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In discussing the proposal to establish a Department of Consumers at the cabinet level of the Government, Mr. Forte discusses the many regulatory functions of the several consumer-oriented agencies which could be transferred to the new department, and he details the many problems attendant upon this consolidation of functions. He concludes that the Department of Consumers may eliminate much of the inefficiency implicit in the present division of responsibility of consumer protection among various agencies. However, the author warns that the difficulties involved in merging functions of the FTC and the FDA in one department warrant serious legal study in order to avoid the pitfall of hasty and ill-conceived legislation which could result in jurisdictional problems, and he calls for the formation of a committee to conduct such a study.

I. INTRODUCTION

In 1872, Congress began protecting the American consumer by enacting legislation to prevent mail fraud.[1] From this modest beginning, the consumer protection activities of the federal government have proliferated until today there are at least 33 government agencies engaged in 296 consumer protection activities.[2] In 1961, the estimated annual expenditures by the federal government for direct consumer protection activities totalled 272 million dollars and the number of full-time federal employees engaged in such activities was almost 22,000.[3] Expenditures for consumer advancement, a broader concept, were estimated at 681 million dollars in 1961 and the number of full time federal employees assigned to such work was nearly 43,000.[4]

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1. 17 Stat. §§ 296-306 (1872), *as amended*, 39 U.S.C. § 4005 (1964).
2. *See* HOUSE COMM. ON GOV'T OPERATIONS, CONSUMER PROTECTION ACTIVITIES OF FEDERAL DEPARTMENTS AND AGENCIES, H.R. REP. No. 1241, 87th Cong., 1st Sess. 4, 23 (1961).
3. *Id.* at 4-5, 25.
4. *Id.*

Current figures for such expenditures and employees would surely be substantially greater.[5]

This vast expenditure of money and time was not coordinated or administered by any single department or agency of the federal government. The activities were conducted independently except when independent federal agencies, in their own discretion, found it advisable to consult among themselves.

Individual consumers find it difficult to determine what programs are available for their benefit and what agency has jurisdiction over each program.[6] Some consumers also believe that the federal government is not responsive to their needs because they have no "spokesman" at this level of government.[7] While these difficulties have been mitigated by the appointment of a Special Assistant to the President for Consumer Affairs,[8] some feel that more can and should be done. One proposed solution is the creation of a Department of Consumers or a Department of Consumer Affairs[9] at the cabinet level of the federal government.

The bill to create a Department of Consumers originated with the

5. Inflation and inereases in compensation for federal employees alone probably would have inereased the expense of consumer protection activities substantially. More important, however, has been the constant expansion in consumer protection activities during the 1960's. In addition to the costs of expanding existing consumer protection programs, there must be included the costs of administering the following statutes which have been enacted since 1961: Fair Packaging and Labeling Act, 15 U.S.C. § 1451 (Supp. 1966); Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1381 (Supp. 1966); Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 (Supp. 1966); Drug Abuse Control Amendments of 1965, 21 U.S.C. § 360(a) (Supp. 1965); Child Protection Act, 15 U.S.C. § 1261 (Supp. 1966); and Drug Amendments of 1962, 21 U.S.C. § 321 (1964).

6. *See Hearings on H.R. 7179 Before the Executive and Legislative Reorganization Subcomm. of the Comm. on Gov't Operations*, 89th Cong., 2d Sess. 160, 164-65 (1966) [hereinafter cited as *House Hearings*] and *Hearings on S. 1571 Before the Subcomm. on Reorganization and Int'l Organizations of the Comm. on Gov't Operations*, 86th Cong., 2d Sess. 43, 75-78 (1960) [hereinafter cited as *Senate Hearings*]. Consumers' problems in determining the jurisdiction of government agencies are not unique. Experienced lawyers sometimes have difficulty in determining either the respective jurisdictions of government agencies or, more commonly, which agency to consult when two or more agencies have jurisdiction over the same practice.

7. *See House Hearings* 31-32, 36-39, 83, 114, 124.

8. The present Special Assistant to the President for Consumer Affairs is Betty Furness. Her predecessor was Esther Peterson. The appointment of a Special Assistant to the President for Consumer Affairs is the most important but is not the only action taken to increase consumer influence in government. *See* Peterson, *Representing the Consumer Interest in Government*, 64 MICH. L. REV. 1323 (1966), for the history of consumer representation in the federal government. Other actions include the establishment of the President's Committee on Consumer Interests and the Consumer Advisory Council, *see* Barber, *Government and the Consumer*, 64 MICH. L. REV. 1203, 1213-14 (1966) and *House Hearings* 240, and the appointment of former Sen. Maurene Neuberger as consumer consultant to the Food and Drug Administration.

9. The original proposal of Sen. Kefauver was to create a Department of Consumers. *See* S. 1571, 86th Cong., 1st Sess. (1959). For consistency only a single designation, "The Department of Consumers," is used in this article.

late Senator Estes Kefauver[10] and is now sponsored by Representative Paul Fino of New York.[11] A related bill is sponsored by Representative Benjamin S. Rosenthal of New York.[12] The Fino bill would authorize the Department of Consumers to present the viewpoint of consumers in the formulation of policies of the government and to represent the economic interests of consumers in proceedings before courts and regulatory agencies.[13] These provisions are intended to provide a consumer spokesman in the federal government.

Another function of the Department of Consumers would be to receive complaints from consumers, refer them to the proper agency and ascertain the nature and extent of action taken on these com-

10. Sen. Kefauver's speech in introducing this bill contains most of the arguments that are made today in favor of a Department of Consumers. 105 CONG. REC. 5335-41, March 26, 1959. Hearings were held on the bill in 1960, but the bill remained in committee. Succeeding bills suffered the same fate.

11. H.R. 6921, 90th Cong., 1st Sess. (1967).

12. Rep. Rosenthal's bill, H.R. 7179, 89th Cong., 1st Sess. (1965), though similar to the Kefauver-Fino Bills, would transfer to the Department of Consumers only a part of the Food and Drug Administration. The proposed division leaves all functions of the Food and Drug Administration relating to drugs, devices and cosmetics in the FDA; and it would transfer all functions of the FDA relating to misbranding (but not adulteration) of food and relating to standards of identity, quality and fill of container of foods to the Department of Consumers. *Id.* It is difficult to understand the reasoning behind this division of responsibility. Consumers are at least as concerned with the adulteration of foods as with the misbranding of foods and it would seem that the administration of both powers should be in the Department of Consumers. Additionally, the line between adulteration and misbranding is not at all clear in some situations, and two different agencies would often have jurisdiction over the same offense if Rep. Rosenthal's bill were adopted. Finally, the division of responsibility seems inadvisable because it would split the FDA without discernible reason and because it would reduce the responsibilities transferred to the Department of Consumers, although critics have already charged that not enough responsibility is being given to make the Department of Consumers equal to other federal departments. *See* note 19 *infra*. In view of these difficulties, the legislation reviewed in this article will be the Kefauver-Fino bill, and general references to the "proposed legislation" or the "bill to establish a Department of Consumers" refer to the Kefauver-Fino bills.

13. *See* H.R. 6921, 90th Cong., 1st Sess. §§ 5-6 (1967). The bill provides that the Department of Consumers may intervene in regulatory proceedings as a matter of right if (a) the proceeding does not involve the adjudication of an alleged violation and (b) the matter may substantially affect the economic interests of consumers within the United States. *Id.* § 6(a). When the proceeding does involve adjudication of a violation in regulatory or court proceedings, the Department may certify all relevant information in its possession to the government officer or employee presenting this case for the government. *Id.* § 6(b). Finally, in any appellate court proceeding which may substantially affect the economic interests of consumers within the United States, the Department could seek to file consumers' views as an amicus curiae to the appellate review. *Id.* § 6(c). Supporters of the bill believe that the information presented in adjudicative proceedings is generally information compiled by producers. *See House Hearings* 152-53. The intervention procedure would also permit information compiled by the Department of Consumers to be submitted, thus protecting the consumers' economic interest. *See House Hearings* 92-93. This intervention procedure would, of course, sometimes result in two departments of the federal government—a regulatory agency and the Department of Consumers—seeking contrary results in the same case. *Id.* at 60. The federal government would, therefore, not be speaking in a single voice with a unity of purpose in the litigation. *Id.*

plaints.[14] This would permit consumers to send all complaints to a single department, reducing consumer perplexity concerning the intricacies of the jurisdiction of federal agencies. The legislation would also authorize the Department of Consumers to administer the Food and Drug Administration and certain agencies of the federal government which compile and disseminate information helpful to consumers.[15] This would consolidate a few consumer-oriented activities of the federal government in the proposed Department but would, of course, leave most consumer protection activities to be conducted by the federal government outside the Department.[16] Therefore, the plan is primarily for the proposed Department to make the existing consumer protection programs more effective by influencing the various departments and agencies now administering the programs rather than by taking operating responsibility for consumer protection programs.[17]

14. *Id.* § 7.

15. *Id.* § 8. The bill would transfer to the Department of Consumers the Food and Drug Administration, the Division of Prices and Cost of Living of the Department of Labor, the Home Economics Research Branch and the Human Nutrition Research Branch of the Department of Agriculture, and those elements of the National Bureau of Standards which the Director of the Bureau of the Budget shall determine to be engaged primarily in research with respect to, or the testing of, articles intended for use by consumers.

16. Consumer-oriented activities are so diverse and administered by so many different departments and agencies that even when a Department of Consumers is established, it is inevitable that most of these activities will not be consolidated. For a list of these activities, which vary from the regulation of air carrier rates to the insuring of withdrawable accounts in savings and loan associations, *see* COMM. ON GOV'T OPERATIONS, CONSUMER PROTECTION ACTIVITIES OF FED. DEP'TS AND AGENCIES, H.R. REP. No. 1241, 87th Cong., 1st Sess. 6-22 (1961). *See also House Hearings* 241. However, it should be possible to consolidate in a single enforcement agency many of the basic regulatory laws giving consumers protection in their purchases of ordinary and necessary goods. This more modest goal is the premise of this article. If a Department of Consumers were established on this foundation, it would probably prove possible to transfer more of the existing consumer protection programs to this Department at a later date. Additionally, as new consumer protection laws are enacted, Congress would probably assign their administration, if possible, to this Department.

17. *See House Hearings* 101. The plan of creating a government department partly for the purpose of having it influence other government departments and agencies to give greater consideration to consumer interests is an intriguing and apparently unique concept. *See House Hearings* 107. The plan is one which is born partly of necessity. As pointed out in note 16 *supra*, it is impossible to consolidate all consumer-oriented activities in a single agency or department. One remedy would seem to be for the President to appoint consumer-oriented men to administer the other departments of government and thus get greater consideration for the consumer. However, many consumers have little faith in this solution. They seem to believe that, whatever the philosophy of presidential appointees when they are appointed, these agency heads and their subordinates become captives of the regulated industry. *See House Hearings* 31-32, 59, 83-84, 88, 106, 124, 144, 211 and *Senate Hearings* 30-31, 33, 40, 99, 133-35. Also, even when agencies do not become captives of the regulated industry, the agencies are frequently required to adjudicate matters affecting consumers who are unrepresented in the proceedings. Consumers themselves cannot supply a spokesman because they are so numerous that organization is difficult and their breadth of interests

Those who have opposed the Department of Consumers in legislative hearings have raised several interesting counter-arguments. They suggest that the bill would create primarily a "lobbying" agency and that the Department cannot be an effective lobbyist for consumer interests because the President will not tolerate a department which publicly seeks more action for consumers than he himself desires.[18] They also argue that federal departments customarily administer a wide range of interrelated programs directed toward a common goal, and that an agency which is primarily a lobbying and information disseminating organization would not have sufficient operating responsibilities and stature to be a department of the federal government.[19]

It is apparent that the arguments against the proposed Department are, in part at least, interrelated. The Department would be reduced to lobbying with other government agencies for action favorable to consumer interests because it would have no direct control over the consumer protection activities of these other agencies. Similarly, the proposed structure of the Department of Consumers is considered inadequate by comparison with other government departments because not enough of the present consumer protection activities of the federal government would be transferred to it. Therefore, the logical compromise between proponents and opponents of the bill would seem to be to transfer more of the major consumer protection activities of the federal government to the new Department.[20] Such

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would require the expensive maintenance of a large organization qualified to speak expertly on many diverse subjects. *Cf. House Hearings* 43. This type of reasoning leads to the conclusion that the only solution is to establish a consumer spokesman within the federal government.

18. *See House Hearings* 60-61, 67-68, 75, 90. *Cf.* Jones, *The Role of Administrative Agencies as Instruments of Social Reform,* 19 AD. L. REV. 279, 287 (1967). The Secretary of Consumers would therefore have to exereise a persuasive influence upon the President and other department heads if he were to secure more progress for consumers. A related objection is that the creation of a Department of Consumers would add excessive responsibilities to the President. As critics of the bill see it, existing governmental agencies represent both producers and consumers and the competing interest of these groups are arbitrated within the agencies. If instead, producers were represented by one department and consumers by another, the President would continually be refereeing squabbles between them. *House Hearings* 97-98.

