Office. In the one or two instances where the State Office insisted the Code Authority handle the complaint, nothing was done by the Code Authority."

There is definitely less material on the organization and procedure of the local authorities for obtaining compliance in the returns for this trade than in either of the two preceding.

b. Conclusions.

The information supplied as to this trade tallies to a very high degree with that received from the two preceding ones. It would appear reasonably evident, if no other evidence existed, that in these three largest and most important of the retail trade groups, handling a great variety of commodities and dealing directly with the vast mass of the consuming public misrepresentative practices of various kinds are of general prevalence.

It is also apparent that, while industry efforts to control the situation prior to NRA were only occasionally effective, under the codes improvement was very generally achieved.

That these conditions and results may be taken as probably characteristic, not only of these three codes but also of the retail sector of the distributive system in general, is indicated by further comparison with the data concerning two other retail trades - Motor Vehicle Retailing and Retail Monument - to be presented below, and also by contrast with the information supplied with respect to the eight codes other than retail which are included in these local code authority results. (*)

4. Crushed Stone, Sand and Gravel Industry (Code No. 109)

Reports were received of 23 interviews with former members of the District or Area Committees (sub-code authorities) of this industry. A total of 106 such interviews were originally projected.

Twenty-three states also were included in the areas covered by the reports. These included Arizona, California, Colorado, Connecticut, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Montana, New Hampshire, New Mexico, New York, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Wisconsin and Wyoming.

In some instances the reporting committee represented an area of several states, and in others only a local region within a state.

a. Data Reported.

To the question whether misrepresentations were a problem in the industry in that area 11 of the 23 replies said "no", 8 said "yes", and 2 made no definite statement. As to the specific types of misrepresentation encountered, 1 stated deceptive advertising, 3 price misrepresentations, 4 misrepresentation of competitors' goods, and 1 "all".

Of the 8 replying "yes" to the above, 7 stated that NRA had improved the situation, ("to certain degree", "effectively", "very helpful", "very salutary effect", "effectively until members learned ways to evade it"); 1 denied any benefit - "no enforcement ever attempted". Three others made the familiar complaint that weakness of NRA enforcement was the principal obstacle to effective administration.

One reply reported attempt to work with the Federal Trade Commission, without result. Several others reported "no" - ("processes too slow and too timid"). Only two committees reported definite procedure for handling complaints.

b. Summary.

In contrast to the retail codes, only a little more than a third of the responses showed misrepresentations to be an industry problem. Misrepresentative advertising dropped to a secondary place among the practices reported, while misrepresentation of prices and of competitors' goods assumed first importance. Both of these showings are what might be expected the type of industry being such as would apparently not readily lend itself to ordinary misrepresentations, and one in which, as was stated several times, "little advertising is done".

(*) Compare table p. 87, below

The results of NRA were again almost unanimously reported beneficial where the unfair practices existed, and again the complaint of inadequate enforcement was repeatedly raised. The general tenor of the replies gives the impression that the trade practice work of the committees was rather loose-jointed.

5. Motor Vehicle Retailing- (Code No. 46).

Sixteen of a possible 35 State or Regional Advisory Committees provided responses to the queries concerning misrepresentation. The reporting Committees were located in Atlanta, Des Moines, Denver, Hartford, Los Angeles, Louisville, Minneapolis, Milwaukee, Jackson, Miss., Newark, Omaha, Richmond, Seattle, Sioux Falls, Santa Fe, and Wilmington, Del.

a. Data Reported

Fifteen committees reported misrepresentative practices prevalent - advertising, 9; price, 9; competitors' goods, 4; "all", 1.

Twelve stated that NRA had helped; 3 that it had not.

Five had sought aid from the Federal Trade Commission; 4 without success.

As to the degree of effectiveness of NRA: "partially", "adequately", "during first 6 months", "somewhat", "effectively", "99% during first 6 months", "only temporarily", were among the qualifying phrases.

Five replies stressed failure of NRA enforcement - ("Code was very detrimental to legitimate, conscientious dealers. It placed a premium on dishonesty on account of lack of enforcement"). Other difficulties cited were the looseness and indefiniteness of the code provisions concerning advertising (mentioned twice), and difficulty of securing evidence of violation.

A considerable number of these Committees appeared to have well-established procedure for dealing with complaints.

b. Summary

In general, the proportion of NRA success here appears to be somewhat less than with the codes already dealt, and the complaints of failure of enforcement somewhat greater. Genuine misrepresentative practices appear to have been less of an industry problem than in the other three retail trades, but considerably more so than in the Crushed Stone Industry. There is evidence in the replies that in reporting "price misrepresentations" there has been a tendency to interpret the term as referring to deception as to prices actually charged the customer, (that is, evasions of the minimum price provisions), rather than to price deceptions to the customer. In all but two instances, however, where price misrepresentations were reported misrepresentative advertising was also shown to be present. Like most of the local retail code authorities, these committees seem to have been rather generally on the job in their compliance effort.

6. Paper Distributing Trade (Code No. 176).

Regional Committees or Sub-Committees from 12 areas representing all or a part of 13 states (*) furnished data for this code. Six answered "yes" to the question whether misrepresentation constituted an industry problem, 5 "no", and 1 failed to deal with the subject.

Price misrepresentations, deceptive labeling, and misrepresentation of competitors' goods were principally complained of. ("Another trick of the industry was to change and remove labels put on by the manufacturer when the goods did not meet the standards of the trade.") False advertising seems to have been of relatively little importance.

In 4 cases the effect of NRA was reported favorable; in 2 the results were negative. In one of the favorable four the benefit was during "the first three months". Three complaints of laxity of NRA support in enforcement are made. The majority of the committees seem to have had definite compliance procedure.

This industry appears in a number of areas to have been successful prior to NRA in handling misrepresentative practices through its trade associations and other organized effort. The Fine Paper Group (New York City) "called upon the Federal Trade Commission and were successful to a large degree in eliminating these conditions in their group."

