

Syllabus

IN THE MATTER OF
BARAGER-WEBSTER COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 2506. Complaint, July 31, 1935—Decision, Aug. 3, 1936

Where a corporation engaged in manufacture and sale of candy, including both "straight" goods and "draw" or "deal" assortments, in two of which consumer-purchaser received, in accordance with number pushed or punched by chance and card's legend, one or two suckers or one of larger candy pieces or bars, or other article of merchandise for his penny, or choice of any bar in assortment, or two chocolate pellets, or box of chocolate angel food, and in third of which five-cent purchaser similarly received one or two candy bars or box of chocolate fudge, and, for last purchase, large box of chocolates—

Sold said various assortments and cards to wholesalers, jobbers and retailers, knowingly packed and designed for display, offer and sale, without alteration, addition or rearrangement, to consuming purchasing public, by means of said cards and by lot or chance, by retailers, stores of which, in case of the small establishments, are frequently near schools and attract trade of school children, substantial proportion of whom constitute the consumers of the lottery or prize package candy and who, given choice, purchase same in preference to "straight" goods because of lottery or gambling feature connected therewith, and chance of winning;

With result that competitors dealing in "straight" goods candy, who regard such sale and distribution as morally bad and as encouraging gambling, and especially among children, and as injurious to the industry in merchandising, instead of candy, a chance or lottery, and as providing retail merchants with means of violating the laws of the States, and refuse to sell candy so packed and assembled that it can be resold to public by lot or chance, were put to a disadvantage, retailers bought from it and others employing similar methods of sale as enabling them to sell more candy, and trade was diverted to it and such others from aforesaid competitors dealing in "straight" goods and able to compete on even terms only by giving same or similar devices to retailers, some competitors began sale and distribution of candy to public by lot or chance to meet constant demand for candy thus sold, sale of "straight" goods candy showed a marked decrease whenever and wherever lottery or prize package candy appeared in its markets by reason of gambling feature connected therewith, public and competitors were prejudiced and injured, and there was a restraint upon and a detriment to the freedom of fair competition in said industry and a violation of public policy:

Held, That such acts and practices under the conditions and circumstances set forth, were all to the prejudice of the public and competitors and constituted unfair methods of competition.

Before *Mr. Miles J. Furnas*, trial examiner.

Mr. Henry C. Lank and *Mr. P. C. Kolinski* for the Commission.

Mr. Walter C. Hughes, of Chicago, Ill., for respondent.

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COMPLAINT

Pursuant to the provisions of an act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission having reason to believe that the Barager-Webster Company, a corporation, hereinafter referred to as respondent, has been and is now using unfair methods of competition in commerce, as "commerce" is defined in said act of Congress, and it appearing to said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent is a corporation organized under the laws of the State of Wisconsin, with its principal office and place of business in the city of Eau Claire, State of Wisconsin. Respondent for several years last past has been engaged in the manufacture of candy, and in the sale and distribution thereof through wholesale and retail dealers located at points in the various States of the United States, and causes the said products when so sold to be transported from its principal place of business in the city of Eau Claire, Wis., to purchasers thereof in other States of the United States at their respective places of business, and there is now and has been for several years last past a course of trade and commerce by said respondent in such candy between and among the States of the United States. In the course and conduct of the said business respondent is in competition with other corporations, and with individuals and partnerships engaged in the manufacture of candy and in the sale and distribution thereof in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of its business as described in paragraph 1 herein respondent sells and has sold to wholesale and retail dealers certain packages or assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof.

Several of the said assortments are composed of a number of small pieces of candy, a number of larger pieces of candy, and a small package of candy or another article of merchandise, together with a device commonly called a push card. The larger pieces of candy and the small package of candy, or the other article of merchandise, are to be given as prizes to purchasers obtaining certain specified numbers from said card in the following manner:

The sales are one cent each, and when a push is made a number is disclosed. There are as many separate numbers on the card as there

are pushes. The numbers begin with one, but are not arranged consecutively. The card bears a statement, or statements, informing the prospective customer as to which numbers receive the small pieces of candy, and the number of such pieces, and which numbers receive the larger pieces of candy. The purchaser of the last push on the card ordinarily receives the small package of candy or the other article of merchandise. All purchasers from said card receive a piece of candy, but certain purchasers depending upon the number printed on the push selected by them receive more than one piece of candy, or one of the larger pieces of candy. The numbers on such card are effectively concealed from the purchasers, or prospective purchasers, until a push or selection has been made and the particular push separated from the card. The additional pieces of candy and the larger pieces of candy in said assortments are thus distributed to purchasers of pushes from said card wholly by lot or chance.