19. *Id.* at 53-54, 147, 149, 242, 246. Opponents also argue that if the Department of Consumers were established, it would have no influence because of its lack of regnlatory responsibility. *Id.* at 107-08.

20. The creation of a cabinet-level department of the federal government is, of course, a rare occurrence. However, the growing complexity of the federal government promises to make the creation of such departments more frequent in the future. *See* H.R. 1701, 89th Cong., 2d Sess. (1966). The witnesses seemed to agree that the decision to create a new department was a pragmatic decision but that generally a new department shonld be established when there was such a quantity of interrelated activities, programs and body of law that it cannot cfficiently function as an appendage to an existing government department or in a multitnde of government agencies and departments. *House Hearings* 136, 246, 250. On this point a proponent of the bill

an approach could raise the new Department to the level of the other departments of the federal government and reduce its dependency on lobbying by reason of its greater potential for direct action. However, implicit in such a compromise would probably be a recognition that the proposed Department cannot concern itself with all consumer-oriented activities and pursue consumer complaints about all subjects.[21] Some consumer protection programs would then remain under the jurisdiction of their present departments (which are concerned with producers', as well as consumers', interests), free from lobbying by the Department of Consumers. Thus, the Department of Consumers would be primarily a regulatory department, administering a consolidated set of basic consumer protection laws.[22]

If the major consumer protection activities of the federal government are truly capable of being interrelated, the consolidation would result in several benefits. For example, first, it would facilitate an exchange of information by those engaged in similar activities, eliminate some situations in which independent agencies each defer to the other's jurisdiction (leaving consumers without a remedy),[23] and permit a shifting of government personnel engaged in consumer protection according to the relative priorities of their projects. Second, it would also permit consumers to send their complaints to a single government department which would have jurisdiction over many im-

testified: "A cardinal principle of public administration is to avoid having different functions which are closely related and directed to some sort of general purpose scattered among a different number of agencies, as is presently the case with respect to such consumer-oriented functions of Government as do exist." *Senate Hearings* 103.

21. It seems that this would be a necessary conclusion in any event since to pursue competently all consumer complaints on all subjects would require either a large staff of technically trained personnel having substantial experience in many diverse fields or remarkably capable and versatile agency personnel. *Cf. House Hearings* 43.

22. Bills to establish a Department of Consumers have not yet followed this approach. The probable reason is that to combine our basic consumer protection laws means at least to merge the consumer protection programs of the FDA and the FTC, and certain parts of the Department of Agriculture and Bureau of Commercial Fisheries of the Department of Interior. Such a move would raise complex legal questions and would probably also raise the combined opposition of all of these agencies. Those who advocate a Department of Consumers apparently have been either unwilling to face this opposition or incapable of resolving the legal problems. However, some witnesses have advocated this type of consolidation. *See House Hearings* 39-41, 54, 57, 111 and *Senate Hearings* 41, 43, 120. It is interesting to note that Sen. Kefauver's own views were not fixed insofar as the particular functions which were to be transferred to the Department. He believed simply that a transfer should be made where ". . . consolidation in a consumer-oriented department would lead to more efficient operation, higher morale, and a general strengthening of the overall program through the new focus and unity of purpose." *Senate Hearings* 32.

23. When two agencies have concurrent jurisdiction over the same practice, both procedural and substantive legal problems can arise. Neither agency may act, or both agencies may take action, causing an unwarranted expenditure of time and money and raising fundamental issues of fair play insofar as the defendant's rights are concerned. Moreover, if two agencies act consecutively, difficult questions of res judicata and collateral estoppel may arise.

portant consumer problems and could refer the remaining complaints to other agencies for their appropriate independent action. Consumers seeking helpful information would find it convenient to secure such information from a consolidated department handling most consumer protection programs, and state and local governments would find it more effective to coordinate enforcement with a unified department.[24] While its lobbying function would be reduced in scope, the Department, like others, could, with the President's approval, support new legislation when needed to aid it in carrying out its assigned responsibilities. Therefore, the Department of Consumers could be economical, efficient and effective.[25]

At least as important as the above are the intangible benefits which might result from the establishment of a Department of Consumers. Two of the government agencies which now administer consumer protection activities—the Department of Agriculture and the Bureau of Commercial Fisheries of the Department of Interior—have as their principal function the promotion of producers' interests.[26] The Federal

24. The creation of a Department of Consumers would probably have an important effect upon state consumer protection programs. The states would then have a unified federal department which could secure information about consumer frauds, and which could set an example for state legislation. *See House Hearings* 40, 86-87.

25. A simple example of the possible benefits involves distribution of educational material to consumers by various agencies of the federal government. Information helpful to consumers is now distributed by at least the Department of Agriculture, the Food and Drug Administration and the Federal Trade Commission. Such information includes educational material relating to grade labeling (USDA), standards of identity and mandatory labeling requirements for foods (FDA), and frauds practiced against unwary consumers (FTC). The most successful agency in distributing such literature is probably the Department of Agriculture, and it can be considered successful only by comparison with the totally unimpressive record of the other two agencies. If a unified Office of Consumer Education were established and adequately funded within the Department of Consumers, it should be able to coordinate and improve the dissemination of information to consumers.

26. There is no doubt that the Department of Agriculture and the Bureau of Commerical Fisheries perform very real services for consumers. However, when a conflict arises between producers' interests and consumers' interests, these departments frequently support the producers. For example, in early 1967 the Secretary of Agriculture stated publicly that consumers should be prepared to pay a little more for their food. Dairy Record, March 29, 1967, at 5, col. 1. This statement was not conducive to influencing producers to hold a stable price on foods sold to consumers. When an enforcement agency is charged principally with the promotion of producers' interests, it is also not likely to be over-zealous in regulating these producers. For example, it is clear that historically the Department of Agriculture exercised an unhealthy influence upon the FDA and it may have been this influence which prompted President Roosevelt to transfer the FDA to the Federal Security Agency stating, "[t]he work of the Food and Drug Administration is unrelated to the basic functions of the Department of Agriculture." *See* S. WILSON, FOOD AND DRUG REGULATION 76-79, 149-50 (1942). The Department of Agriculture and Department of Interior now occupy the same anomalous position in regard to their inspection and grade labeling activities as was once occupied by the USDA in its administration of the FDA. The first Hoover Commission, however, believed the Department of Agriculture would be vigorous in its protection of the consumer interest. *See* REPORT OF THE COMMISSION ON THE ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT 251 (1951).

Trade Commission (as its name indicates) was originally intended to protect honest businesses from dishonest competition. As recently as 1960, the then chairman of the Federal Trade Commission (FTC) testified, "So I think that while our primary purpose may be the protection of honest businessmen, certainly, we have an ancillary assignment of protecting the public generally and consumers."[27]

Creation of a Department of Consumers would be a clear notice to individual consumers that there was a department of the federal government which was concerned principally with their problems. Consumers would probably respond to the establishment of the new department by sharply increasing the number of complaints and other communications sent by them to the government. The transfer to the Department of Consumers of functions now performed by other government agencies would also be a clear notice to the personnel involved in these functions that the consumer's interest is to be their first concern. These agencies might therefore become more responsive to consumer demands and consumer needs for greater protection. Thus, establishing a Department of Consumers would probably increase rapport between consumers and government and might result in a revitalization of government personnel involved in consumer protection.

The principal arguments against consolidation of more consumer protection activities in a Department of Consumers rest upon technical and political considerations. The problem of devising legislation which consolidates government agencies without adversely affecting their powers and performance is complicated by the differences in structure of governmental agencies (*e.g.*, compare the administrative structure of the FDA with the quasi-judicial structure of the FTC)[28] and by the present inter-relationships of government agencies (*e.g.*, the FDA is now located in the same department as U. S. Public Health and therefore has convenient access to Health Department research).[29] The existing government departments and agencies which would be reduced in size and importance by reason of the transfer of part of their functions to the new Department also present a formidable political force opposed to such consolidation.[30] Understandably, these

27. *Senate Hearings* 49.

28. *See* text accompanying notes 39 and 179-81 *infra*.

29. *See Senate Hearings* 19, 101-02, for a review of this objection. It is also argued that it would be inappropriate to transfer the Department of Agriculture's Institute of Home Economics to the Department of Consumers since this Institute's research is helpful to producers as well as consumers.

30. This is recognized by supporters of the bill to establish a Department of Consumers. As Rep. Rosenthal said, "[M]any agency heads do not like to offer to be transferred. They do not like to give up jurisdiction. I find they are somewhat jealous of their prerogative, and everybody in bureaucracy tends to be a status quo kind of operator." *House Hearings* 159. No government department has supported the bill;

departments and agencies now feel that they are providing great protection for consumers and that they could do even better if they were given greater appropriations and more power.[31] Yet, as indicated above, there are advantages to the consolidation approach if the political and technical difficulties can be overcome.

A determination of the consumer protection activities which can be transferred successfully to the Department of Consumers can begin conveniently with an understanding of the functions which the pending legislation would transfer to the Department.[32] The sole regulatory agency which would be transferred to the Department of Consumers under the proposed legislation is the Food and Drug Administration,[33] now administered by the Secretary of Health, Education and Welfare. FDA's primary responsibility is to prevent the adulteration or misbranding of foods, drugs, devices and cosmetics.[34] However, it also administers the Hazardous Substances Labeling Act, a statute intended to require proper warning statements on the labels of hazardous household articles.[35] Violations of statutes administered by the FDA are generally prosecuted by seizures of the offending articles (which are required to be brought into compliance with the act or destroyed),[36] injunctions to prevent a continuation of violations,[37] or criminal actions against those responsible for the violations.[38] The FDA has no quasi-judicial authority, and enforcement (other than by moral suasion)[39] is exclusively through court actions.

In the administration of its powers over foods, drugs, devices and cosmetics, the FDA: prevents false and misleading labeling; enforces mandatory labeling requirements governing consumer products; in-

virtually all departments affected by the bill have voiced general disapproval or specific objections (while not purporting to pass on the bill in general). *House Hearings* 159, 194-95.

31. *See, e.g., Senate Hearings* 48 and *House Hearings* 278-96.

32. Those who have advocated a Department of Consumers have consistently viewed the FDA as an appropriate regulatory agency to be made a part of the new department. *See* S. 1571, 86th Cong., 1st Sess. (1959), and H.R. 6921, 90th Cong., 1st Sess. (1967). It seems appropriate therefore to look for agencies which perform functions similar to those of the FDA to find additional functions which can be consolidated as part of the Department of Consumers.

33. *See* note 15 *supra.*

34. *See* 21 U.S.C. § 331 (1964).

35. *See* 15 U.S.C. §§ 1261-73 (1964). The FDA also administers the Federal Caustic Poison Act, the Import Milk Act, the Filled Milk Act and the Tea Importation Act. F.D. COSM. L. REP. ¶ 2441.

36. Federal Food, Drug & Cosmetic Act, 21 U.S.C. § 334 (Supp. 1965); Federal Hazardous Substances Labeling Act, 15 U.S.C. § 1265 (1964).

37. Federal Food, Drug & Cosmetic Act, 21 U.S.C. § 332 (Supp. 1965); Federal Hazardous Substances Labeling Act, 21 U.S.C. § 1267 (1964).

38. Federal Food, Drug & Cosmetic Act, 21 U.S.C. § 333 (Supp. 1965); Federal Hazardous Substances Labeling Act, 15 U.S.C. § 1264 (1964).

39. This may include threats of criminal prosecution. *See* Austern, *Sanctions in Silhouette: An Inquiry into the Enforcement of the Federal Food, Drug and Cosmetic Act,* 18 FOOD DRUG COSM. L.J. 617, 626-28 (1963).

spects factories and plants of producers to detect possible statutory violations and prohibits or restricts sale of unsafe or dangerous products; and sets governmental standards prescribing the composition of foods and drugs to prevent cheats.

Since other government agencies perform similar functions, the proper foundation for a Department of Consumers could be laid by transferring to the new department those parts of these agencies concerned with such similar functions. Those similar functions are described below.

II. REGULATORY FUNCTIONS WHICH COULD BE TRANSFERRED TO A DEPARTMENT OF CONSUMERS

A. *False and Misleading Labeling, Advertising and Other Unfair Acts and Deceptive Practices*

The FDA has the power to prevent false and misleading labeling of foods, drugs, devices and cosmetics.[40] The Federal Trade Commission has the power under Section 5 of the Federal Trade Commission Act to prevent unfair trade practices and unfair or deceptive acts or practices.[41] Under Section 5, The FTC can take action against the false and misleading labeling of all commodities (including foods, drugs, devices and cosmetics which fall within FDA's jurisdiction) and also against false and misleading advertising of all commodities.[42] Therefore, the FTC's power not only encompasses but also exceeds the FDA's power over false and misleading promotional claims.[43]

The proper exercise of the FTC's power over false and misleading advertising and labeling is vital to the consumer's economic interests. Consumers today frequently purchase their foods, drugs, shoes, clothing and other necessaries in large self-service stores. Their decision to purchase is increasingly influenced by representations in advertising and labeling rather than by the personal salesmanship of the corner grocer or tailor of another generation. Control over the representations which influence purchase is probably the single most important

40. Foods which bear false and misleading labeling are misbranded. Federal Food, Drug & Cosmetic Act, 21 U.S.C. § 343(a) (1964). Misbranded foods may be seized, *see* statute cited in note 36 *supra*, or injunctive or criminal actions may be brought against those responsible for the misbranding. *See* statutes cited notes 37 and 38 *supra*.