The influence of standardization is indicated by the following excerpt (Minneapolis Trading Area) -

> "It was determined (in the pre-NRA period) that the main source of the troubles besetting the trade arose from the lack of simplification and standardization of the kinds of paper handled. Eventually considerable standardization resulted, thus removing many of the past difficulties."

7. Set-Up Paper Box Industry - (Code No. 167)

Five of ten Divisional Committees of this industry (Minneapolis, St. Louis, Nashville, Dallas, and Richmond) were interviewed. Four reported various types of misrepresentation, principally as to price. One found no problems of the sort. Three stated emphatically that the NRA had been of no help ("All competition continued as if there had been no code"). One considered that it had. Efforts of the industry to deal with its own problems prior to NRA seem to have met with about the same degree of non-success. There is indication that in several instances the Code Authorities were either inactive or ineffectual in their methods, which may be a partial explanation of the negative results obtained.

(*) New York, Montana, Georgia, Maine, New Hampshire, Minnesota, Missouri, Colorado, Oklahoma, Kansas, Connecticut and Texas.

8. Retail Monument Industry - (Code No. 366)

Returns from 4 of 8 Regional Committees (California, Oregon, Nebraska, Iowa, Kansas, Missouri, South Dakota) showed misrepresentative practices of various sorts prevalent in each. All reported some degree of benefit from NRA - "material extent", "very well", "to some degree", "only partially". All also sounded the note of complaint over handicaps imposed by ineffective enforcement backing. Little appears to have been accomplished by the industry itself in combating the practices prior to the code.

9. Wholesale Confectionary Industry- (Code No.458)

Misrepresentative practices were a distrubing influence in a distinct minority of the areas reporting for this trade. Nine of the 14 (out of a possible 51) replies indicated no problem; 5 answered affirmatively. (*) Four of these reported NRA benefit, but for the most part in very mild terms ("to certain extent", "for a little while"). Three complaints as to lack of enforcement appear.

(*) The reporting cities: New York, Des Moines, Minneapolis, Denver, Louisville, Jackson, Miss., Indianapolis, Nashville, Roanoke, Concord, N. H., Oklahoma City, Dallas, Atlanta, Milwaukee.

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10. Farm Equipment Mfg. Industry - (Code No. 39)

Only 3 replies, of apossible 13, were received from this industry, and none indicated any problem with respect to misrepresentation. Two stated that what practices of the sort had existed prior to the code had been taken care of by cooperative efforts within the industry

11. Household Goods Storage & Moving - (Code No. 399)

Results of 4 interviews out of 12 projected were received from this industry. Three reported difficulty with misrepresentations, chiefly with respect to price and competitors' services. No results due to NRA were reported, this being attributed to the fact that the entire code quickly failed to function as a result, among other things, of controversies over relations with the code for the Trucking Industry. One reply stated it to be the consensus of opinion that if the code provisions had been given opportunity to function, they would have served effectually to check the misrepresentative practices.

12. Graphic Arts (Commercial Relief Printing) - (Code No. 287)

Six returns were received for this group. Five reported no misrepresentation problem. The sixth reported misrepresentations as to price and competitors' products, which were "reasonably" corrected by the code.

13. Wholesale Monumental Granite - (Code No. 449)

Reports were received from two Divisional Control Committees of this industry, both of which stated that no problem as to misrepresentative practices existed.

14. General Summary

The principal information set forth in the preceding pages is presented below, for comparative purposes, in tabular form:

Tabulation of Local Code Authority Returns

Industry	No. of Returns Rec'd	Misrep'n Rept'd a Problem	NRA Code a Help	Complaint as to Enforcemt.	Success in Prior Regul'n	Work With FTC
*Retail Trade	24	21	20	1	12	2
*Retail Drug	22	21	18	3	6	2
*Retail Food & Grocery	25	21	17	3	5	1
*Motor Vehicle Retail	16	15	12	5	-	5
*Retail Monument	4	4	4	4	1	-
#Crushed Stone, Sand, etc.	21	8	7	3	2	2
#Paper Distributing	12	6	4	3	2	1
#Set-up Paper Box	5	4	1	1	1	-
#Wholesale Confectionery	14	5	4	3	-	1
#Farm Equipment	3	-	-	-	2	-
#Household Goods Moving, etc.	4	3	-	-	-	-
#Graphic Arts	6	1	1	-	-	-
#Wholesale Monumt. Granite	2	-	-	-	-	-
Total, 13 codes:	158	109	88	26	31	14
*Total, 5 Retail codes	91	82	71	16	24	10
#Total, 8 other codes	67	27	17	10	7	4

An examination of these figures shows that 109 of the total of 158 responses received, or 69 percent, reported misrepresentations as constituting an industry problem. The proportion is not evenly distributed through the different types of reporting industries, however. Taking the five retail trades as a group, we find that the proportion of affirmative replies on this point is slightly in excess of 90 percent, whereas for the other group comprising the remaining 8 miscellaneous industries it is only a little over 40 percent.

Taking the 109 affirmative replies as a base, the portion of this entire number in which it is said that the NRA codes were of assistance in dealing with the existing misrepresentation problem amounts to 88, or approminately 81 percent. Again, however, there is considerable disparity between the groups, the retail codes showing nearly 87 percent reporting NRA a help, as against 63 percent of the miscellaneous group so finding.

By the side of the 81 percent of cases in which NRA was in some degree successful may be placed the 31 instances, or something over 26 percent, in which the industries, by their own efforts prior to NRA, had met with some measure of success in handling the problem of these practices.

In 14 of the 109 replies answering "yes" to the question whether there was misrepresentation, some attempt to work with the Federal Trade Commission was reported. In 3 cases this course had been found helpful. In 7 instances no benefit was reported. The other 4 reports were to the effect that Trade Practice Conference agreements had been adopted, but without further statement as to the results obtained from these.

In nearly one-fourth of all the instances where misrepresentation was reported, failure of the NRA to back up the codes with adequate enforcement was affirmed as the cause of the ineffectiveness, or failure of full effectiveness, of the code provisions in dealing with the situation.

The conclusions indicated by the summary data are substantially those which have been noted in dealing with the individual codes:

(1) Misrepresentative practices were industry problems in the great majority of all the codes reporting, and were prevalent; in one or more of the industries, in all sections of the country.