The respondent manufactures, sells, and distributes several assortments involving the use of a push card in the resale of said assortments to the consuming public, all of which make use of the same sales plan or principle, but each of which varies somewhat in detail. In addition to the assortment and sales plan described just above some of the assortments consist of a number of bars of candy rather than small pieces of candy and sales are 5 cents each, and the prize winners or lucky purchasers receive more than one bar of candy for the price of 5 cents.

PAR. 3. The wholesale dealers to whom respondent sells its assortments resell the same to retail dealers, and said retail dealers and the retail dealers to whom respondent sells direct expose said assortments for sale in connection with the aforesaid push cards and sell said candy to the purchasing public in accordance with the aforesaid sales plan. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of its product in accordance with the sales plan hereinabove set forth as a means of inducing purchasers thereof to purchase respondent's said product in preference to candies offered for sale and sold by its competitors.

PAR. 4. The sale of said candy to the purchasing public as above alleged involves a game of chance or the sale of a chance to procure additional or larger pieces of candy or packages of candy or an article of merchandise in the manner alleged. Such games of chance, and the sale along with the sale of such candy of such chance to procure such additional or larger pieces of candy or packages of candy in the manner alleged are contrary to the established public policy of the several States of the United States and of the Government of the

United States, and in many of the States of the United States are contrary to local criminal statutes.

By reason of said facts many persons, firms, and corporations who make and sell candy in competition with respondent as above alleged are unwilling to offer for sale or sell candies so packed and assembled as above alleged, or otherwise arranged and packed for sale to the purchasing public so as to involve a game of chance, or the sale with such candy of a chance to procure additional or larger pieces of candy by chance; and such competitors refrain therefrom.

PAR. 5. Many dealers in and ultimate purchasers of candy are attracted by respondent's said methods and manner of packing said candy and by the element of chance involved in the sale thereof, in the manner above described, and are thereby induced to purchase said candy so packed and sold by respondent in preference to candies offered for sale and sold by said competitors of respondent who do not use the same or equivalent methods. Many dealers in candies are induced to purchase said candies so offered for sale and sold by respondent in preference to all others, because said ultimate purchasers thereof give preference to respondent's said candies on account of said game of chance so involved in the sale thereof.

PAR. 6. The use of said methods by respondent has the tendency and capacity unfairly, and because of said game of chance alone, to divert to respondent trade and custom from its said competitors who do not use the same or equivalent methods; to exclude from said candy trade all competitors who are unwilling to and who do not use the same or equivalent methods; to lessen competition in said candy trade, and to tend to create a monopoly of said candy trade in respondent and such other distributors of candy as use the same or equivalent methods, and to deprive the purchasing public of the benefit of free competition in said candy trade. The use of said methods by respondent has the tendency and capacity unfairly, to eliminate from said candy trade all actual competitors, and to exclude therefrom all potential competitors, who do not adopt and use said method or equivalent methods that are contrary to public policy and to criminal statutes as above alleged. Many of said competitors of respondent are unwilling to adopt and use said methods, or any method involving a game of chance or the sale of a chance to win something by chance, because such method is contrary to public policy or to the criminal statutes of certain of the States of the United States, or because they are of the opinion that such a method is detrimental to public morals and to the morals of the purchasers of said candy, or because of any or all of such reasons.

PAR. 7. The aforementioned methods, acts, and practices of the respondent are all to the prejudice of the public and of respondent's competitors as hereinabove alleged. Said methods, acts, and practices constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, on July 31, 1935, issued and served a complaint upon the respondent, Barager-Webster Company, a corporation, charging that the respondent had been and was using unfair methods of competition in commerce, as "commerce" is defined in said act of Congress.

After the issuance of said complaint, the respondent having failed to file answer thereto, testimony and evidence in support of the allegations of the complaint were introduced by Henry C. Lank and P. C. Kolinski, attorneys for the Commission, theretofore duly designated by it. The respondent was represented by Walter C. Hughes, Esq., but offered no testimony or evidence in defense of the charges of the complaint. Thereafter the proceeding regularly came on for final hearing before the Commission on the said complaint, testimony and evidence and brief in support of the complaint, respondent having failed to file any brief, and through its counsel having indicated it did not desire to orally argue the matter, and the Commission having duly considered the same and being fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Barager-Webster Company, is a corporation organized under the laws of the State of Wisconsin, with its principal office and place of business in the city of Eau Claire, Wis. Respondent is now, and for several years last past has been, engaged in the manufacture of candy in Eau Claire and in the sale and distribution of said candy to wholesale dealers and jobbers and, in a few instances, to retailers located in the State of Wisconsin and other States of the United States. It causes said candy, when sold, to be shipped or transported from its principal place of business in the

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State of Wisconsin to purchasers thereof in Wisconsin and in the States of the United States other than the State of Wisconsin. In so carrying on said business, respondent is, and has been, engaged in interstate commerce and is, and has been, in active competition with other corporations and with partnerships and individuals engaged in the manufacture of candy and in the sale and distribution thereof in commerce between and among the various States of the United States.