41. 21 U.S.C. § 45 (1958).

42. *See* Kelley & Cassedy, *The Federal Trade Commission Act as Amended by the Wheeler-Lea Act*, 2 FOOD DRUG COSM. L.Q. 315, 322 (1947).

43. *See* Fresh Grown Preserve Corp. v. FTC, 125 F.2d 917 (2d Cir. 1942), and Kelley & Cassedy, *supra* note 42. *See also* Forte, *The Food and Drug Administration, The Federal Trade Commission and the Deceptive Packaging of Foods*, 40 N.Y.U. L. REV. 860, 861 n.6 (1965).

element in the economic protection of the consumer.[44] If a Department of Consumers were established, the power to control false and misleading promotional claims should certainly be transferred to that department.

There would be clear advantages in the consolidation of FDA's power over false and misleading labeling and the FTC's power over false and misleading labeling and advertising if that consolidation is technically and politically feasible.[45] The same claims are frequently made on product labels and in descriptive promotional literature within the FDA's jurisdiction, and in newspaper, magazine, radio and television advertising within the FTC's jurisdiction. In such situations, the FDA and the FTC are confronted with the same issues —whether the claims are false or misleading—and the same evidence is determinative of these issues. It is desirable for the FDA and the FTC to cooperate closely in investigating and prosecuting such cases and this cooperation would be furthered by having all personnel working upon the cases within the same department.

Additionally, whether the FDA or the FTC is the agency primarily responsible for taking action against promotional claims relating to foods, drugs, devices and cosmetics now depends upon whether these claims are made in labeling or advertising.[46] The distinction between

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44. As many trademark and some food and drug cases recognize, purchasers generally exercise very little care in the purchase of ordinary low-priced goods. *See* Forte, *The Ordinary Purchaser and The Federal Food, Drug & Cosmetic Act,* 52 VA. L. REV. 1467, 1478-83 (1966).

45. Analogous support for this type of consolidation can be found in the report of the first Hoover Commission and in the report of the Task Force of the Second Hoover Commission. Both reports note the illogic of the present division of responsibility and suggest as a possible remedy the consolidation of the FDA's regulatory power over foods and the FTC's regulatory power over the advertising of foods in the Department of Agriculture. *See* REPORT OF THE COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT 250-51 (1951); THE COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURES 121-31 (1955). The establishment of a reorganized Drug Bureau governing advertising and labeling of drugs was also recommended. *See id.* The Second Hoover Commission Report did not expressly advocate the reorganization recommended in the Task Force Report, but the Commission did say that duplicating and overlapping jurisdiction of federal agencies should be reduced to a minimum by delegating authority to the states, or by reorganizing the authority of federal agencies over the same subject of a single agency, or by combining agencies in a commission so that they perform a specialized regulatory function. *See* REPORT OF THE COMMISSION ON THE ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURES 48 (1955). This type of consolidation would be possible in the Department of Consumers.

46. Although the FTC now has jurisdiction over both labeling and advertising, by agreement with the FDA the FTC generally permits the FDA to exercise sole jurisdiction over all matters regulating the labeling of foods, drugs, devices, and cosmetics. *See* 3 TRADE REG. REP. ¶ 9850.03 (1965). Similarly, the FDA has recognized the FTC's right generally to exercise sole jurisdiction over all matters regulating the advertising of foods, drugs, devices, and cosmetics. *See id.*

labeling and advertising has never been entirely clear,[47] and in borderline situations defendant's lawyers can argue to each agency that the matter primarily falls within the other's jurisdiction. Alternatively, when complaints arise relating to promotional claims in borderline situations, each agency can disclaim responsibility for failing to take action against these claims by arguing that the matter lies primarily within the other's jurisdiction. While consolidation would not end the distinction between labeling and advertising, it would reduce the importance of this distinction by making it clear that the responsibility for handling all false and misleading claims rests solely in the Department of Consumers.[48]

The present jurisdictional distinction between claims made in labeling and claims made in advertising is grounded almost exclusively in history rather than logic. The FDA's power to prohibit false and misleading labeling was expressly conferred upon its predecessor agency by the 1906 Food and Drugs Act[49] and was expressly confirmed in the superseding statute, The Federal Food, Drug and Cosmetic Act of 1938.[50] The FTC's power to regulate false and misleading labeling and advertising finds no such clear congressional consideration. When Congress enacted the Federal Trade Commission Act in 1914 authorizing the FTC to take action against "unfair methods of competition,"[51] it was concerned primarily with adding another weapon to the arsenal against trusts and monopolies rather than with preventing false and misleading labeling and advertising.[52]

47. The United States Supreme Court has held that the labeling does not have to physically accompany the product. Kordel v. United States, 335 U.S. 345, 350 (1948). While the Supreme Court clearly did not mean to grant the FDA authority to regulate advertising in general, the status of such things as promotional material distributed by mail remains doubtful. *See id.*, which seems to imply such material could be within FDA jurisdiction. The concurrent jurisdiction of the FDA and the FTC is reviewed in *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1116-17 (1967) and in the First and Second Citizens Advisory Committee Reports, 10 FOOD DRUG COSM. L.J. 453, 514 (1955) and 17 FOOD DRUG COSM. L.J. 581, 670 (1962).

48. The jurisdictional difference might still be important since actions brought under the Federal Food, Drug & Cosmetic Act for false and misleading labeling could result in criminal penalties while actions brought under the Federal Trade Commission Act could only result in cease and desist orders. However, the Department of Consumers would be under more pressure to prosecute by one route or the other since the matter would be clearly within its jurisdiction.

49. Act of June 30, 1906, ch. 3915, § 8, 34 Stat. 768 (repealed by 52 Stat. 1059 (1938)).

50. *See* Federal Food, Drug & Cosmetic Act, 21 U.S.C. § 343(a) (1964).

51. Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1964).

52. *See* G. HENDERSON, THE FEDERAL TRADE COMMISSION 33-38, 339 (1924); Kinter, *Federal Trade Commission Regulation of Advertising*, 64 MICH. L. REV. 1269, 1272-74 (1966); Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439, 450-51 (1964). *See also Developments In The Law—Deceptive Advertising*, *supra* note 47, at 1019, in which it is noted that the power to regulate false advertising was not even mentioned in the extensive debates before the enactment of the FTC Act.

Indeed, the legality of the FTC's regulation of false and misleading advertising under the "unfair methods of competition" prohibition of the FTC Act was originally considered highly questionable by some authorities.[53]

In the 1930's, a determined effort was made to move jurisdiction over false and misleading advertising of foods, drugs, cosmetics and devices from the FTC to the FDA.[54] This effort was unsuccessful, primarily because it was considered beneficial to have the authority to prohibit false and misleading advertising of all commodities in a single agency.[55] Thus, the FTC's defense to the attempted removal of part of its false and misleading advertising function to the FDA rested almost entirely upon the fact that the FTC had, under section 5 of the FTC Act, already assumed the responsibility for false and misleading advertising of all products. Politically, the FTC also made a valiant and successful effort to prevent the transfer of part of its advertising responsibility, causing a distinguished member of the House, Sam Rayburn, to say, "There might be a little lobbying around here by some people, but there is nobody who has lobbied around this Capitol on any bill in the 23 years I have been in Congress more than the members of the Federal Trade Commission have lobbied on this bill . . . ."[56]

If it is advantageous to have all responsibility for prohibiting false and misleading advertising consolidated in one agency, it would seem even more advantageous to have the responsibility for prohibiting all false and misleading advertising and labeling consolidated in a single enforcement authority.[57]

The Department of Agriculture's authority over false and misleading labeling should also be consolidated in the Department of Con-

53. *See id.*

54. *See generally* C. DUNN, FEDERAL FOOD, DRUG & COSMETIC ACT, A STATEMENT OF ITS LEGISLATIVE RECORD (1938); Young, *The Government and the Consumer: Evolution of Food and Drug Laws—The 1938 Food, Drug and Cosmetic Act,* 13 J. PUB. L. 197 (1964).

55. *See* H.R. REP. No. 1613, 75th Cong., 1st Sess. (1937).

56. C. DUNN, *supra* note 54, at 633.

57. Sen. Copeland noted during debate on the Wheeler-Lea amendments to the Federal Trade Commission Act that identical problems are often involved in proceedings against false statements on labels and false statements in advertising. Complex scientific questions arise in the administration of food and drug laws and the Food and Drug Administration has assembled a competent scientific staff capable of dealing with them. For the FTC to prosecute false and misleading representations in advertising involving these questions, the FTC either has to duplicate the FDA's scientific staff or secure the information from the FDA or some other source. *See* C. DUNN, WHEELER-LEA ACT, A STATEMENT OF ITS LEGISLATIVE RECORD 336-37 (1938). While the FTC can secure information from the FDA, these two agencies often seem to be motivated in part by competitive considerations, and it is doubtful whether the FTC will always get the information as quickly or efficiently as someone within the FDA would.

sumers. Meat and meat food products[58] and poultry and poultry food products[59] are exempted from the FDA's authority under the Federal Food, Drug & Cosmetic Act. The Department of Agriculture has authority over false and misleading labeling of these products.[60] Since false and misleading labeling of meat and meat food products and poultry and poultry food products raises no legal questions other than those generally involved in false and misleading labeling of foods, the division of responsibility between FDA and the Department of Agriculture should be eliminated.

B. *Mandatory Labeling and Disclosure*

Before consumers can make an intelligent selection and purchase, they must be provided with basic information concerning the products offered for sale.[61] The information needed generally consists of the answers to one or more of the following questions: What is the product and what is its general composition? Who made the product? What quantity of the product is offered for sale and what price is asked for that quantity? The necessity for having this type of information is the foundation of our mandatory labeling and disclosure laws.[62]

Under the Federal Food, Drug & Cosmetic Act, the FDA has the responsibility for enforcing requirements that each food be labeled with (1) its common or usual name,[63] (2) a statement of its ingredients (if the food is fabricated from two or more ingredients, and if

58. The exemption from the Food, Drug & Cosmetic Act extends so far as meats and meat food products are regulated by the Meat Inspection Act. *See* Federal Food, Drug & Cosmetic Aet, 21 U.S.C. § 392 (1964).

59. The exemption is similar to that for meats. *See* Poultry and Poultry Products Inspection Aet, 21 U.S.C. § 467 (1964), and note 58 *supra*.

60. *See* Meat Inspection Act, 21 U.S.C. § 75 (1964); Poultry and Poultry Products Inspection Act, 21 U.S.C. § 457-58 (1964); 9 C.F.R. § 317.8 (1967).

61. *See* Barber, *Government and The Consumer*, 64 MICH. L. REV. 1202-10 (1966), for the view that existing law does not give consumers sufficient information to make an intelligent selection of goods. The same philosophy underlies Rep. Rosenthal's bill, H.R. 2374, 90th Cong., 1st Sess. § 9 (1967), which would establish an info-tag system which would furnish more information to consumers.

62. In general, the Federal Food, Drug & Cosmetic Act requires all of this information be placed upon labels of products under its jurisdiction with the exception of the price. *See* statutes citcd in notes 63-66, 69 *infra*. The FTC enforces similar laws requiring labeling of textiles. *See* statutes cited notes 72-80 *infra*. There are, however, no federal statutes requiring the price to be statcd clearly on consumer goods. The manufacturer, of course, does not usually fix the pricc charged at retail for his product and a law requiring marking of the price on consumer goods would be directed at retailers. Presumably, Congress could require that all foods, and other consumer commodities regulated by the Fair Packaging and Labeling Act be stamped clearly and conspicuously with their price while held for sale after shipment in interstate commerce. However, euforcement might be difficult and would require a policing of many small stores. This may bc why Congress bas never prescribed such a requirement.