(2) Such practices were more generally encountered in the retail trades than in the industries comprising the miscellaneous group.

(3) Prior to NRA no generally effective method of dealing with the practices had been developed by the industries themselves, although some success in this had been achieved by the three large retail trades.

(4) The effect of NRA was helpful in abating the practices in a very large majority of the areas reporting, and particularly so among the retail trade codes.

(5) The local code authorities in the retail trade codes appear to have been somewhat more active in dealing with the practices in question than were those in the miscellaneous codes.

(6) Little effort had been made by the regional trade groups to enlist the aid of the Federal Trade Commission in attacking their problems of misrepresentation, and the efforts which had been made were in half the cases not productive of important results.

(7) State laws, municipal ordinances, trade associations, Better Business Bureaus, and technical societies were factors mentioned in one or more instances as having contributed to successful efforts to discourage misrepresentations prior

to the codes.

(8) Lack of adequate enforcement, including specifically failure to assess penalties against violators, was the principal, and in fact the only cause generally alleged as explanation for failure of the provisions to operate satisfactorily. In the great majority of cases, especially in the retail trades, the reporting groups appear to have felt that with proper enforcement to back the efforts of the local code authorities the codes would have very largely solved their problems with respect to misrepresentations.

(9) In several instances the general problem of drawing a proper line between truthful and deceptive advertising, and of a working definition of misrepresentations of other kinds, was touched upon by the code authorities as one of the difficulties of administering the provisions; but no constructive suggestions were advanced.

(10) In one or two instances, also it was reported that aid in dealing with misrepresentations had been derived from the adoption of definite commodity standards.

E. Analysis of NRA Compliance Cases.

The preceding sections of this chapter have discussed the operation of the misrepresentation provisions largely in terms of opinions and attitudes, as expressed by the Code Authorities, or otherwise on record in the NRA files. This section aims to supplement that evidence by such statistical data as is obtainable from the records of NRA compliance and enforcement.

1. Tabulations of State Compliance Records.

As a part of the general compilation of NRA records, tabulations have been made by the Statistics Section, Field Division, of the various types of trade practice complaints referred to the State Compliance Offices for action by Code Authorities or other complainants. Data for 115 codes (75 basic, 40 supplemental) are available at the time of completing this report.

The figures for these 115 codes give a total of 23,611 trade practice cases of all types reported for compliance action to the NRA State offices throughout the country. Of this number, 1,619 or 6.8 percent, are shown to have been misrepresentation cases of some type.(*)

The forms of misrepresentation specifically reported in the Field Division tabulations include different types of advertising misrepresentations, false labeling, marking and branding, inaccurate underselling claims, misrepresentations of a competitor or his goods, and miscellaneous deceptive selling methods.

The tabulations also break down the cases into four classes, according to general disposition effected: (1) Adjusted (that is, violation found and some corrective action taken); (2) No violation found; (3) Case dropped (for lack of evidence, withdrawal of complaint, etc.); and (4) Case pending on May 27, 1935, when the codes lapsed.

a. Relative Frequency of Misrepresentation Cases

To indicate, first, the relative frequency with which the various type of misrepresentation cases occurred in this group of codes, and, second, the comparative disposition of the different classes of case, the following summary table has been prepared:

(*) Summary figures in files of Commodity Information Unit, Trade Practice Studies Section, Division of Review; Compliance folder.

Cases Affecting	Total	Disposition of Cases: Adjusted	No Viol'n	Dropped	Pending
False, misleading and inaccurate advertising	517	346	120	37	14
False and misleading labeling, branding, etc.	131	71	44	10	6
Advertising provisions of Retail & Retail Food Codes	392	260	101	16	15
Inaccurate underselling claims	84	56	23	5	0
Other advertising restrictions	105	92	10	2	1
Misrepresentations of competitors or their goods (defamation)	225	68	49	101	7
Deceptive selling methods	135	88	24	9	4
Other misrepresentations	40	24	3	9	2
TOTAL-MISREPRESENTATIONS	1,619	1,005	376	189	49

These figures show misrepresentative advertising of some sort to have characterized the great majority of all the cases, with defamation of competitors second, and deceptive labeling third.

Of the total 1,619 cases, violation was found and adjustment of some sort effected in 1,005 instances, or something more than 62 percent of the entire number. This was a slightly larger proportion of adjustments than for the trade practice provisions as a whole, which showed 12,449 out of 23,611 cases adjusted, a little less than 57 percent.

As between the different types of violations, adjustments were effected in the following proportions of cases: false advertising in general, 67 percent; advertising provisions of the retail codes, 66 percent; inaccurate underselling claims, 67 percent; other advertising re-

strictions, 88 percent; deceptive selling methods, 70 percent; misbranding, 54 percent; defamation of competitor, 30 percent.

b. Distribution in Retail and Non-Retail Codes

The most conspicuous point to be observed concerning the relative distribution of the misrepresentation cases as between types of codes is their very great concentration in the retail trade group. Nine retail trade codes are found to account for 1,298 of the 1,619 misrepresentation cases shown for the entire 115 codes, a proportion of 80.2 percent. Three codes - Retail Trade, Retail Food and Grocery, and Retail Jewelry contributed 891 of these cases.