PAR. 2. Among the candy manufactured and sold by respondent was an assortment designated as "Webster's Big Chief Tom-Tom Draw" composed of a number of pieces of candy together with a number of larger pieces or bars of candy, and another article of merchandise, and a device commonly called a "push card". The push card included with this assortment bore legends at the top thereof stating the manner in which the candy and the other article of merchandise in said assortment were to be distributed to the ultimate purchasers. These legends were as follows:

WEBSTER'S 1¢

Nos. 1-3-7-9-10-11-22-30-33-44-50-55-66-70-77-90-99-110-111-122-130-133-144-150 receive choice of any bar in assortment

Nos. 5-15-25-35-45-55-65-75-85-95-105-115-120-125-147 receive choice of any two suckers.

Last number purchased receives a Big Chief Tom-Tom.

All other numbers receive one sucker.

NOTE.—55 is twice lucky.

No Blanks—1 piece or more with every purchase.

The push card also had immediately below the legends quoted, 150 partially perforated discs, and under each disc was a number which number was effectively concealed from the purchasers and prospective purchasers until a push or selection had been made and the particular disc separated from the card. The candy contained in said assortment was distributed to the consuming public in accordance with the legends at the top of said push card. Sales were one cent each and the fact as to whether a purchaser received one of the suckers, two of the suckers, or one of the larger pieces or bars of candy, or the other article of merchandise for the price of one cent, was thus determined wholly by lot or chance.

The respondent distributed to its customers and prospective customers a circular advertising the above mentioned assortment, which showed the manner in which such assortment was to be distributed to the ultimate consumer.

PAR. 3. Another assortment manufactured and distributed by the respondent and involving the same principle or sales method, was designated by respondent as "Webster's Big Value." This assortment contained a number of small chocolate pellets together with a number of larger pieces or bars of candy and a box of chocolate Angel Food candy, together with a push card. The push card included with this assortment bore legends at the top stating the manner in which the several pieces of candy in said assortment were to be distributed to the ultimate purchasers. These legends were as follows:

1¢ WEBSTER'S BIG VALUE 1¢

Nos. 15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38- receive choice of any bar in assortment.

Nos. 100-101-102-103-104-105-106-107-108-109-110-111-112-113-114- receive two chocolate pellets.

Last purchase in each section receives box of chocolate Angel Food.

All other numbers receive one chocolate pellet.

No Blanks—1 piece or more with every purchase.

The push card also had immediately below the legends quoted, 150 partially perforated discs and under each disc was a number effectively concealed from the purchasers and prospective purchasers until a push or selection had been made and the disc separated from the board. The candy contained in said assortment was distributed to the consuming public in accordance with the legends at the top of said push card; sales were one cent each, and the fact as to whether a purchaser received one or two of the small pieces of chocolate candy, or received one of the larger pieces or bars of candy, or received the box of chocolate Angel Food candy, was thus determined wholly by lot or chance.

PAR. 4. Another assortment manufactured and distributed by respondent was composed of a number of bars of candy and a number of boxes of candy of varying sizes together with a device commonly called a push card. The push card included with this assortment bore legends at the top thereof stating the manner in which the bars of candy in said assortment and the several boxes of candy in said assortment were to be distributed to the ultimate purchasers. These legends were as follows:

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5¢

Bargain Sale

WEBSTER'S

Nos. 17-49 RECEIVE A BOX OF CHOCOLATES.

Nos. 10-20-30-40 RECEIVE A BOX OF FUDGE.

Nos. 35-45-55 RECEIVE CHOICE OF 2 Bars of CANDY.

ALL OTHER NUMBERS RECEIVE 1 BAR OF CANDY.

LAST PURCHASE RECEIVES LARGE BOX OF CHOCOLATES.

NOTICE.—This is not a Gambling device. Every punch receives a 5¢ bar. Extra bars for advertising.

The push card also had immediately below the legends quoted, 60 partially perforated discs and under each disc was a number effectively concealed from the purchasers and prospective purchasers until a push or selection had been made and the particular disc separated from the card. The candy contained in said assortment was distributed to the consuming public in accordance with the legends at the top of said push card. Sales were five cents each and the fact as to whether a purchaser received one or two bars of candy, or received a box of chocolates, or a box of fudge or a large box of chocolates, for the price of five cents, was thus determined wholly by lot or chance.