63. Federal Food, Drug, & Cosmetic Act, 21 U.S.C. § 343(i)(1) (1964). Standardized fcods must bear the name prescribed in the definition and standard of identity. Federal Food, Drug, & Cosmetic Act, 21 U.S.C. § 343(g) (1964).

the government has not prescribed standards of identity for the food);[64] (3) an accurate statement of its quantity in terms of weight, measure or numerical count (if the food is sold in package form),[65] and (4) the name and place of business of its manufacturer, packer, or distributor (if the food is sold in package form).[66] The act does not require a statement of the percentage of each ingredient of the food in the finished product but the FDA generally considers the proper practice to be a listing of ingredients in their decreasing order of predominance in the finished food. Manufacturers have generally complied with this practice.[67] By regulation, the FDA has required a statement of the percentage of each ingredient in hypoallergenic foods.[68]

The Federal Food, Drug & Cosmetic Act also contains mandatory labeling requirements for drugs, devices and cosmetics. Drugs, devices and cosmetics are governed by requirements similar to those relating to foods so far as the quantity statement and name of the manufacturer, packer and distributor are concerned.[69] However, the labeling requirements for ingredients differ. No disclosure of the ingredients of cosmetics is presently required.[70] Drugs must bear a statement of the name and quantity of each active ingredient, a warning of habit-forming ingredients, and adequate directions for use including a statement of the purposes for which the drug is intended.[71]

The FTC enforces similar laws which are intended to protect the public through mandatory labeling of consumer products. Among these laws are the Wool Products Labeling Act,[72] the Fur Products Labeling Act[73] and the Textile Fiber Products Identification Act.[74]

64. *Id.* § 343(i)(2).
65. *Id.* § 343(e)(2).
66. *Id.* § 343(e)(1).
67. In the FDA's proposed regulations under the Fair Packaging and Labeling Act governing foods, the FDA required that ingredients be listed in order of decreasing predominance. *See* 32 Fed. Reg. 4174, § 1.10(g) (1967). However, these regulations have not become final. While no regulations have previously prescribed the order in which ingredients are to be listed, the FDA's position has been that false and misleading labeling may occur if ingredients are listed otherwise. *See* 21 C.F.R. § 1.104(d) (1967).
68. *See* 21 C.F.R. § 125.8 (1967). A hypoallergenic food is a food purported to be or represented for "special dietary use by man by reason of the decrease or absence of any allergenic property." *Id.*
69. For drugs, *see* Federal Food, Drug & Cosmetic Act, 21 U.S.C. § 352 (1964) and for cosmetics, *see id.* § 362.
70. Disclosure of the ingredients of cosmetics has not been required either by statute or by FDA regulation probably because the composition of cosmetics is a closely guarded trade secret.
71. *See* Federal, Food, Drug & Cosmetic Act, 21 U.S.C. § 352(d), (e) & (f) (1964).
72. 15 U.S.C. §§ 68-68j (1964).
73. 15 U.S.C. §§ 69-69j (1964).
74. 15 U.S.C. §§ 70-70k (1964).

The Wool Products Labeling Act requires each product containing wool to bear a label disclosing by percentages the constituent fibers contained therein.[75] The label must bear the name of the manufacturer, dealer or reseller.[76] The Textile Fiber Products Labeling Act, in effect, extends the same requirements to other consumer textile fiber products not included under the Wool Act.[77] It applies to wearing apparel, cosmetics and accessories, draperies, rugs, furnishings and those textile products customarily used in households.[78] The Fur Products Identification Act generally provides that labels, invoices and advertisements for furs must bear the true English name of the animal producing the fur, its country of origin (if imported) and the manufacturer's name or other identification.[79] If the fur product is composed of used, damaged or scrap fur, or fur that has been dyed or bleached, these facts must also be disclosed.[80]

There is an essential similarity in purpose and in content between these acts enforced by the FTC and the mandatory labeling sections of the Federal Food, Drug & Cosmetic Act. Even the enforcement of these acts is not wholly dissimilar. Although the FTC could bring cease and desist proceedings for violations of the Wool, Textile, and Fur Products Labeling Acts,[81] under present law both agencies can also handle violations by bringing injunctive or criminal actions against the persons responsible for the misbranding and, with the exception of the Textile Products Labeling Act, by bringing condemnation proceedings against the misbranded products.[82] All of these acts could be made a part of the responsibility of the Department of Consumers.

The essential interrelationship of FDA's and FTC's mandatory labeling functions and the absurdity of vesting administration in two separate agencies were made plain when Congress enacted the Fair Packaging Act of 1966.[83] This act governs the labeling and packaging of all consumer commodities and provides, in part, that the administering agencies shall promulgate regulations establishing a uniform location and print size for the net quantity statement of such commodi-

75. Wool Prod. Labeling Act, 15 U.S.C. § 68b(a)(2)-(4) (1964).

76. *Id.* § 68b(a)(2)(C).

77. Textile Fiber Prods. Identification Act, 15 U.S.C. §§ 70-70b (1964).

78. *Id.* § 70g.

79. Fur Prods. Labeling Act, 15 U.S.C. §§ 69b-69c (1964).

80. *Id.*

81. Wool Prods. Labeling Act, 15 U.S.C. § 68d (1964); Fur Prods. Labeling Act, 15 U.S.C. § 69f (1964); Textile Fiber Prods. Identification Act, 15 U.S.C. § 70e (1964).

82. Federal Food, Drug & Cosmetic Act, 21 U.S.C. §§ 331-34, 342 (1964); Wool Prods. Labeling Act, 15 U.S.C. §§ 68e, 68h (1964); Fur Prods. Labeling Act, 15 U.S.C. §§ 69g, 69i (1964); Textile Fiber Prods. Identification Act, 15 U.S.C. §§ 70f-70i (1964).

83. 15 U.S.C. § 1451 (Supp. 1966).

ties.[84] The agencies also have the power to promulgate such regulations as are necessary to prevent fictitious bargains[85] (*e.g.*, abuse of "cents-off" labeling) and to prevent nonfunctional slack-fill of packages.[86] Following traditional lines, Congress vested jurisdiction over labeling of foods, drugs, devices and cosmetics under the FDA and jurisdiction over labeling of other consumer commodities under the FTC.[87] Congress also provided that nothing in the Fair Packaging and Labeling Act would invalidate or supersede the FTC Act, although as noted previously, under section 5 of the FTC Act, the FTC and the FDA have concurrent jurisdiction over false and misleading labeling of foods, drugs, devices and cosmetics. The FTC could, under section 5, take action against labeling which complies with the FDA's Fair Packaging and Labeling Act regulations.[88]

As a result of the Fair Packaging and Labeling Act, the FDA and the FTC are now both working on regulations governing labeling of consumer commodities. Since both agencies are dealing with essentially the same problems, the agencies are consulting with each other in an effort to promulgate like regulations. The FDA has taken the lead in promulgating regulations prescribing mandatory labeling,[89] but the FDA probably will defer to the FTC's experience in promulgating regulations prohibiting fictitious bargains.[90] After the regulations are promulgated, investigations of compliance will have to be made by each agency. Conceivably the FDA inspectors and the FTC investigators may visit the same supermarket on the same day, each looking for violations of regulations within their agency's jurisdiction. Only one set of regulations and one group of investigators would have been required if jurisdiction had been vested in a Department of Consumers.

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84. *Id.* § 1453(a)(2), 4(a)(3)(C).
85. *Id.* § 1454(c)(2).
86. *Id.* § 1454(c)(4).
87. This is the traditional dichotomy: the FDA has primary responsibility for taking action against false and misleading labeling of foods, drugs, devices and cosmetics, and the FTC has responsibility for taking action against false and misleading labeling of all other consumer commodities. *See* notes 41-43 *supra* and accompanying text.
88. *See id.* the FTC has technical jurisdiction but generally has deferred to the FDA in conformity with the working agreement between the agencies.
89. The proposed FDA regulations governing foods under the Fair Packaging and Labeling Act were published in the *Federal Register* of March 17, 1967. *See* 32 Fed. Reg. 4172 (1967). The proposed FTC Regulations were promulgated in the *Federal Register* of June 27, 1967. *See* 32 Fed. Reg. 9109 (1967). There were substantial differences in the FDA and FTC initial proposals for mandatory labeling regulations and therefore it is doubtful how much actual cooperation exists between the two agencies.
90. The FTC has previously issued Guides Against Deceptive Pricing under the FTC Act. *See* 2 TRADE REG. REP. ¶ 7897 (1965). It has also investigated "cents-off" pricing in coffee, an alleged fictitious bargain, but the FDA will probably continue this investigation now that the Fair Packaging and Labeling Act has become law. *See* Goodrich, *The Issues We Face in Carrying Out the Fair Packaging and Labeling Act,*

The Fair Packaging and Labeling Act also interjects a third agency into the regulation of packaged consumer commodities, thereby offering another example of decentralized administration of consumer protection programs. Section 5(d) of the act provides that whenever the Secretary of Commerce determines that there is an undue proliferation of weights, measures and quantities in which any packaged consumer commodity is sold, and that the proliferation impairs the reasonable ability of consumers to make value comparisons with respect to such a commodity, he shall request manufacturers to develop a voluntary product standard limiting such weights, measures, and quantities.[91] If the voluntary standard does not work, the Department of Commerce reports the failure to Congress, which may then enact legislation.[92] To determine whether there is an undue proliferation, the Department of Commerce will also have to send its investigators to check in supermarkets to determine the various package sizes in which consumer commodities are sold. Thus, there will be investigators for three different agencies—the FDA, the FTC and the Department of Commerce—in the nation's supermarkets looking for violations of the Fair Packaging and Labeling Act, an obviously wasteful procedure which could be avoided by establishing a Department of Consumers.

In addition to these statutes which explicitly regulate mandatory labeling and packaging of consumer products, the FTC has, through the ubiquitious section 5 of the FTC Act, required mandatory disclosure of relevant facts to prevent deception of consumers in other situations. For example, purchasers would ordinarily assume that paperback books would contain the full text of the original edition,[93] that motor oil was made from new oil,[94] that goods offered for sale in the United States were made in the United States,[95] and that preparations or devices advertised as remedies for baldness or bed-wetting

22 FOOD DRUG COSM. L.J. 158, 161-62 (1967). The FTC will probably lead in issuing regulations governing fictitious bargains because it previously promulgated the Guides Against Deceptive Pricing. However, the FDA will have to acquire enough of the FTC's experience to enforce the regulations competently. This problem of trying to have one agency acquire expertise from another is an inefficiency which would, of course, be avoided if the two were combined in the Department of Consumers.

91. Fair Packaging and Labeling Act, 15 U.S.C. § 1454(d) (Supp. 1966).

92. *Id.* § 1454(e).

93. *See* Bantam Books, Inc. v. FTC, 275 F.2d 680 (2d Cir.), *cert. denied*, 364 U.S. 819 (1966). *See also* New Am. Library of World Literature, Inc. v. FTC, 213 F.2d 143 (2d Cir. 1954).

94. Kerran v. FTC, 265 F.2d 246 (10th Cir.), *cert. denied sub nom.* Double Eagle Ref. Co. v. FTC, 361 U.S. 818 (1959); Royal Oil Corp. v. FTC, 262 F.2d 741 (4th Cir. 1959); Mohawk Ref. Corp. v. FTC, 263 F.2d 818 (3d Cir. 1958), *cert. denied*, 361 U.S. 814 (1959).

95. Baldwin Bracelet Corp. v. FTC, 325 F.2d 1012 (D.C. Cir. 1963); L. Heller & Son, Inc. v. FTC, 191 F.2d 954 (7th Cir. 1951).

would be effective in most cases involving these problems.[96] The FTC, therefore, compels affirmative disclosure of the facts when the contrary is true.[97] Such disclosure—a type of mandatory labeling—is clearly for consumer protection, and should also be administered by the Department of Consumers.

Finally, under the Meat Inspection Act and Poultry Products Inspection Act, mandatory labeling of meat and poultry products is vested in the Department of Agriculture. These acts and their regulations require generally that packaged meats and poultry bear the common or usual name of the product, the name of the manufacturer or packer, a statement of ingredients, and an accurate statement of the quantity of contents.[98] It is unlawful to ship these foods in interstate commerce without approved labeling, and criminal sanctions can result from such shipments.[99] The mandatory labeling requirements of these statutes are very similar to those in the Federal Food, Drug & Cosmetic Act. Historically, administration of the Federal Food, Drug & Cosmetic Act and the Meat Inspection Act were once both under the Department of Agriculture.[100]

So far as the consumer is concerned, there is little logic in having four different agencies enforce mandatory labeling and packaging requirements. The consumer is equally concerned with securing adequate information concerning the clothes he wears and the meat and other food he eats and basically the same type of problems are inherent in such regulation. A possibility at least exists that consolidation of the administration of all of these statutes in a single department directed and oriented solely toward consumer protection would give the consumer greater protection at a lower cost.

C. *Inspection and Safety*

Among the most important safeguards for consumer protection are the statutes which authorize federal inspection of factories producing

96. *See* Feil v. FTC, 285 F.2d 879 (9th Cir. 1960); Ward Labs, Inc. v. FTC, 276 F.2d 952 (2d Cir.)., *cert. denied*, 364 U.S. 827 (1960); Keele Hair & Scalp Specialists, Inc. v. FTC, 75 F.2d 18 (5th Cir. 1960).

97. *See* cases cited in notes 93-96 *supra*, in which such disclosure was compelled. For additional examples of the FTC's power to compel affirmative disclosure, see 29 Fed. Reg. 8325, 8351-53 (1964).