The distribution of the misrepresentation cases among this group by code and by type of violation, is shown in the table following:

	Type of Provision Affected (*)								
Code	A	B	C	D	E	F	G	Misrep'n Total	Tr.Prac. % of All Cases
Retail Trade	180	1	235	34	2	43	10	505	28.9
Retail Food & Groc.	62	2	107	24	1	95	4	295	11.3
Retail Jewelry	49	-	47	11	79	4	1	191	64.5
Retail Solid Fuel	33	-	-	-	-	8	66	107	6.3
Motor Vehicle Retail	56	-	-	-	-	3	17	76	17.1
Retail Tire & Bat.	9	-	-	6	20	26	5	66	8.5
Retail Monument	19	1	-	2	1	3	12	38	4.8
Retail Tobacco	12	-	-	-	-	-	1	13	3.5
Retail Lumber	5	1	-	-	-	-	2	8	1.6
TOTAL - 9 RETAIL	425	5	389		77	103	182	1,299	14.1

The general distribution among the remaining 106 codes is as follows:

No misrepresentation cases----------46 codes
1 to 5 such cases----------42 codes
5 to 10 cases----------11 codes
More than 10 cases---------- 7 codes
Average number per code---------- 3.0 cases

(*) A- False and misleading advertising
B- False labeling, marking, branding
C- Advertising provisions of Retail Trade, Retail Food and Grocery and Retail Jewelry codes.
D- Inaccurate underselling claims.
E- Other advertising restrictions
F- Misrepresentations of competitors or their goods (defamation)
G- Other deceptive selling methods.

Among the group of codes shown to have referred either none, or not more than five misrepresentation cases, are: Silk Textile, Undergarment and Negligee, Toy and Plaything, Business Furniture, Bottled Soft Drink, Can Manufacturing, Candy Manufacturing, Electrical Manufacturing, Rubber Manufacturing, Fire Extinguisher, Cotton Garment, Luggage and Leather Goods, Funeral Supply, Canvas Goods, Lumber and Timber, Mayonnaise, Men's Clothing, Dental Laboratory, Paper and Pulp, and nearly all supplements of the Wholesale Trade Code.

The seven codes with 10 or more reported cases each are: Bedding, Macaroni, Cleaning and Dyeing, Scientific Apparatus, Wholesale Confectionery, Plumbing Fixtures, and the basic Wholesale Trade Code.

c. Summary

The two points indicated above, the particular activity with respect to misrepresentative practices in the retail codes, and the lack of record of such activity in a large proportion of the remaining codes, bear out evidence to a similar effect which has been presented in earlier sections of this chapter.

Suggestion has also been made of the possible reasons for the relative scarcity of record, as contrasted with the preponderant number of codes which contain misrepresentation provisions, i.e. that the provisions in many cases were merely formally included, without real industry interest in the subject; and/or, that in others an interest existed, but the subject was dealt with without recourse to NRA aid to effect compliance.

In many instances no doubt the provisions were included principally at the suggestion of the Deputies, or because it was being generally done. In various industries, too, misrepresentations such as this report is concerned with do not, in fact, constitute appreciable problems. Data from the Federal Trade Commission records shown above (*) indicate a rather restricted group of industries, chiefly concerned with consumer goods, with respect to which the Commission has found occasion to take action in restraint of misrepresentative practices.

Again, what the code-sponsoring industries were primarily interested in were practices which were competitively troublesome; they would hardly be apt to concern themselves greatly about methods which, while perhaps vexatious to the buying public, did not create difficulties for the industries themselves. It is notable that in the retail trades, where the record of referred cases is largest, the types of misrepresentative practices employed were particularly obnoxious competitively.

As to the handling of misrepresentations without reference to NRA, the discussions of the Coffee and Dog Food codes previously presented, and various returns from the Code Authority questionnaires, indicate that in a number of cases the Code Authorities did actively attempt to admin-

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(*) Chapter III, Section III, p. 30, above.

ister the misrepresentation provisions without calling upon NRA, either because they found themselves able to obtain satisfactory compliance by their own efforts, or because they felt that no effective help was to be had.

Informal representations received from one or two quarters, also, indicate that in some cases the Code Authorities were inclined simply to file away the records of complaints of misrepresentation violations in their archives, rather than to take any action tending to draw attention to the presence of such practices in their industries.

Finally there must be borne in mind the fact that, with a very considerable number of the codes, no Code Authority organization was ever effected for dealing with code violations of any sort.

2 Further Analysis of Type and Disposition of Compliance Cases.

The tabular material given above indicates only the general type - not the specific form - of the misrepresentation violations reported; and in the cases where violations were found, the "adjusted" column gives no indication of the precise form which the adjustment took. These further details are not obtainable at the present time from the Field Division's compilations. To supply them in some degree, a sample of cases obtained from the Washington Compliance Division files has been analyzed.

The material given below illustrates in a number of instances the specific deceptive practices which were complained of in the different industries represented, and shows the nature of the disposition made of the case where violation was found.

Code	Violation Charged	Disposition
Retail Trade	Misleading combination sale prices.	Case closed by Certificate of Compliance.
" "	False claim that goods were union made and labelled.	Oral Agreement with State Office to comply.
" "	Advertising "no interest added" in time payment sales.	No violation found.
" "	Misleading statement re repossessed goods.	Certificate of Compliance.
" "	Advertising current goods at cut rates and selling discontinued items.	Certf. of Comp.
" "	Misleading advertising, "buy direct from mill".	Respondent removed ads and case closed.
" "	False advertising of goods.	Certf. of Compl.
" "	False "clearance sale."	Blue Eagle removed.
" "	Violation of advertising provisions.	After F.T.C. report, Certf. of Compliance.
" "	Goods not as advertised.	Certf. of Compl.
" "	Goods not as advertised.	No violation found.
" "	Advertised "forced sale" but bought goods to include in sale.	Consent decree obtained and penalties assessed.
" "	Two-price policy.	Case rejected - no violation found.

Code	Violation Charged	Disposition
Retail Trade	Inaccurate advertising.	Case closed when both parties stopped ads.
" "	Falsely advertised merchandise as unclaimed freight.	Respondent desisted; case closed.
" "	Falsely advertised stock as part of "bankrupt stock"	Case dropped. Respondent too small.
" "	Advertising "irregular" Hosiery as "perfect."	After F.T.C. report, Certf. of compl.; also another later.
" "	Inaccurately advertised wall paper.	Certf. of Compl.
" "	Misrepresentation of costs and sale prices.	Case pending May 27, 1935.
" "	Inaccurate advertising.	Case pending May 27, 1935.
" "	Advertised "Forced to Vacate" and then later renewed lease.	Blue Eagle removed.
" "	Inaccurate advertising.	Referred to F.T.C. who secured Certf. of Compl.
" "	Misleading advertising re trade-in-allowance on furniture.	Blue Eagle removed for refusal to sign Certf. of Compl. and case pending.
" "	Falsely advertised savings to buyers of 40-60 %.	Case pending May 27, 1935.
" "	Misleading statements by force.	F.T.C. investigated and secured Certf. of Compl.
Retail Drug	Slogan "We will not be under-sold" misleading and inaccurate.	Certificate of Compliance.
" "	Inaccurate advertising and underselling claims.	Case dropped, because poorly prepared and unimportant.
Motor Vehicle Retail	Inaccurate advertising.	Closed by Certf. of Compliance.