The respondent has manufactured and sold various assortments with which a push card was included, but all of these assortments, while they varied in detail, made use of the same principle or sales plan.

PAR. 5. The candy assortments involving the lot or chance feature, as described in paragraphs 2, 3, and 4, above, are generally referred to in the candy trade or industry as "draw" or "deal" assortments. Assortments of candy without the lot or chance feature, in connection with their resale to the public, are generally referred to in the candy trade or industry as "straight" goods. These terms will be used hereafter in these findings to distinguish these types of assortments.

PAR. 6. Numerous retail dealers purchase and have purchased the assortments described in paragraphs 2, 3, and 4 above, direct from respondent and from wholesale dealers and jobbers, who in turn have purchased said packages or assortments from the respondent. Such retail dealers display said packages for sale to the public as packed and assembled by the respondent and the candy contained in said packages or assortments is sold and distributed to the consuming public by means of the push card furnished by respondent and in accordance with the legends printed thereon.

PAR. 7. The respondent sells its merchandise to some retail dealers and to wholesale dealers and jobbers throughout the United States,

with the exception of the extreme Western Coast States, and respondent's merchandise, both "straight" and "draw" or "deal" assortments, is resold in practically all stores where candy is sold.

All sales made by respondent are absolute sales and respondent retains no control over the goods after they are delivered to the wholesaler, jobber, or retail dealer. The packages are packed in such manner that they can be displayed and are designed to be displayed without alteration, addition or rearrangement, and offered for sale to the consuming public by means of said push cards.

In the sale and distribution to jobbers and wholesale dealers, for resale to retail dealers, and to retail dealers direct, of packages and assortments of candy assembled and packed as described in paragraphs 2, 3, and 4 herein, respondent has knowledge that said candy will be resold to the purchasing public by retail dealers by lot or chance and it packs and assembles such candy in the way and manner described and furnishes the said push card so that the said candy may, without addition, alteration, or rearrangement, be resold to the public by lot or chance by said retail dealers.

PAR. 8. A substantial demand in the trade for "draw" or "deal" candy comes from the small retailers. The stores of these small retailers are, in many instances, located near schools and attract the trade of school children. A substantial proportion of the consumers or purchasers of lottery or prize package candy are children, and because of the lottery or gambling feature connected with the "draw" or "deal" assortments and the possibility of becoming a winner, it has been observed that the children purchase them in preference to the "straight" goods candy when the two packages are displayed side by side. The sale and distribution of "draw" or "deal" packages or assortments of candy, or candy which has connected with its sale to the public the means or opportunity of obtaining a prize or becoming a winner, by lottery or chance, teaches and encourages gambling, especially among children.

PAR. 9. There are in the United States many manufacturers of candy who do not manufacture and sell lottery and prize package assortments of candy and who sell their "straight" goods candy in interstate commerce in competition with the "draw" or "deal" candy. The manufacturers of "straight" goods type of candy have noted a marked decrease in the sales of their products whenever and wherever the lottery or prize candy has appeared in their markets. This decrease in the sale of "straight" goods candy is principally due to the lottery or gambling features indicated with the "draw" or "deal" candy.

PAR. 10. The sale and distribution of candy by retailers, by the methods described in paragraphs 2, 3, and 4 hereof, is the sale and distribution of candy by lot or chance, and constitutes a lottery or gaming device.

Competitors of respondent appeared as witnesses in this proceeding and testified and the Commission finds that many competitors regard such sale and distribution as morally bad and as encouraging gambling, especially among children, as injurious to the candy industry as it results in the merchandising of a chance or lottery, instead of candy; and as providing retail merchants with a means of violating the laws of the several States. Because of these reasons some competitors of respondent refuse to sell candy so packed and assembled that it can be resold to the public by lot or chance. These competitors are thereby put to a disadvantage in competing. The retailers, finding that they can dispose of more candy by the "draw" or "deal" method, buy from respondent and others employing the same methods of sale, and thereby trade is diverted to respondent and others using similar methods from said competitors. Such competitors can compete on even terms only by giving the same or similar devices to retailers. This, they are unwilling to do and their sales of "straight" candy show a marked decrease. The sale and distribution of candy by lot or chance provides an easy means of disposing of such products.