98. *See* Poultry and Poultry Prods. Inspection Act, 21 U.S.C. § 457 (1964); 9 C.F.R. § 317.2 (1967); MEAT INSPECTION DIVISION, U.S. DEP'T OF AGRICULTURE, AGRICULTURAL HANDBOOK No. 3 (1965).

99. *See* Poultry and Poultry Prods. Inspection Act, 21 U.S.C. §§ 458, 461 (1964); Meat Inspection Law, 21 U.S.C. §§ 87-88 (1964).

100. The Food and Drug Administration was part of the Department of Agriculture until June 30, 1940, when it was transferred to the Federal Security Administrator. On April 11, 1953, FDA was transferred from the Federal Security Administrator to the Secretary of Health, Education and Welfare. *See* F.D. COSM. L. REP. ¶ 34, at 4108 n.1 (1965). The Meat Inspection Division has remained under the Department of Agriculture since 1907.

certain consumer commodities, and the statutes restricting or prohibiting the sale of certain unsafe consumer commodities. The factory inspection statutes are intended to assure consumers that articles purchased by them are produced under safe and clean conditions. Factory inspection also gives government inspectors an opportunity to stop noncompliance with consumer protection statutes before consumers have suffered harm. The restrictions upon the sale of unsafe consumer commodities are intended to prevent the sale of deleterious products, or to permit their sale only when consumers are aware of the dangers inherent in the product. Both the factory inspection statutes and the restrictions upon the sale of unsafe products are essential to the safety of consumers.

The FDA has the authority under the Federal Food, Drug & Cosmetic Act to inspect all factories, establishments or warehouses in which foods, drugs, devices or cosmetics are manufactured, processed, packed or held for introduction in interstate commerce.[101] Under the Federal Hazardous Substances Labeling Act it has authority to inspect all factories, warehouses and establishments in which hazardous substances are manufactured, processed, packed or held for introduction into interstate commerce.[102] However, meat and meat food products and poultry and poultry products must be inspected before the shipment in interstate commerce by the Department of Agriculture,[103] and this Department generally has a resident inspector in meat and poultry plants to inspect these foods. The Department of Agriculture inspector inspects the same conditions as an FDA inspector;[104] therefore, the FDA generally does not inspect meat and poultry packaging plants.[105]

101. Federal Food, Drug & Cosmetic Act, 21 U.S.C. § 374 (Supp. 1965). Two recent Supreme Court cases, Camara v. Municipal Court, 87 Sup. Ct. 1727 (U.S. 1967) and See v. City of Seattle, 87 Sup. Ct. 1737 (U.S. 1967) suggest that FDA may have to secure search warrants before making factory inspections without the owner's consent. Whether the inspection is voluntary or compulsory, it should, however, be made by a Department of Consumers.

102. Federal Hazardous Substances Labeling Act, 15 U.S.C. § 1270 (1964).

103. Meat Inspection Act, 21 U.S.C. § 72 (1964); Poultry and Poultry Prods. Inspection Act, 21 U.S.C. § 455 (1964).

104. These conditions generally concern raw materials and sanitary conditions of the plant. *See* 9 C.F.R. §§ 301-40 (1967) for the scope of the Department of Agriculture's inspections of meat packing plants, and 7 C.F.R. pt. 81 (1967) for the scope of the Department of Agriculture's inspections of poultry processing plants.

105. Technically, meat and meat food products and poultry and poultry products are exempted from the Federal Food, Drug & Cosmetic Act to the extent of the application or extension thereto of the Meat Inspection Act and Poultry and Poultry Products Inspection Act. Federal Food, Drug & Cosmetic Act, 21 U.S.C. § 392 (1964); Poultry and Poultry Prods. Inspection Act, 21 U.S.C. § 467 (1964). Therefore, insofar as inspections by the Department of Agriculture are not equivalent to Food and Drug inspections, the FDA can send its inspectors into meat and poultry plants. However, in practice, the FDA rarely takes such action either because USDA inspectors cover all of the conditions inspected by the FDA or, perhaps, simply because of comity

In addition to these two agencies, the Bureau of Commercial Fisheries of the Department of Interior has an inspection program for factories producing foods made from fish.[106] Although inspection by the Bureau of Commercial Fisheries is voluntary, the inspection is relevant to consumer safety because the Bureau of Commercial Fisheries, like the Department of Agriculture and the Food and Drug Administration, also inspects raw materials, sanitary conditions of the plant, and finished products produced by the plant.[107] The essential similarity of the inspections performed by all three agencies makes it desirable that the inspection authority be consolidated in a single enforcement agency concerned primarily with consumer protection.

The fragmentation of the federal government's factory inspection authority is contrary to its history. The factory inspection authority in the Meat Inspection Act of 1907 has always been administered by the Department of Agriculture. The administration of the Food and Drugs Act of 1906 was also under the Department of Agriculture.[108] While the 1906 Act contained no provision for factory inspection, the Department of Agriculture had a voluntary inspection program in which about 95 percent of the factory owners cooperated.[109] The superseding statute, the Federal Food, Drug & Cosmetic Act of 1938, contained express authority for factory inspections.[110] The Department of Agriculture continued to administer it and the other provisions of the Federal Food, Drug & Cosmetic Act until 1940.[111] The voluntary inspection of fishery products was also administered by the Department of Agriculture until 1956 when it was transferred to the Bureau of Commercial Fisheries.[112] Thus, the factory inspection authority of all three different departments was originally united under the Department of Agriculture.

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between government agencies. In 1961 the FDA inspected only 14 meat processing establishments, which also received continuous inspection by the USDA. *See The Second Citizens Advisory Committee Report,* 17 FOOD DRUG COSM. L.J. 581, 666 (1962).

106. *See* 50 C.F.R. pt. 260 (1967).

107. *Id.* § 250.97-250.103.

108. *See* note 100 *supra.*

109. *See* H.R. No. 2139, 75th Cong., 3d Sess. (1938), in C. DUNN, THE FEDERAL FOOD, DRUG & COSMETIC ACT, A STATEMENT OF ITS LEGISLATIVE RECORD 815, 826 (1938).

110. *See* statute cited note 101 *supra.*

111. *See* note 100 *supra.*

112. Fish and Wildlife Service Act, 16 U.S.C. § 742e (1964). In reviewing generally the FDA's relationship with the Department of Agriculture, the first Hoover Commission stated, "Many of these authorities were once in the Department of Agriculture. Their separation from other departmental activities in these fields causes great overlap and also confuses the public." REPORT OF THE UNITED STATES COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT 250 (1951).

A similar division of responsibility occurs in the administration of laws restricting the sale of unsafe consumer commodities. The FDA administers the Federal Food, Drug & Cosmetic Act which contains a wide variety of prohibitions intended to prevent the sale of unsafe foods, drugs, devices and cosmetics,[113] and the Federal Hazardous Substances Labeling Act which requires warning on packages of hazardous substances which are intended or are suitable for household use.[114] The Department of Agriculture, the FTC, and other agencies administer statutes having similar purposes.

The Federal Hazardous Substances Labeling Act, administered by the FDA, requires any packaged household product which is flammable to bear a label stating "Danger" or "Warning"—"Flammable" and describing the precautionary measures to be followed.[115] The Flammable Fabrics Act administered by FTC, provides that the sale, and manufacture for sale, in interstate commerce of wearing apparel which is so highly flammable as to be dangerous when worn by individuals is an unfair method of competition and a deceptive practice.[116] The standards for determining flammability are those set by the Secretary of Commerce who is authorized to submit a report to Congress with new proposals for legislation if he finds that his standards are inadequate for the protection of the public interest.[117] A consolidation of the functions of all three agencies—the FDA, the FTC, and the Department of Commerce—would be possible as part of the Department of Consumers.

Additionally, in 1965 Congress passed a statute regulating cigarette labeling and advertising.[118] This statute requires packages of cigarettes to bear the legend, "Caution—Cigarette Smoking May Be Hazardous To Your Health."[119] The Attorney Ceneral of the United States, acting through the several United States attorneys, enforces this act.[120] Meanwhile, an FTC Trade Regulation Rule governing labeling and advertising of cigarettes is being held partly in abeyance while Congress evaluates the effectiveness of the required warning on cigarette packages.[121] This Trade Regulation Rule may ultimately govern cigarette labeling and advertising. The act also authorizes both the Secretary of Health, Education and Welfare and the FTC

113. *See* 21 U.S.C. §§ 321, 325, 342, 351, 361, 376, 501, 601 (1964).
114. 15 U.S.C. §§ 1261-73 (1964).
115. *Id.* § 1261(p).
116. *Id.* §§ 1191-1200.
117. *Id.* § 1193.
118. Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-39 (Supp. 1966).
119. *Id.* § 1333.
120. *See id.* §§ 1335-36.
121. *See* 29 Fed. Reg. 8325 (1964). For the present status of the Trade Regulation rule, see 2 TRADE REG. REP. ¶ 7939 (1965).

to report such recommendations for added legislation as they deem appropriate.[122]

The mandatory labeling on cigarette packages is only another restriction upon the sale of an unsafe product. Responsibility for enforcing this restriction should be in the Department of Consumers. The Department of Consumers should also administer the Trade Regulation Rules which may ultimately govern cigarette labeling and advertising. There is no apparent advantage in having cigarette labeling regulated now by the Attorney-General and in the future by the FTC, while both the FTC and the Department of Health, Education and Welfare make recommendations for additional legislation. There are advantages in combining the experience obtained in performing all of these functions in a Department of Consumers.

The regulation of additives in foods also is subject to the jurisdiction of two different agencies. Under the Food Additives Amendment of 1958, a food is adulterated if it contains a food additive (frequently a chemical) which is not generally recognized as safe or is not used in conformity with a regulation of the Food and Drug Administration.[123] Under the Meat Inspection Act and Poultry and Poultry Products Inspection Act, the Department of Agriculture inspects meat and poultry prior to shipment in interstate commerce and certifies it as approved for shipment.[124] If the meat or poultry contains any chemicals which render it unhealthful or unwholesome, the inspector condemns the food and it is destroyed.[125] Since the inspector's decision concerning the wholesomeness of the meat or poultry is based on Department of Agriculture regulations,[126] it is clear that the Department of Agriculture is performing precisely the same function for meat and poultry as the Food and Drug Administration is performing for all other foods—it is licensing the use of chemicals in foods. It seems likely therefore that consumers would benefit from the greater exchange of scientific information which would result from a consolidation of the food additive functions of the two agencies.[127]

The problems of dual jurisdiction between the Department of Agriculture and the Food and Drug Administration today also include the determination of their respective jurisdictional lines. While it is

122. 15 U.S.C. § 1334(d) (Supp. 1966).

123. 21 U.S.C. §§ 321(s), 342(a), 348 (1964).

124. 21 U.S.C. §§ 72, 455 (1964).

125. *See* 21 U.S.C. §§ 74, 453(h), 455 (1964).

126. *See* 9 C.F.R. § 318.7 (1967); 7 C.F.R. § 81.95 (1967). *See also* Miller, *Food Additives and the Federal Meat Inspection Act*, 10 FOOD DRUG COSM. L.J. 762 (1955).

127. The most current and impartial study of the Food and Drug Administration was made by the Second Citizens Advisory Committee. Although the Committee did not study consolidation of the Meat Inspection Division of the Department of Agriculture with the FDA, which is proposed in this article, it did study the relationship between these two agencies, noting an essential similarity of interest.

clear that foods composed entirely of meat or poultry are under the Department of Agriculture and that foods that contain no meat or poultry are under the FDA, there is a gray area involving foods which contain some meat or poultry as an ingredient.[128] In general, this gray area has thus far been handled by cooperation between the two agencies and Department of Agriculture regulations defining the scope of its jurisdiction.[129] However, the possibility of a difference of opinion between the two agencies concerning their respective jurisdictions does exist and such a difference could result in either dual regulation of the producer or no protection for the consumer. The importance of jurisdictional differences would be minimized by consolidating the consumer protection functions of both agencies in a Department of Consumers.

D. *Government Standards*

Part of the federal government's program for consumer protection includes the promulgation and enforcement of government standards for certain consumer products. These standards, which apply generally to foods, are intended primarily to prevent economic deception, although some standards are of incidental assistance to government officials in protecting the health of consumers.[130] Another type of standard of interest to consumers governs the safety of automobiles,[131] but the administration of this standard has been vested in the Department of Transportation;[132] therefore, it is not given detailed consideration in this article.

In general, there are four types of government standards governing foods. First, there are standards of identity which define the minimum composition which the product must have before it can be legally sold,

128. *See* Miller, *Federal Meat-Inspection Law*, 12 FOOD DRUG COSM. L.J. 135 (1957), for a review of this gray area. While the percentage of the meat ingredient in the food is certainly one factor considered in determining whether the food is subject to USDA inspection, it is not the only factor, and the USDA apparently decides whether or not the product is covered on an ad hoc basis. *See id.* at 138-39.

129. *Id.* at 137-38.