Code	Violation Charged	Disposition
Motor Vehicle Retail	Disconnecting speedometer.	Closed by Certf. of Compl.
Motor Vehicle Retail	Misrepresented condition of truck.	Case adjusted. No Certf. of Compliance.
Motor Vehicle Retail	Disconnecting speedometers.	Obtained consent decree and case closed.
Motor Vehicle Retail	Disconnecting speedometer, etc.	Insufficient evidence; case dropped.
Motor Vehicle Retail	Disconnecting speedometer.	Lack of evidence; case dropped.
Motor Vehicle Retail	Inaccurate advertising and failing to connect speedometer.	No violation.
Motor Vehicle Retail	Incorrect and misleading prices in newspaper advertising.	Certificate of Compliance.
Retail Food and Grocery	Selling merchandise inferior to that advertised.	Certificate of Compliance.
Retail Food and Grocery	Misleading advertising of egg grades.	Certificate of Compliance.
Canvas Goods Industry	Misrepresentation of products by salesmen.	Certificate of Compliance.
Lumber & Timber Products	Billing No. 2 Common Fir as No. 1.	Case dropped. Respondent was wholesaler and not in code.
Package Medicine	Inaccurate advertising.	Not subject to Code. Case dropped.
Retail Jewelry	Inaccurate advertising; repair work at uniform price.	Blue Eagle removed and case pending May 27, 1935.
Bedding Industry	False labels, "new Material" tag when it was used material.	Case pending on May 27, 1935.
Chain Mfg. Industry	Misleading Advertising.	Blue Eagle removed. Case referred to Litigation and returned; insufficient evidence.
Photographic & Photo Finishing	Advertised "new and better" method of photography, which Association claimed false.	No violation.

Code	Violation Charged	Disposition
Retail Solid Fuel	Misrepresentation including using false measures.	No violation.
Coffee Industry	Inaccurately advertising "dated" coffee as not over 10 days old.	Certificate of Compliance.
" "	Misrepresentation as to ingredients other than coffee.	To F.T.C. Dismissed for lack of Jurisdiction (Not interstate commerce.)
" "	Misrepresentation as to ingredients other than coffee.	Certificate of Compliance.

Analysis of the manner in which the above cases were disposed of shows that in 19 instances they were closed upon respondent's signing of a Certificate of Compliance, and in 4 other cases by oral or other informal agreement to comply. In 5 cases the Blue Eagle was removed, the action in 3 instances being appealed. In two cases consent decrees were obtained, and one of these a penalty was assessed.

"No violation" was found in 6 of the cases, and 6 others were dropped, 4 for lack of evidence or faulty presentation of the case, and 2 because respondent was found not subject to the code in question. Six cases were still pending at the time the codes lapsed.

Without knowledge of the merits of these particular cases it is not possible to pass upon this record as a commentary on NRA compliance work. The frequent Code Authority complaint of lack of support, however, insofar as it included the specific allegation of habitual use of the Certificate of Compliance, does seem to receive some support. From the available data it appears probable that 31 of the cited cases involved a real violation. In 25 of these a Certificate of Compliance or other agreement to desist was accepted as satisfying the charge. Five Blue Eagles were removed, at least temporarily, and one actual penalty was assessed.

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The above section rounds out the picture of the operation of the NRA with respect to the misrepresentation provisions of the codes as the available records reveal it.

In the following chapter an outline of some other forms of control and influences which operate to discourage misrepresentative practices in particular fields will be given.

The general findings and conclusions of the entire MISREPRESENTATION AND DECEPTION portion of the study have already been summarized at the head of the report.

CHAPTER FIVE

OTHER MISREPRESENTATION CONTROL

I. FEDERAL LEGISLATION

The two preceding chapters have dealt with the principal methods - the Federal Trade Commission machinery and the NRA codes - which have been employed to exercise statutory control over, among other things, misrepresentative and deceptive practices in advertising and selling, on a national scale. Both of these attempts have viewed the practices primarily in terms of unfair methods of competition, and have aimed at their restraint chiefly in the interest of the members of the particular trade or industry involved. Other Federal legislation exists in which control of unfair and deceptive practices in a particular field is the aim, and where the effort to this end is predicated largely upon other public concerns.

A. The Food and Drug Administration.

The Federal Food and Drug Act, adopted in 1906, seeks primarily to protect the consuming public from abuses in the preparation and marketing in interstate commerce of these necessaries of life and health. The Act confers upon the Secretary of Agriculture, through the Food and Drug Administration, wide powers to prevent adulteration of foods and medicinal preparations, and misrepresentation concerning them in the form of labeling and branding.

The Act forbids the movement in interstate commerce of "any article of food or drug which is adulterated or misbranded within the meaning of this Act". (*) Section 3 empowers the Secretary of Agriculture to "make uniform rules and regulations for carrying out the provisions of this act." The Act specifically provides that any drug or article of food is to be deemed misbranded "the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular; "also "any food or drug product which is falsely branded as to the State, Territory or country in which it is manufactured or produced." (**) Various other specifications concerning both adulteration and misbranding are written into the Act, and numerous regulations having the force of law have been promulgated by the Food and Drug Administration.

The Act provides for enforcement of its provisions directly through the courts, both by criminal prosecution, with fines and imprisonment, and civil action with penalty of seizure and condemnation of the adul-

(*) The Food and Drugs Act, June 30, 1906, as Amended August 23, 1912, Mar. 3, 1913, March 4, 1913, July 9, 1919, January 18, 1927, and July 8, 1930.