There is a constant demand for candy which is sold by lot or chance and in order to meet the competition of manufacturers who sell and distribute candy which is sold by such methods, some competitors have begun the sale and distribution of candy to the public by lot or chance. The use of such methods by respondent in the sale and distribution of its candy is prejudicial and injurious to the public and its competitors and has resulted in the diversion of trade to respondent from its said competitors and is a restraint upon and a detriment to the freedom of fair and legitimate competition in the candy industry.

PAR. 11. The average annual volume of respondent's business amounts to approximately \$100,000, and while the "draw" or "deal" assortments do not constitute the major portion of this business yet sales of such assortments by respondent are substantial.

PAR. 12. The Commission further finds that the sale and distribution in interstate commerce of assortments or packages of candy so packed and assembled as to enable retail dealers, without alteration, addition, or rearrangement, to resell the same to the consuming public by lot or chance is contrary to public policy.

CONCLUSION

The aforesaid acts and practices of the respondent, Barager-Webster Company, a corporation, under the conditions and circumstances set forth in the foregoing findings of fact, are all to the prejudice of the public and respondent's competitors and constitute unfair methods of competition in commerce and constitute violation of Section 5 of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, testimony and evidence taken before Miles J. Furnas, an examiner of the Commission, theretofore duly designated by it, in support of the charges of said complaint, and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

It is hereby ordered, That the respondent, Barager-Webster Company, a corporation, its officers, agents, representatives, and employees, in the manufacture, sale and distribution in interstate commerce of candy and candy products, cease and desist from:

(1) Selling and distributing to wholesale dealers and jobbers for resale to retail dealers and to retail dealers direct, candy so packed and assembled that sales of said candy to the general public are to be made, or are designed to be made, by means of a lottery, gaming device, or gift enterprise;

(2) Supplying to or placing in the hands of wholesale dealers and jobbers or retail dealers, packages or assortments of candy which are used or which are designed to be used without alteration or rearrangement of the contents of said packages or assortments, to conduct a lottery, gaming device, or gift enterprise in the sale or distribution of the candy or candy products contained in said assortment to the public;

(3) Supplying to or placing in the hands of retail and wholesale dealers and jobbers assortments of candy together with a device commonly called a "push card" for use or which is designed to be used in distributing or selling said candy to the public at retail;

(4) Furnishing to retail and wholesale dealers and jobbers a device commonly called a push card, either with packages or assortments

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of candy or candy products, or separately, bearing a legend or legends or statements informing the purchasing public that the candy or candy products are being sold to the public by lot or chance or in accordance with a sales plan which constitutes a lottery, gaming device or gift enterprise.

It is further ordered, That the respondent, Barager-Webster Company, a corporation, within 30 days after the service upon it of this order, shall file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist hereinabove set forth.

Complaint

IN THE MATTER OF
CHARLES N. MILLER COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 2826. Complaint, May 29, 1936—Decision, Aug. 4, 1936¹

Where a corporation engaged in manufacture and sale of candies, including assortments composed of number of individually wrapped penny pieces of uniform size and shape, together with number of large candy bars given as prizes to chance purchasers of penny pieces, color of which was found to differ from that of majority—

Sold said assortments to wholesalers and retailers by whom they were exposed for sale and sold to purchasing public in accordance with aforesaid sales plan, and thereby supplied to and placed in hands of others means of conducting lotteries in sale of its products in violation of long-established public policy of common law and criminal statutes and of the established public policy of the United States Government;

With capacity and tendency to induce purchasers to buy its said product in preference to that offered and sold by competitors, many of whom were and are unwilling to adopt and use said method or any method involving a game, sale or scheme of chance or other method contrary to public policy, and with result that many dealers in and ultimate purchasers of candy were attracted by said method and manner of packing same and element of chance involved in sale thereof, and induced to purchase such candy, so packed, in preference to that of competitors who do not use same or equivalent methods, and with tendency and capacity, by reason thereof, to divert to it trade and custom from competitors who do not use same or equivalent methods, and to exclude from trade concerned all competitors unwilling to use and who did not use same or equivalent method as unlawful, lessen competition therein, and tend to create monopoly thereof in it and such other candy distributors as used such method, and to deprive purchasing public of benefit of free competition therein, and eliminate therefrom all actual competitors and exclude therefrom all potential competitors who did not adopt and use such method:

Held, That such acts and practices, under the conditions and circumstances set forth, were all to the prejudice of the public and competitors and constituted unfair methods of competition.

Before *Mr. Miles J. Furnas*, trial examiner.

Mr. Henry C. Lank and *Mr. P. C. Kolinski* for the Commission.

Mr. Harold W. Knowlton, of Boston, Mass., for respondent.

COMPLAINT

Pursuant to the provisions of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade

¹ Order, however, published as of Nov. 14, 1936.