130. As indicated in § 401 of the Federal Food, Drug & Cosmetic Act, the objective of standards of identity, quality and fill is to promote honesty and fair dealing in the interest of consumers. 21 U.S.C. § 341 (1964). However, in promulgating standards of identity, the Food and Drug Administration may consider the expectations of consumers concerning the nutritive values of a food and fix the standard in conformity therewith. *See* Federal Sec. Adm'r v. Quaker Oats Co., 318 U.S. 218 (1943). *See also* Forte, *Definitions and Standards of Identity for Foods*, 14 U.C.L.A.L. REV. 796, 802-07 (1967). The standard of identity therefore may safeguard the nutritional values of a food. Similarly standards of fill may make certain that the consumer gets his full quantity of the food and thus nutritive value for the purchase price. Hence, while the primary purpose of these standards is to prevent economic cheats, they may indirectly affect the nutrition and therefore the health of the purchasers.

131. *See* Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1425 (1966).

132. *See* 49 U.S.C. § 1651 (1966).

except perhaps as an "imitation."[133] Second, there are standards of quality which define the minimum quality which products must meet.[134] Products which fail to meet this minimum quality level can be legally sold provided they are clearly labeled as below the government's quality standards.[135] Third, there are standards of fill of container which define how full the container of the product should be.[136] Again, containers of products filled below the minimum can be sold so long as the products are clearly labeled as substandard in fill.[137] Fourth, there are grade labeling standards which rate products according to factors which determine consumer acceptance.[138] This type of standard generally compels informative labeling, for example, Grade AA, A, B, or C, on eggs or, Choice, Prime, etc. on meats.[139] Grade labeling standards are very different from other government standards because producers are not compelled to have their products rated according to grade labeling standards[140] and because instead of prescribing a minimum level of acceptability and outlawing all products below that level or permitting their sale only if labeled substandard, grade labeling standards prescribe a number of different classifications into which the food may fit. The goal of grade labeling is to offer fairly specific information to consumers which will assist them in making purchases.

Standards of identity, quality and fill of containers are promulgated and enforced by the Food and Drug Administration for all foods except meat and poultry food products.[141] Standards similar to standards of identity for meat and poultry food products have been promulgated by the Department of Agriculture.[142] The Food and

133. *See* Federal Food, Drug & Cosmetic Act, 21 U.S.C. §§ 341, 343(g) (1964). *See also* Federal Sec. Adm'r v. Quaker Oats Co., 318 U.S. 218 (1943) and 62 Cases of Jam v. United States, 340 U.S. 593 (1951).

134. See Federal Food, Drug & Cosmetic Act, 21 U.S.C. § 343(h) (1964).

135. *See id. See also* 21 C.F.R. § 10.7(a) (1967).

136. *See* Federal Food, Drug & Cosmetic Act, 21 U.S.C. § 341 (1964). *See also* Forte, *The Food and Drug Administration, The Federal Trade Commission and the Deceptive Packaging of Foods*, 40 N.Y.U.L. REV. 860, 863-64 (1965).

137. *See id.* and 21 C.F.R. § 10.7(b) (1967).

138. *See* 7 C.F.R. pts. 51-56 (1967).

139. *See, e.g.*, 7 C.F.R. §§ 53.103, 56.216 (1967).

140. When standards of identity, quality and fill are promulgated for a food, all producers immediately become subject to the standards. *See* Federal Food, Drug & Cosmetic Act, 21 U.S.C. § 341, 343(g)(h) (1964). However, the statute authorizing grade labeling standards expressly states ". . . that no person shall be required to use the service authorized by this subsection." 7 U.S.C. § 1622 (1964).

141. *See* Federal Food, Drug & Cosmetic Act, 21 U.S.C. 341 (1964).

142. *See* 9 C.F.R. § 317.8 (1967); 7 C.F.R. §§ 81.131, 81.134 (1967); Miller, *Federal Meat Inspection Act*, 11 FOOD DRUG COSM. L.J. 565, 569-70 (1956). However, the Department of Agriculture has not been quite so successful as the FDA in convincing the courts that all foods which fail to comply with its standards of identity must be labeled imitations. *See* Armour & Co. v. Freeman, 304 F.2d 404 (D.C. Cir.), *cert. denied*, 370 U.S. 920 (1962).

Drug Administration has no authority to prescribe grade labeling standards for any products.[143] That authority, insofar as it relates to agricultural products, is in the Department of Agriculture.[144] Grade labeling, insofar as it relates to fish products, is administered by the Bureau of Commercial Fisheries of the Department of Interior.[145] There are no grade labeling standards for other foods.[146]

The administration of all of the above standards was originally centralized under the Department of Agriculture and was later dispersed among these other agencies.[147] This dispersal of the administration of government standards affords no discernable advantage to consumers, and there are several evident disadvantages. These include a reduced opportunity to shift personnel to activities having greater priority for the protection of consumer interests and a reduced opportunity to interchange information about related subjects among such personnel. A consolidation of these activities in a Department of Consumers would be consistent with their original administration by a single department of the federal government and would cause no discernable, significant disadvantage to the government.

Finally, intimately related to the government standards program are some of the trade practice rules of the Federal Trade Commission promulgated in connection with section 5 of the FTC Act (prohibiting unfair acts and deceptive practices). These rules (which

143. While consumers believe that grade labeling would permit a more intelligent choice and reduce the "economic waste" in advertising, industry has always been opposed, and it may be feared that grade labeling would impede research and development in new food products. Precedent for this fear can be found in the FDA's unsuccessful attempts to outlaw artificially sweetened soft-drinks and other foods as recently as the early 1950's, despite the consumer demand for such products. *See, e.g.*, United States v. 70 Gross Bottles of Quenchies, (S.D. Ohio 1952), in V. KLEINFELD & C. DUNN, FEDERAL FOOD, DRUG & COSM. ACT—JUDICIAL AND ADMINISTRATIVE RECORD 1951-1952, at 141 (1953).

144. Agricultural Marketing Act of 1946, 7 U.S.C. § 1622(h) (1964).

145. 16 U.S.C. § 742e (1964). *See also* 50 C.F.R. §§ 261-72 (1967).

146. Many of the USDA's grade labeling standards apply to fresh fruits and vegetables. *See* 7 C.F.R. pt. 51 (1967). The FDA does not have the authority to fix definitions and standards of quality for these foods. Federal Food, Drug & Cosmetic Act, § 401, 21 U.S.C. § 341 (1964). This considerably reduces the overlap between the two agencies. *See Second Citizens Advisory Committee Report on The Food and Drug Administration*, 17 FOOD DRUG COSM. L.J. 581, 668 (1962). However, both agencies can set standards for processed fruits and vegetables. Hence, for example, there are standards of identity, standards of quality, standards of fill and grade labeling standards for canned peas. *See* 21 C.F.R. § 51.2 (1967) and 7 C.F.R. § 52.2281 (1967). The grade labeling standards are administered by the USDA and other standards by the FDA.

147. *See* notes 108-12 *supra*. One witness described the effects of the dispersal as follows: "It is patently absurd to have standards laid down for fish fillets by one department—Interior—for meat by another department—Agriculture—for many other food products by the Food and Drug Administration while on the flank the Federal Trade Commission is establishing standards for advertising these products—sometimes even standards which bridge on product identity." *House Hearings* 39-40.

are advisory rather than compulsory) are very similar to some of the standards of identity[148] and standards of fill of container[149] promulgated by FDA. Some of these rules even govern the same products. Thus, situations arise in which the same practice for the same product is prohibited by two almost identical rules—one administered by the FDA and the other by the FTC.[150] The FTC generally defers to the FDA in the regulation of the labeling and packaging of the product but reserves the right to regulate advertising.[151] However, there is no legal barrier to FTC action against producers for violations of trade practice rules which govern labeling; hence, producers are, theoretically at least, open to legal action by both the FDA and the FTC for the same offense. Consolidation of the FDA and the FTC's section 5 power over unfair acts and deceptive practices relating to the composition and packaging of foods would eliminate the possibility of double liability of producers for such practices.[152]

III. The Problems of Consolidation

Foremost among the problems of consolidation are the problems raised by the omniscient jurisdiction and quasi-judicial structure of the FTC. Today the FTC's jurisdiction extends to the FTC Act (unfair methods of competition or unfair or deceptive acts or practices),[153] the Clayton Act, as amended by the Robinson-Patman Act (unlawful discrimination in price and in services and facilities and

148. *See* Trade Practice Rules for the Tomato Paste Industry, 16 C.F.R. § 133.2 (1967); Trade Practice Rules for Preserve Manufacturing, 16 C.F.R. § 114.1 (1967); Trade Practice Rules for the Tuna Industry, 16 C.F.R. § 146.1 (1967). *See also* Trade Practice Rules for Macaroni and Noodle Prods. Industry, 16 C.F.R. § 132.5 (1967). The FTC's Trade Practice Rules which are similar to standards of identity are reviewed in greater detail in Gunderson, Gunderson & Ferguson, Food Standards and Definitions in the United States—A Guidebook 119-24 (1963).

149. Trade practice rules similar to standards of fill are reviewed in Forte, *The Food and Drug Administration, The Federal Trade Commission and The Deceptive Packaging of Foods*, 40 N.Y.U.L. Rev. 860, 879 n.94 (1965).

150. *E.g., compare* the Trade Practice Rules for the Preserve Manufacturing Industry, 16 C.F.R. § 114.1 (1967), *with* the standard of identity for preserves, 21 C.F.R. § 29.3 (1967). Both require 45% fruit in preserves. A manufacturer who used a lesser percentage of fruit in preserves would therefore be in violation of both the trade practice rule and standard of identity and would be, theoretically at least, subject to legal action by both agencies.

151. See the working agreement between the two agencies, 3 Trade Reg. Rep. ¶ 9850.03 (1965) and Forte, *The Food and Drug Administration, The Federal Trade Commission and the Deceptive Packaging of Foods*, 40 N.Y.U.L. Rev. 860, 862 n.8 (1965).

152. As the Second Hoover Commission stated, ". . . it violates common sense that two or more agencies should exercise the same type of authority over the same matter," Report of the United States Commission on the Organization of the Executive Branch of the Government—Legal Services and Procedure 47 (1965).

153. 15 U.S.C. § 45(a) (1964).

unlawful mergers),[154] the various Textile Fabric,[155] Wool,[156] and Fur Products Labeling[157] Acts and certain other less prominent statutes.[158] While some of these statutes (*e.g.*, the Textile and Fur Products Labeling Acts) are primarily consumer protection statutes similar to the Federal Food, Drug & Cosmetic Act, other statutes (*e.g.*, the Robinson-Patman Act) are primarily for the protection of small businesses or are more similar to the statutes enforced by the Justice Department. Therefore, it would seem desirable to transfer the FTC's jurisdiction over consumer protection statutes to the Department of Consumers and to transfer its antitrust and price discrimination authority to the Department of Justice.

A possible division of the FTC's responsibilities between the Department of Consumers and the Department of Justice is:

A. The Department of Consumers
   1. Textile Fiber Products Identification Act[159]
   2. Wool Products Labeling Act[160]
   3. Fur Products Labeling Act[161]
   4. Flammable Fabrics Act[162]
   5. Section 5 of the FTC Act insofar as it relates to unfair or deceptive acts or practices in commerce.[163]
   6. Wheeler-Lea Act prohibitions against false and misleading advertising of foods, drugs, devices and cosmetics.[164]
   7. The Lanham Trade-Mark Act of 1946[165]
   8. Fair Packaging and Labeling Act[166]

B. The Department of Justice
   1. The Clayton Act[167]
   2. Robinson-Patman Act[168]
   3. Webb-Pomerene Act[169]

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154. 21 U.S.C. §§ 12-27 (1964).
155. 15 U.S.C. §§ 70-70k (Supp. 1966).
156. 15 U.S.C. §§ 68-68j (1964).
157. 15 U.S.C. §§ 69-69j (1964).
158. Laws administered by the FTC are summarized in Federal Trade Commission Rule 1.1, 16 C.F.R. 1.1 (1967).
159. *See* note 155 *supra.*
160. *See* note 156 *supra.*
161. *See* note 157 *supra.*
162. 15 U.S.C. §§ 1191-1200 (1964).
163. 15 U.S.C. § 45(a) (1964).
164. Federal Trade Commission Act, 15 U.S.C. §§ 53-55 (1964).
165. The FTC has the power under this Act to cancel deceptive trademarks. *See* Lanham Trade-Mark Act of 1946, 15 U.S.C. § 1064 (1964).
166. 15 U.S.C. § 1551 (Supp. 1966).
167. *See* note 154 *supra.*
168. 15 U.S.C. §§ 13-13b, 21a (1964).
169. 15 U.S.C. §§ 61-65 (1964).

4. Section 5 of the FTC Act insofar as it relates to unfair methods of competition in commerce.[170]

This division of responsibility would consolidate the antitrust responsibilities of the FTC and the Department of Justice. Such a consolidation may be desirable per se,[171] quite apart from the benefits which would be derived from the consolidation of the administration of consumer protection statutes in the Department of Consumers.