(**) Ibid. Sec. 8

terated or misbranded goods. A field staff of about 150 is employed by the Administration in inspection and the collection of evidence with respect to compliance with the requirements of the Act.

There is general agreement that the Food and Drug Act has worked decided improvement in the character of interstate traffic in food, and that it has gone far to eliminate false and deceptive marking and branding. The authority of the Act does not, however, extend to advertising, and one result of this has been to cause a shifting over of misrepresentations from the medium of branding to that of advertising. The Food and Drug Administration has a collection of comparative exhibits illustrating, product by product, the way in which subject matter barred from the labels has concentrated in the advertisements. Modifications of the Food and Drug Act now pending in Congress provide specifically for extension of the Administration's control to misrepresentative advertising of foods and drugs. (*)

B. Other Regulatory Statutes.

The Federal Alcohol Administration Act of August 29, 1935, in Sec. 5 entitled "Unfair Competition and Unlawful Practices", makes illegal the labeling or advertising of the products concerned except in accordance with regulations to be prescribed by the Administrator such as will, among other things, (1) "prevent the deception of the consumer with respect to" and (2) "provide the consumer with adequate information as to" the products so labeled and advertised. (**)

The Securities Exchange Act of 1934 provided:

"Regulation of the Use of Manipulative or Deceptive Devices".

Sec. 10 "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange -

(b) "To use or employ in connection with the purchase or sale of any security . . any manipulative or deceptive contrivance in contravention of such rules and regulations as the Commission may prescribe. . in the public interest or for the protection of investors." (***)

Both Acts provide substantial fines as penalty for violation of their terms.

The Postal Laws empower the Postmaster General to withhold use of the mails and forbid payment of money orders -

(*) S. 5. 74 Cong. 1st. Ses. (Copeland Bill) "To prevent adulteration, misbranding, and false advertising of food, drugs, devices and cosmetics." etc. Also S. 580 for the same purpose.
(**) Public - No. 401 - 74th Congress, Sec. 5. e.f.
(***) Public - No. 291 - 73d Congress (H.R. 9323) Section 10.

"... upon evidence satisfactory to him that any person or company is engaged in conducting a lottery...or is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretences.."(*)

These penalties may be applied by Fraud Orders, without court action, although relief may be sought by appeal. Criminal action is also possible, this section of the Act employing the language "writing, circular, pamphlet or advertisement." Technically, prosecution might be brought solely on the fact of transmission of false or fraudulent advertising through the mails; but as a practical matter it is generally found necessary to show direct harm, either physical or pecuniary, to the complainant, courts and juries being hesitant about imposing criminal penalties for the practices in themselves.

It will be noted with respect to each of the first three statutes mentioned above - the Food and Drug Act, the Federal Alcohol Control Act, and the Securities Exchange Act - that general prohibitions upon misrepresentation in marking, branding, labeling and/or advertising are further implemented by enabling clauses permitting, or requiring, the administrative agencies to adopt regulations for their enforcement - that is, in effect, to define the scope of the control set up by the statute. It is the general type of method which, in the opinion of many, was originally intended by Congress to be the procedure of the Federal Trade Commission - "unfair methods of competition" declared unlawful, with wide discretion left the Commission to decide as to the applicability of the phrase to specific practices.

In practice, as has been shown in the discussion of the Commission above, the right to prescribe as to the definition and interpretation of unfair methods of competition has been exercised by the courts. Some modification of the Federal Trade Commission Act to empower the Commission to set up affirmative standards for determining unfair competition, as the Food and Drug Administration is empowered to set up affirmative standards for determining as to adulterations and misbrandings, would appear to be one possible solution of the question of increasing the Commission's effectiveness in its field.

II. STATE STATUTES

State legislation affecting misrepresentation has dealt with the subject almost entirely in terms of police and general welfare powers. All but six of the States (Arkansas, Georgia, Maine, Mississippi, New Mexico and Wyoming) have some form of law prohibiting false advertising and making violation a misdemeanour. (**) The following statute from the Alabama code is quoted as typical of the State laws on the subject:

(*) Paragraphs 259, and 732, of Title 39 of the Revised Code, 69th Congress.

(**) Final Report on Chain Store Investigation, F.T.C. Senate Document No. 4, 74th Cong. 1933. p. 105.

> Untrue advertising is prohibited. If any person, firm corporation, or association, or agent or employee thereof, with intent to sell or any way dispose of merchandise, real estate, securities, service, or anything offered by such person, firm, corporation, or association, or agent or employee thereof, directly or indirectly, offers to the public for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto or an interest therein, knowingly makes, publishes, disseminates, circulates or places before the public or causes directly or indirectly to be made, published, disseminated, circulated or placed before the public in this State, in a newspaper, magazine or other publication, or in the form of a book, notice circular, pamphlet, headbill, letter, poster, bill sign, placard, card, label or tag, or in any other way an advertisement, announcement or statement of any sort regarding merchandise, securities, service or anything so offered to the public which contains any assertion, representation or statement that is untrue, deceptive or misleading; such person firm, corporation or association or the members of such firm, also the agent and employee shall be guilty of a misdemeanor, punishable by a fine or not less than $50 nor more than $1,000, or by imprisonment for more than one year, or by both such fine and imprisonment. (*)

Some of the States, namely, Maryland, Massachusetts, North Carolina, Pennsylvania, South Carolina, Texas, and West Virginia provide that, to constitute a violation, the advertiser must be aware of the untrue and misleading nature of the statement, or, that it should be possible, by the exercise of reasonable care, for him to have informed himself. (**)

As to misrepresentations through false labels, marking, or branding, a number of the states have Food and Drug laws patterned upon the Federal law; and in addition there are a wide variety of statutes designed to prevent deception in the labeling of other products, such as feedstuffs, fertilizer, paints, oils, and turpentine, etc. A compilation of these would fill a large volume. Finally there are the laws and local ordinances dealing with false weights and measures and other immediate frauds upon the consumer.

