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Trade Regulation

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tax treaties with other countries.[55] The signers of such treaties agree that citizens of each country shall be exempt from taxation by the other unless engaged in business in the country of the other through a branch, factory, or other place of business. This does not include having agents in the taxing country unless the agent has either general authority to negotiate and conclude contracts, or has a stock of merchandise from which he regularly fills orders.[56] It is doubtful whether states which have refused to enact uniform allocation laws would choose to do so by treaty. This suggestion seems in effect to be merely a method of preventing state taxation of income from interstate commerce beyond very definite limits.

In his dissenting opinion in the *Northwest-Stockham* case,[57] Mr. Justice Frankfurter stressed the need for Congressional action in this field, and made the observation that, "Australia has resolved the problem of conflicting and burdensome state taxation of commerce by a national agreement whereby taxes are collected by the Commonwealth and from this revenue appropriate allocation is made annually to the States through the mechanism of a Premiers' conference—the Prime Minister of the Commonwealth and the Premiers of the several states."[58] It is submitted that such a plan would be apt to be very difficult to administer in the United States, which is much more highly industrialized than Australia, and which has fifty states rather than seven.

Perhaps the most effective and speedy solution would be the enactment by Congress of legislation denying states the right to tax interstate commerce unless such income as is taxed is apportioned among various states in which a firm does business in accordance with a uniform apportionment formula.[59] Such a formula now exists in the Uniform Division of Income for State Tax Purposes Act which was discussed previously.

No matter what Congress sees fit to do in this area, it would seem imperative that it do something to resolve the tangled and cumbersome mass of state tax legislation which now besets the businessman who does a multi-state business. It is to be hoped that the report of the Congressional committees which have been studying the problem will suggest a legislative solution to a problem which cannot be fairly solved in any other way.

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TRADE REGULATION

Since the last issue of the REVIEW there has been no new federal legislation in the field of trade regulation. However, a number of significant proposals are being considered by Congress.

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[55] Supra note 30.
[56] Ibid.
[57] Supra note 19, at 476.
[58] Ibid.
[59] Stapchinskas, supra note 36, at 59.

Several bills are now pending which would authorize the Federal Trade Commission to enter cease and desist orders providing temporary injunctive relief until final orders are issued in long-drawn-out cases.[1] Many cases involving unfair trade practices drag on for years and, at present, the Commission is powerless to halt allegedly illegal activities until a final determination has been made. All too often the unscrupulous businessman may reap the full benefits of his illegal practices by continuing with such practices during litigation. The problem is especially acute where the small businessman is the target of discriminatory or monopolistic practices, since his business is often destroyed or irreparably injured long before his rights can be vindicated by a court of law.[2] The proposed legislation would give the Federal Trade Commission authority to prohibit unfair practices while the question of permanent relief is pending. Such orders would be issued only where a careful investigation had been made, resulting in a finding of probable cause that one of the statutes administered by the Commission was being violated. In a speech before the Federal Bar Association of Washington, D.C., Commissioner MacIntyre stated that the Commission would issue a temporary order only where the failure to do so would

> substantially diminish or impair the effectiveness of any relief ultimately directed by the Commission for the protection of the public. In this respect, the issue of irreparable injury comes into focus under the proposed temporary cease and desist order provisions. Upon this issue the ultimate burden of proof would rest upon the Commission, not the respondent.

Where such orders were issued, the case would be placed on a special docket for rapid determination in order to prevent unnecessary hardship to the respondent.[3] It can be easily seen that the power to issue such orders would

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[1] S. 2252, H.R. 8830, H.R. 8831, 87th Cong., 1st Sess. (1961).

[2] Last year the Select Committee on Small Business of the House of Representatives made the following recommendation in its final report on the problems of small business.

> It is recommended that the Federal Trade Commission Act be amended to authorize and empower the Federal Trade Commission to enter temporary cease and desist orders to provide temporary injunctive relief pending the issuance of final orders in long-drawn-out litigated cases.
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> Currently pending at the Federal Trade Commission are 24 cases involving price discrimination and other trade practices utilized by the large processors and distributors of dairy products. These cases have been pending for periods up to 12 years—nine of them have been pending for a period of more than 6 years, and others for varying periods of time. Representatives of the Federal Trade Commission who have testified during the course of the hearings have failed to indicate that under existing law better results can be obtained. On the contrary, they have made it clear that they believe that under existing law they are doing all that is possible to expedite the litigation of these cases. H.R. Rep. No. 2235, 86th Cong., 2d Sess. 167 (1960).

[3] 1962 Trade Reg. Rep. ¶ 55,121. In a letter written to the Chairman of the House Committee on Interstate and Foreign Commerce President Kennedy recommended approval of this legislation. 107 Cong. Rec. 16746 (daily ed. Aug. 31, 1961).

be a formidable weapon in the hands of the Commission. However, it would seem that the dangers inherent in giving such injunctive powers to a regulatory agency may be offset by the danger to the public which is caused by unnecessary delay in the imposition of sanctions.

Several other bills are now being considered which would give the government new tools in the field of trade regulation. S. 167 would give the Attorney General authority to require a company to turn over its books and records to government attorneys during an antitrust investigation. This measure was passed by the Senate at the last session of Congress and is now being considered by the House.

A corporate officer who has been convicted of violations of the antitrust laws would be restrained from rendering any service to a convicted corporation for a period up to one year under S. 996. Other bills would increase the maximum penalties under the Sherman and Clayton Acts.[4]

State legislatures have enacted little important material in this field in recent months. The only notable item is a new Massachusetts law authorizing the Attorney General to institute actions where the Commonwealth or any city or town has acquired the right to recover damages under the federal antitrust laws.[5]

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UNIFORM COMMERCIAL CODE

Before discussing the recent developments toward nationwide acceptance of the Code, it should be noted that a Permanent Editorial Board for the Commercial Code has been established. The purpose and function of the Board will be to attain and maintain uniformity of law. It is scheduled to meet at least once every five years under the auspices of the American Law Institute and the National Conference of Commissioners on Uniform State Laws. The project is to be financed with the income from an endowment fund established by the Falk Foundation of Pittsburgh, Pennsylvania, financial supporter of the original preparation of the code.

The most significant legislative action since the last edition of the Review has been the adoption of the Code in Georgia (effective April 1, 1963), Alaska (effective December 31, 1962), and New York. The New York Code will not become effective until September 30, 1964, if the legislature does not revise the effective date. New York has departed from the 1958 Official Text in a number of places.

In Missouri the Code bill was unanimously passed in the Senate but, because this action did not take place until late in the session, there was not sufficient time for a House vote. There was no apparent opposition to the bill in the House, and the Code should become law in 1963.

Adoption of the Code in Michigan is imminent. Both houses have passed

[4] S. 2252, S. 2253, S. 2254, S. 2255, 87th Cong. 1st Sess. (1961).

[5] Acts of 1960, ch. 788, Amending Mass. Gen. Laws (Ter. Ed.) ch. 12, § 10.