The most radical part of this division of responsibility would be the split of section 5 of the FTC Act, giving unfair or deceptive acts or practices to the Department of Consumers and unfair methods of competition to the Department of Justice. Such a split would require careful study. However, there are some factors which indicate that this division of responsibility may be both feasible and desirable.

Section 5, as enacted in 1914, prohibited only unfair methods of competition in commerce. The additional prohibitions against the use of unfair or deceptive acts or practices in commerce were enacted in 1938 as part of the Wheeler-Lea Act. The intent of Congress originally in enacting the 1914 statute was to provide greater flexibility in dealing with antitrust violations.[172] The Supreme Court has held that the prohibition against unfair methods of competition includes only methods which injuriously affect a competitor's business.[173] Conversely, in enacting the prohibition against unfair acts and deceptive practices in commerce Congress intended to provide a remedy when the wrong was to the public rather than to competitors.[174] It is the

170. 15 U.S.C. § 45(a)(1) (1964).

171. The consolidation of the FTC's and the Department of Justice's antitrust responsibilities would eliminate problems of dual jurisdiction (*e.g.*, indecision over which agency will handle particular cases) and promote cooperation and increased communications between all personnel working on antitrust cases. The need for a better relationship between the FTC and the Department of Justice was recently reviewed by Philip Elman, member of the Federal Trade Commission, in Elman, *Antitrust Enforcement: Retrospect and Prospect*, 53 A.B.A.J. 609 (1967). Commissioner Elman noted that the FTC's and the Department of Justice's responsibilities are concurrent and overlapping and that the area of overlap, on paper at least, is very extensive indeed. He suggested a more meaningful relationship was needed between these two agencies and stated, "What is called for is a merger of the two agencies' respective resources and skills. They should form a joint venture or partnership for antitrust enforcement." *Id.* at 611. While Commissioner Elman did not suggest merging the FTC's antitrust responsibilities into the Department of Justice, this would seem to be one method of achieving such a partnership.

172. *See* Elman, *The Federal Trade Commission and the Administrative Process*, 8 ANTITRUST BULL. 607, 609 (1963), and text accompanying notes 51-52 *supra*.

173. FTC v. Raladam Co., 283 U.S. 643 (1931).

174. *See* H.R. REP. No. 1613, 75th Cong., 1st Sess. (1937) stating: "By the proposed amendment to Section 5, the Commission can prevent such acts or practices which injuriously affect the general public as well as those which are unfair to competitors. In other words, this amendment makes the consumer who may be injured by an unfair trade practice of equal concern before the law with the merchant or manufacturer injured by the unfair methods of a dishonest competitor." C. DUNN, WHEELER-LEA ACT, A STATEMENT OF ITS LEGISLATIVE RECORD 167 (1938).

prohibition against use of unfair or deceptive acts or practices in commerce which was intended to give the FTC clear power to prevent all consumer cheats, although the FTC had previously assumed the power to regulate false and misleading advertising. Concurrent transfer to the Department of Consumers of the power to regulate unfair or deceptive acts or practices and the other Wheeler-Lea Act prohibitions against false and misleading advertising of foods, drugs, devices and cosmetics would probably make it plain that the congressional intent is to vest all of the power to deal with frauds upon the public in the Department of Consumers rather than the Department of Justice.

Inevitably, there is, of course, some duplication in the power to prevent unfair methods of competition (which would be vested in the Department of Justice) and in the power to prevent unfair acts and deceptive practices (which would be vested in the Department of Consumers). However, given the proper legislative history, the lines of demarcation between these two departments would be reasonably clear.[175] In addition, the Department of Justice has traditionally been antitrust-oriented whereas the Department of Consumers would probably be deceptive practice-oriented, and the likelihood of

175. Deceptive acts or practices are controlled by a simple legal standard: "If the seller attempts to deceive the consumer in any particular which could influence the latter's buying choice—if in other words, he uses any false inducement—he has committed a deceptive act or practice in violation of Section 5." 29 Fed Reg. 8325, 8350 (1964). This power to regulate such practices should clearly be in the Department of Consumers, and there is little difficulty in separating it from the rest of § 5. The line of demarcation becomes less clear between unfair methods of competition and unfair acts or practices. What is desired is to give the Department of Justice power to prohibit those acts or practices which have been prohibited primarily because of their unfairness to competitors and to give the Department of Consumers power to prohibit acts or practices which have been prohibited primarily because of their unfairness to consumers. There is a distinction between the two, and the FTC has listed many examples falling in each category. *Id.* at 8354-55. A similar but more complete list could be incorporated in the committee reports on the bill to transfer the FTC's functions to the Department of Consumers and the Department of Justice. This list would serve as a guide to the departments and the courts in handling any immediate jurisdictional problems and as a reference to use in determining which department would bandle new types of offenses in the future. Such a list would not be wholly consistent with those practices which have been termed "unfair methods of competition" or "unfair acts or practices" under existing law. "Unfair acts or practices" bas in the past included acts which are unfair either to competitors or to consumers. *See id.* By dividing jurisdiction and listing offenses which are primarily injurious to business as "unfair method of competition" and offenses which are primarily injurious to consumers as "unfair acts or practices," we would be broadening the former and narrowing the latter. In dividing responsibility, a careful review should be made of the internal guidelines for division of responsibility within the FTC today. The FTC's three regulatory bureaus are the Bureau of Deceptive Practices, the Bureau of Restraint of Trade, and the Bureau of Textiles and Furs. *See* 3 TRADE REG. REP. ¶ 9555 (1965). It seems quite possible that the proper division of responsibility would be to assign the functions of the Bureaus of Deceptive Practices and Textiles and Furs to the Department of Consumers and the functions of the Bureau of Restraint of Trade to the Department of Justice.

these two departments having a conflict in jurisdiction seems relatively slight.

There are, of course, definite advantages to retaining the present language of section 5 and splitting it between the Department of Consumers and the Department of Justice as opposed to drafting new statutory powers for these two departments. The prohibition against unfair methods of competition has benefited from over fifty years of judicial interpretation while the prohibition against unfair or deceptive acts or practices has benefited from almost thirty years of judicial interpretation. The courts generally have interpreted section 5 so that it both supplements our antitrust law and provides protection against cheats of consumers. All of the precedents would be nullified if, instead of retaining the section 5 language, new statutory powers were drafted for these agencies.

The existing language of section 5 has also been demonstrated to have the principal qualities needed to supplement the antitrust laws and to provide efficient consumer protection, namely the qualities of breadth and flexibility.[176] Breadth and flexibility are needed for supplementation of the antitrust laws because specific offenses are already prohibited and the additional protection required is a general statute upon which the Department of Justice can rely in acting against other anti-competitive practices.[177] Breadth and flexibility are also needed in preventing consumer cheats because experience has shown that there are infinite ways for the swindler to take advantage of the consumer.[178] The phrase "unfair or deceptive acts or practices" has proved effective to prevent such cheats, and it would be difficult to find more appropriate language. On balance then, it seems advisable to retain the present language of section 5 if a Department of Consumers is established rather than to attempt a redraft of prohibitions in order to eliminate any possibility of concurrent jurisdiction between the Department of Consumers and the Department of Justice.

176. *See* FTC v. Colgate-Palmolive Co., 380 U.S. 374, 384-86 (1965); FTC v. Beech Nut Bros. Inc., 312 U.S. 349, 353-55 (1941).

177. *See, e.g.*, Atlantic Ref. Co. v. FTC, 381 U.S. 357, 369-71 (1965), in which the Supreme Court noted that there were many unfair methods of competition which do not rise to the level of antitrust violations, but which the FTC can prevent if they have the characteristics of antitrust violations.

178. When Congress originally prohibited "unfair methods of competition" it concluded these methods could not be defined because they were too numerous and because the most complete definition of these methods would be frustrated by the ingenuity of unscrupulous persons in inventing new unfair trade practices. *See* S. REP. No. 597, 63d Cong., 2d Sess. (1914) and H.R. REP. No. 1142, 63d Cong., 2d Sess. (1914), in Kelley and Cassedy, *The Federal Trade Commission Act as Amended by the Wheeler-Lea Act*, 2 FOOD DRUG COSM. L.Q. 315, 319-20 (1947). The same situation prevails today and, as shown by FTC v. Raladam Co., 283 U.S. 643 (1931), some consumer cheats were not even encompassed in the broad prohibition against unfair methods of competition.

The division of the FTC's responsibility between the Department of Consumers and the Department of Justice would be complicated by the quasi-judicial structure of the FTC. Again, however, these problems are not insurmountable. The FTC now prosecutes violations of many of its statutes by means of cease and desist orders.[179] These orders are issued by hearing examiners; appeal can then be taken to the FTC itself, which either affirms or reverses the issuance of the cease and desist order.[180] The result is that the FTC which originally issued the complaint and prosecuted the action then decides whether its complaint was justified. There is thus a combination of the investigatory, prosecutory and adjudicative functions in a single agency. While appeals from the FTC's decisions can be taken to the courts, the courts have traditionally viewed the FTC as an expert body and have therefore given a wide latitude to the FTC in both its findings of facts and conclusions of law.[181] For many respondents, the FTC's decision, for better or worse, becomes the final decision in the case. It is not surprising that under these circumstances respondents question whether they have received a fair trial and decision.[182]

Assuming that the FTC's administrative responsibilities were split between the Department of Consumers and the Department of Justice, it would then be possible to create a separate independent body which could issue cease and desist orders similar to those now issued by the FTC. This body would logically consist of the Hearing Examiners of the FTC plus the FTC Commissioners. It could be named either the Trade Court or the Federal Trade Commission. However, the essence of the arrangement would be to consolidate all of the investigatory and prosecutory responsibilities of the FTC in the Department of Consumers and the Department of Justice, and to place all of the adjudicative responsibilities of the FTC in a separate and independent agency.[183] Support for the "Trade Court" concept

179. The issuance of these orders is authorized by Federal Trade Commission Act § 5, 15 U.S.C. § 45(b) (1964).

180. *See* FTC Rules §§ 3.22-3.24 in 16 C.F.R. §§ 3.22-3.24 (1967) and Clark, *The Judicial Functions of the Federal Trade Commission Should Be Transferred to the District Courts,* 10 ABA ANTITRUST SECTION 51, 58-65 (1957) for a criticism of this procedure.

181. *See, e.g.,* FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965). *See also* FTC v. Mary Carter Paint Co., 382 U.S. 46 (1965).

182. *See* Barton, *The Federal Trade Commission and the Need For Procedural Impartiality,* 64 COLUM. L. REV. 390 (1964), for examples of instances in which respondents believe they did not receive a fair trial and decision.

183. If such an independent body were constituted, provision might be made for the use of one of the examiners of that body at the FDA hearings. Complaints of procedural unfairness have not been limited to the FTC in the past; some have complained that the FDA Hearing Examiner (being an employee of the Food and Drug Administration) also could not be wholly impartial. *See* Kleinfield, *The Problems of Advocacy in Food and Drug Litigation,* 17 FOOD DRUG COSM. L.J. 404, 413-14 (1962).

has in the past been voiced by the American Bar Association[184] and the Hoover Task Force Commission.[185] The suggestion is therefore neither new nor radical. In the context of creating a Department of Consumers, the intent of the proposal is not to "break up the FTC" but rather to give greater consumer protection through a new agency.

Problems will also arise in drafting legislation which will transfer consumer protection functions of agencies other than the FTC to the Department of Consumers. In addition to the FTC functions described above, it would seem desirable for the reasons stated in part I of this article to transfer to the Department of Consumers the following regulatory authority: all of the Department of Agriculture's authority under the Meat Inspection Act and Poultry and Poultry Products Act; all functions of the Department of Agriculture relating to grading of foods sold to consumers; all functions of the Department of Commerce under the Fair Packaging and Labeling Act and the Flammable Fabrics Act; all functions of the Department of Interior which relate to the inspection and grading of fish and fish products; and all functions of the Attorney-General (and U. S. attorneys), the FTC and the Department of Health, Education & Welfare under the Cigarette Labeling and Advertising Statute, in addition to the agencies which would presently be transferred by this bill.[186]

The transfer of some of these functions will be relatively easy, but the transfer of others will require careful draftsmanship. Care will be needed particularly where the approach is to transfer part of an agency's function under a statute. For example, under the Agricultural Marketing Act of 1964, the Secretary of Agriculture is authorized to and has promulgated standards for agricultural products to aid trading

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While there has been some improvement under the FDA's new Rules of Practice, *see* Spiker and Stafford, *A Look at FDA's New Rules of Practice—and Problems Still Unsolved*, 21 FOOD DRUG COSM. L.J. 448 (1966), it would still be preferable to have a more independent Hearing Examiner. This could be accomplished by permitting one of the examiners from the Trade Court to preside at FDA Hearings.