Prior to NRA there was little if anything in the state statutes dealing with misrepresentation as an aspect of unfair competition. The common law was, and is still, the means of relief in intrastate cases of this sort. Fifteen states did pass some sort of NRA statute, either based upon the national Act or paralleling it in some degree. These state Acts were generally limited by their own terms to two years, or were to run concurrently with the original NIRA, and are understood in practically all cases to be now expired. (***)

(*) Alabama Code, sec. 4135.
(**) Senate Doc. 4, noted above, p. 10a.
(***) The states: California, Colorado, Illinois, Kansas, Kentucky (prison industries only), Massachusetts, Mississippi, Missouri, Montana, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania (Government purchases only), South Carolina, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming, (Data orally from E. Dublick, Legal Research Section, Legal Division, NRA.)

III. PRIVATE AGENCIES

A. Trade Associations.

A great deal of valuable work in helping to restrain misrepresentative practices in marking, branding, advertising and selling has been done by the various trade associations of the country. Both by cooperation with the Federal Trade Commission and through educational campaigns carried on among their membership they have contributed to the development of a higher concept of commercial ethics.

A number of associations work closely with the Commission in checking up on violation of fair practice standards and either themselves filing applications for complaint or furnishing the data upon which a complaint may be based. Still more definite work is done by groups like the National Varnish Manufacturers Association and Paint Manufacturers Association, and the Macaroni Industry, which maintain testing laboratories to detect standards violations or discrepancies between product and labeling, and report offenders to the Federal Trade Commission or the Food and Drug Administration. In some instances they go a step further and collaborate in the development of product standards for their industries which will aid enforcement agencies in establishing the fact of misrepresentation in cases where definite criteria are required.

Other industries, recognizing the necessity for at least some uniform definitions of products and trade terms to prevent deceptions due to either confusion or deliberate fraud, have worked out and applied this type of standard with a considerable degree of success. Notable instances of this are the trade "dictionary" developed by the Tanners Council and the standard definitions agreed upon by various fur trade groups. In a number of cases work of this sort has been incorporated in the Group II rules of Trade Practice Conference codes adopted by the industries in conjunction with the Federal Trade Commission.

Approximately 150 industries formulated codes of this type prior to NRA, almost all of which contained provisions of some sort aimed at misrepresentative and deceptive practices. Now, with the passing of NRA, the way appears to be open for a resumption of that work. If means could be found to give to the Federal Trade Commission statutory authority to approve such agreements, with power to enforce the rules approved, including those of the Group II type, much that was beneficial in the trade practice work of NRA might be preserved.

B. Better Business Bureaus.

Active cooperation in the work of defining trade terms and developing standards of nomenclature, referred to above, has been given by the Better Business Bureaus, which have also been important agencies for the general policing of advertising in both the national and local fields. Founded in 1911, the National Better Business Bureau has been consistently devoted to a "Truth in Advertising" program, as well as the elimination of other misrepresentations and frauds. There are now more than 50 local bureaus in principal cities through the country.

The Bureaus receive consumer complaints; maintain shopping services; obtain the cooperation of newspapers and radio in suspending advertisers who are shown to misrepresent; and work with Federal, State and local authorities in bringing to prosecution violators of the respective laws relating to fraud and deceit. Through arrangement with the Periodical Publishers Association, the National Bureau helps police the magazine industry, doubtful advertisements being referred to it for check. The Bureaus are also important agencies for developing positive standards of ethics and criteria of accuracy in advertising, which to the extent of their acceptance by the local business community become in effect unofficial extensions of the law governing misrepresentation.

During the NRA code period the Better Business Bureaus cooperated actively with the Code Authorities, especially in the retail trade codes. As a sidelight on the influence of NRA upon advertising, one of the Bureaus states:

> "As an aid to persuasion the fact that advertisements might be violating an NRA code has brought many an advertiser in line with Bureau recommendations and policy." (*)

The work of this type of organization, as well as retail and wholesale trade associations and others active in the local field, is of particular importance because of its effect upon false and unfair practices in intrastate trade, which neither the Federal Trade Commission nor, under the doctrine of the Schechter decision, any nationally sponsored form of regulation is able to reach. That their efforts or those of any now available agencies are sufficient to cope satisfactorily with the situation, however, the immense amount of compliance work carried on by the local code authorities of the various NRA retail trade codes in administering their fair practice provisions would lead no one to doubt.

(*) Annual Report, Better Business Bureau, Washington, D. C., 1934-35, page 8.

OFFICE OF THE NATIONAL RECOVERY ADMINISTRATION
THE DIVISION OF REVIEW

THE WORK OF THE DIVISION OF REVIEW

Executive Order No. 7075, dated June 15, 1935, established the Division of Review of the National Recovery Administration. The pertinent part of the Executive Order reads thus:

> The Division of Review shall assemble, analyze, and report upon the statistical information and records of experience of the operations of the various trades and industries heretofore subject to codes of fair competition, shall study the effects of such codes upon trade, industrial and labor conditions in general, and other related matters, shall make available for the protection and promotion of the public interest an adequate review of the effects of the Administration of Title I of the National Industrial Recovery Act, and the principles and policies put into effect thereunder, and shall otherwise aid the President in carrying out his functions under the said Title.

The study sections set up in the Division of Review covered these areas: industry studies, foreign trade studies, labor studies, trade practice studies, statistical studies, legal studies, administration studies, miscellaneous studies, and the writing of code histories. The materials which were produced by these sections are indicated below.

Except for the Code Histories, all items mentioned below are scheduled to be in mimeographed form by April 1, 1936.

THE CODE HISTORIES

The Code Histories are documented accounts of the formation and administration of the codes. They contain the definition of the industry and the principal products thereof; the classes of members in the industry; the history of code formation including an account of the sponsoring organizations, the conferences, negotiations and hearings which were held, and the activities in connection with obtaining approval of the code; the history of the administration of the code, covering the organization and operation of the code authority, the difficulties encountered in administration, the extent of compliance or non-compliance, and the general success or lack of success of the code; and an analysis of the operation of code provisions dealing with wages, hours, trade practices, and other provisions. These and other matters are canvassed not only in terms of the materials to be found in the files, but also in terms of the experiences of the deputies and others concerned with code formation and administration.

The Code Histories, (including histories of certain NRA units or agencies) are not mimeographed. They are to be turned over to the Department of Commerce in typewritten form. All told, approximately eight hundred and fifty (850) histories will be completed. This number includes all of the approved codes and some of the unapproved codes. (In Work Materials No. 18, Contents of Code Histories, will be found the outline which governed the preparation of Code Histories.)

(In the case of all approved codes and also in the case of some codes not carried to final approval, there are in NRA files further materials on industries. Particularly worthy of mention are the Volumes I, II and III which constitute the material officially submitted to the President in support of the recommendation for approval of each code. These volumes

set forth the origination of the code, the sponsoring group, the evidence advanced to support the proposal, the report of the Division of Research and Planning on the industry, the recommendations of the various Advisory Boards, certain types of official correspondence, the transcript of the formal hearing, and other pertinent matter. There is also much official information relating to amendments, interpretations, exemptions, and other rulings. The materials mentioned in this paragraph were of course not a part of the work of the Division of Review.)

THE WORK MATERIALS SERIES

In the work of the Division of Review a considerable number of studies and compilations of data (other than those noted below in the Evidence Studies Series and the Statistical Materials Series) have been made. These are listed below, grouped according to the character of the material. (In Work Materials No. 17, Tentative Outlines and Summaries of Studies in Process, these materials are fully described).

Industry Studies

Automobile Industry, An Economic Survey of
Bituminous Coal Industry under Free Competition and Code Regulation, Economic Survey of
Construction Industry and NRA Construction Codes, the
Electrical Manufacturing Industry, The
Fertilizer Industry, The
Fishery Industry and the Fishery Codes
Fishermen and Fishing Craft, Earnings of
Foreign Trade under the National Industrial Recovery Act
  Part A - Competitive Position of the United States in International Trade 1927-29 through 1934.
  Part B - Section 3 (e) of NIRA and its administration.
  Part C - Imports and Importing under NRA Codes.
  Part D - Exports and Exporting under NRA Codes.
Forest Products Industries, Foreign Trade Study of the
Iron and Steel Industry, The
Knitting Industries, The
Leather and Shoe Industries, The
Lumber and Timber Products Industry, Economic Problems of the
Men's Clothing Industry, The
Millinery Industry, The
Motion Picture Industry, The
Migration of Industry, The: The Shift of Twenty-Five Needle Trades From New York State, 1926 to 1934
National Income, A study of,
Paper Industry, The
Production, Prices, Employment and Payrolls in Industry, Agriculture and Railway Transportation, January 1923, to date
Retail Trades Study, The
Rubber Industry Study, The
Statistical Background of NRA
Textile Industry in the United Kingdom, France, Germany, Italy, and Japan
Textile Yarns and Fabrics
Tobacco Industry, The
Wholesale Trades Study, The

Trade Practice Studies

Labor Studies

Administrative Studies

Legal Studies

9675.

THE EVIDENCE STUDIES SERIES

The Evidence Studies were originally undertaken to gather material for pending court cases. After the Schechter decision the project was continued in order to assemble data for use in connection with the studies of the Division of Review. The data are particularly concerned with the nature, size and operations of the industry; and with the relation of the industry to interstate commerce. The industries covered by the Evidence Studies account for more than one-half of the total number of workers under codes. The list of these studies follows:

Automobile Manufacturing Industry
Automotive Parts and Equipment Industry
Baking Industry
Boot and Shoe Manufacturing Industry
Bottled Soft Drink Industry
Builders' Supplies Industry
Canning Industry
Chemical Manufacturing Industry
Cigar Manufacturing Industry
Coat and Suit Industry
Construction Industry
Cotton Garment Industry
Dress Manufacturing Industry
Electrical Contracting Industry
Electrical Manufacturing Industry
Fabricated Metal Products Mfg. Industry and Metal Finishing and Metal Coating Industry
Fishery Industry
Furniture Manufacturing Industry
General Contractors Industry
General Contractors Industry
Graphic Arts Industry
Graphic Arts Industry
Gray Iron Foundry Industry
Hosiery Industry
Infant's and Children's Wear Industry
Iron and Steel Industry
Leather Industry
Lumber and Timber Products Industry
Mason Contractors Industry
Men's Clothing Industry
Motion Picture Industry
Motor Vehicle Retailing Trade
Needlework Industry of Puerto Rico
Painting and Paperhanging Industry
Photo Engraving Industry
Plumbing Contracting Industry
Retail Lumber Industry
Retail Trade Industry
Retail Tire and Battery Trade Industry
Rubber Manufacturing Industry
Rubber Tire Manufacturing Industry
Shipbuilding Industry
Silk Textile Industry
Structural Clay Products Industry
Throwing Industry
Trucking Industry
Waste Materials Industry
Wholesale and Retail Food Industry
Waste Materials Industry
Wholesale and Retail Food Industry
Wholesale Fresh Fruit and Vegetable Industry
Wool Textile Industry

THE STATISTICAL MATERIALS SERIES

This series is supplementary to the Evidence Studies Series. The reports include data on establishments, firms, employment, payrolls, wages, hours, production capacities, shipments, sales, consumption, stocks, prices, material costs, failures, exports and imports. They also include notes on the principal qualifications that should be observed in using the data, the technical methods employed, and the applicability of the material to the study of the industries concerned. The following numbers appear in the series:
9675.

Asphalt Shingle and Roofing Industry
Business Furniture
Candy Manufacturing Industry
Carpet and Rug Industry
Cement Industry
Cleaning and Dyeing Trade
Coffee Industry
Copper and Brass Mill Products Industry
Cotton Textile Industry
Electrical Manufacturing Industry
9675.

Fertilizer Industry
Funeral Supply Industry
Glass Container Industry
Ice Manufacturing Industry
Knitted Outerwear Industry
Paint, Varnish, and Lacquer, Mfg. Industry
Plumbing Fixtures Industry
Rayon and Synthetic Yarn Producing Industry
Salt Producing Industry