184. *See* ABA, REPORT OF THE SPECIAL COMMITTEE ON SERVICES AND PROCEDURE 42 (1956), which recommended the "Trade Court" concept. The House of Delegates approved this recommendation in February, 1956. *See* Clark, *supra* note 180, at 82. The history of the administrative court concept is reviewed at Lorch, *The Federal Administrative Court Idea*, 52 A.B.A.J. 635 (1966).

185. COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURES 246-50 (1955). The Hoover Commission itself recommended that Congress look into the feasibility of this proposal. *See* COMMISSION ON THE ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, REPORT ON LEGAL SERVICES AND PROCEDURE 85-95 (1965).

186. The first Hoover Commission also recommended the transfer of certain labeling statutes governing oleomargarine, filled cheese, and renovated butter, then administered by the Internal Revenue Service, to the Food and Drug Administration. *See* REPORT OF THE COMMISSION ON THE ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT 250-51 (1951). These statutes are a minor part of our labeling law and little time and expense is needed to administer them. It would be possible to transfer the administration of these statutes to the Department of Consumers.

in these products and to help consumers obtain the quality of products they desire. Some of the standards promulgated are apparently designed primarily for assistance to consumers (as, for example, United States Consumer Standards for Cranberries),[187] and some are apparently designed primarily for assistance to producers (as, for example, United States Standards for Fresh Cranberries for Processing).[188] Other standards are not identified as either standards for consumers or processors and apparently guide both groups.[189]

A thorough study of all of the standards promulgated by the Department of Agriculture will be required to determine whether jurisdiction over each standard should be in the Department of Agriculture or the Department of Commerce.[190] Grade labeling has, so far as consumers are concerned, been rather ineffective and every effort should be made to give jurisdiction to the Department of Consumers to develop standards which are meaningful to consumers and to educate consumers concerning them.[191] Care must also be taken in transferring responsibilities from existing agencies to the new department to make certain that there is no abatement of presently pending litigation. This will also require careful draftsmanship.

Other problems of consolidation involve primarily problems resulting from a shifting of functions from existing agencies to the Department of Consumers. For example, it has been argued that the shift of the FDA will separate it from the United States Public Health Service and make it more difficult to secure the scientific research needed for the FDA's administration of its responsibilities.[192] However, the FDA has been increasing its scientific staff and therefore the force of this objection is somewhat mitigated.[193] Additionally, rela-

187. 7 C.F.R. § 51.2775 (1967).

188. 7 C.F.R. § 51.3030 (1967).

189. *See, e.g.*, United States Standards for Canned Grapefruit, 7 C.F.R. § 52,1141 (1967).

190. The United States Standards for Hay and Straw, 7 C.F.R. pt. 57 (1967), should remain under the jurisdiction of the Department of Agriculture because they have no application to consumer products. However, general standards for fruits, vegetables and meats intended for the guidance of both producers and consumers should be administered by the Department of Consumers.

191. Many consumers do not understand the grades used by the Department of Agriculture nor do they give much attention to these grades as they shop. This may be because the grades are not designed to facilitate consumer understanding, or because the Department of Agriculture has not sufficiently promoted their grade labeling standards to bring them to the attention of consumers. *See House Hearings* 54.

192. *See, e.g., Senate Hearings* 102.

193. *See House Hearings* 77-78; Harvey, *Report on the Growth, Organization, Operation and Plans of the FDA*, 19 FOOD DRUG COSM. L.J. 590 (1964). This upgrading of the scientific function of the FDA was recommended in the *Second Citizens Advisory Committee Report on the Food and Drug Administration*, 17 FOOD DRUG COSM. L.J. 581, 601 (1962).

tionships between the FDA and the Public Health Service have not been particularly cooperative.[194] The objection that exchange of information will become more difficult if functions are removed from existing government agencies must also be weighed against the benefits of consolidation, including the increased exchange of information which would result from the consolidation of some of the personnel of these different agencies in the Department of Consumers. On balance, it is submitted that a more valuable flow of information would result from the establishment of a Department of Consumers than from the present decentralized state of the government agencies engaged in consumer protection activities. Hence the consolidation seems desirable, even while recognizing that the personnel of the new department will have to consult with members of other government departments to secure the scientific research and other information needed efficiently to fulfill their new responsibilities.[195]

Finally, the consolidation of consumer protection programs in a Department of Consumers will result in complex management problems for the executive branch of the government. These problems include such mundane matters as persuading Congress to appropriate sufficient funds adequately to administer the new department, finding offices (both in Washington, D.C., and elsewhere) for an entire new department of the federal government, segregating and transferring relevant files to the department, finding competent consumer-oriented personnel to administer the higher offices of the department, transferring personnel engaged in existing consumer protection programs to the department, building high morale among the transferred per-

194. *See The Second Citizens Advisory Committee Report on The Food and Drug Administration,* 17 FOOD DRUG COSM. L.J. 591, 675 (1962), stating, "Even within HEW, there are disturbing jurisdictional questions regarding matters connected with consumer protection; there seems to be a noticeable lack of coordination between FDA and PHS in particular." *See also id.* at 644 and note 195 *infra.*

195. In evaluating the argument that creation of a Department of Consumers will disturb cooperative relationships among government agencies, it should be noted that the present relationships among these agencies are not idyllic. In 1955, the first Citizens Advisory Report on the Food and Drug Administration noted, "There is some evidence of lack of cooperation among agencies and within the Department of Health, Education and Welfare, there could be more cooperative effort at times between the FDA and the Public Health Service in regard to the use of laboratory facilities in the field." *Report by the Citizens Advisory Committee on the Food and Drug Administration,* 10 FOOD DRUG COSM. L.J. 453, 516 (1955). Apparently there has been a further deterioration of relationships among these agencies since 1955. In 1962, when a Citizens Advisory Committee again studied the Food and Drug Administration, it concluded: "Cooperation among federal ageneies is not better; it seems to be less satisfactory now than it was five years ago. Most of the agencies concerned have grown considerably, as has FDA, and it is primarily this growth which has lessened cooperation, as the overlapping of functions has increased and numerous ageneies find themselves working on different facets of a single problem without clear guidelines for the coordination of their activities." *See The Second Citizens Advisory Committee Report on the Food and Drug Administration,* 17 FOOD DRUG COSM. L.J. 581, 659 (1962).

sonnel, preparing internal procedures defining the respective functions and responsibilities within the department, and arranging liaison with other related departments of the federal, state, and local governments. While these problems may be generally temporary in nature, they cannot be overlooked since they will have a substantial and immediate effect upon consumer protection in the United States and upon consumers' attitudes toward the new department.

IV. CONCLUSION

The 1950's and early 1960's saw the enactment of an almost unprecedented volume of consumer protection legislation.[196] Among the landmark statutes passed during these years were: the Federal Hazardous Substances Labeling Act,[197] the National Traffic and Motor Vehicle Safety Act,[198] the Federal Cigarette Labeling and Advertising Act,[199] the Fair Packaging and Labeling Act,[200] the Kefauver-Harris Drug Amendments,[201] the Food and Color Additives Amendments to the Federal Food, Drug & Cosmetic Act,[202] the Pesticide Chemicals Act,[203] the Poultry Products Inspection Act[204] and the Textile Fiber Products Identification Act.[205] At the same time, there was a discernable increase in the influence of the consumer upon the executive branch of the government and this influence was institutionalized in the President's appointment of a Consumers' Advisory Committee, a Committee on Consumer Interests, and a Special Assistant to the

196. Legislative protection of the consumer seems to be a cyclic phenomenon. There are three significant eras of consumer protection legislation in the United States. The first, beginning in the late 1800's and continuing into the early 1900's, includes the Sherman Act of 1890, 26 Stat. 209 (1890), *as amended,* 15 U.S.C. §§ 1-7 (1964); the Food and Drugs Act of 1906, 34 Stat. 768 (repealed, 52 Stat. 1059 (1938)); the Meat Inspection Act of 1907, 34 Stat. 1260, *as amended,* 21 U.S.C. §§ 71-91 (1964); and the Federal Trade Commission and Clayton Acts of 1914, 38 Stat. 717 (1914), *as amended,* 15 U.S.C. §§ 41-46, 47-58 (1964), and 38 Stat. 730 (1914), *as amended,* 15 U.S.C. §§ 12-27 (1964). The second, beginning in the early and extending through the late 1930's includes the Robinson-Patman Act of 1936, 49 Stat. 1526, 15 U.S.C. §§ 13-13b, 21a (1964); the Federal Food, Drug & Cosmetic Act of 1938, 52 Stat. 1040, 21 U.S.C. §§ 301-92 (1964); and the Wheeler-Lea Act of 1938, 52 Stat. 111. The third era, beginning in the 1950's, is still continuing. Among the statutes enacted during this period were: the Fur Products Labeling Act of 1951, 65 Stat. 175, 15 U.S.C. §§ 69-69j (1964); the Child Protection Act of 1966, 80 Stat. 1305, 15 U.S.C. § 1261 (Supp. 1966); and the Drug Abuse Control Amendments of 1965, 79 Stat. 226 (codified in scattered sections of 21 U.S.C. §§ 321 *et seq.* (Supp. 1966). This era may yet include the proposed "truth-in-lending" bill and the bill to create a Department of Consumers.

197. 15 U.S.C. §§ 1261-73 (1964).
198. 15 U.S.C. §§ 1381-1425 (Supp. 1966).
199. 15 U.S.C. §§ 1331-39 (Supp. 1966).
200. 21 U.S.C. § 1451 (Supp. 1966).
201. 21 U.S.C. § 321 (1964).
202. 21 U.S.C. § 342 (1964).
203. 21 U.S.C. § 346(a) (1964).
204. 21 U.S.C. §§ 451-69 (Supp. 1966).
205. 15 U.S.C. §§ 70-70k (Supp. 1966).

President for Consumer Affairs.[206] Both Norway and Sweden have reportedly established Ministeries of the Consumer and Family Affair;[207] and, on the state level in this country, Connecticut has established a Department of Consumer Protection.[208] Those who believe that history portends the future thus have ample reason to believe that ultimately a Department of Consumers will be established in the United States.

In reviewing the consumer protection programs of the federal government, it quickly becomes apparent that there is no logic to the present division of responsibility among government agencies. The present division of responsibility is purely an anachronism, grounded in history, maintained by inertia, and defended only by the political influence of the agencies presently engaged in consumer protection programs.[209]

The strength of the Department of Consumers concept is that it offers an alternative to a patently indefensible division of responsibility among government agencies.[210] The alternative is simple and

206. *See* Barber, *Government and the Consumer*, 64 MICH. L. REV. 1203, 1213-14 (1966), for a review of the functions of the Consumers' Advisory Council, the Committee on Consumer Interests and the President's Special Assistant for Consumer Affairs. Mr. Barber's view is that the single most important weakness in all of these is their lack of authority. *Id.* The increase in the influence of consumers upon the executive branch of the government was also reflected by President Johnson's recent order giving the Committee on Consumer Interests an upgrading to cabinet status. Exec. Order No. 11349, 32 Fed. Reg. 6759 (May 3, 1967). However, the Committee still has no administrative responsibilities for the operation of consumer protection programs; thus it is primarily a group to study and to make recommendations on matters relating to consumer affairs and consumer interests.

207. *House Hearings*, 39, 153.

208. CONN. GEN. STAT. § 19-170 through § 19-210 (1960). The Connecticut Department has reportedly made its regulatory officials more consumer oriented than industry oriented. *House Hearings* 42-43.

The Connecticut Department of Consumer Protection administers both the Connecticut Food and Drug Act and a Connecticut statute prohibiting deceptive practices. *See* CONN. GEN. STAT. § 42-115 (a)(g) (Supp. 1966). The Food and Drug Act is enforced by injunctions, criminal penalties and seizures. *See id.* at § 19-214 through §19-216. The Deceptive Practices Statute is enforced by cease and desist orders. Thus, Connecticut has done something on the state level similar to merging the FDA and the FTC in a Department of Consumers.

209. The political influence of administrative agencies is not limited to lobbying in its ordinary sense. These ageucies have a constant opportunity to influence the executive and legislative arms of the government by reports circulated both in writing and made verbally at cabinet and other meetings, and by testimony before Congress. No private lobbyist can or does have the same opportunity to influcnce the government as do these official members of the "government family."

210. The bill to establish a Department of Consumers does not provide for the consolidation of the consumer protection programs of the FDA, the FTC, the Department of Agriculture and the Bureau of Commercial Fisheries. However, the bill in this respect is lagging far behind consumer spokesmen. They recognize the illogic of the present division of responsibility; they believe it is impeding progress in consumer protection, and they made this perfectly plain at the hearings on the bill. *See* note 22 *supra*.

direct—a consolidation of consumer protection programs in a single new department—but the implementation of this alternative is fraught with difficulty. The FDA and the FTC are the principal agencies involved in the enforcement of consumer protection statutes and the consumer protection activities of both of these agencies should be merged into the Department of Consumers. Such a merger is complicated by two factors: (1) the FTC performs quasi-judicial as well as administrative functions, and (2) the FTC administers antitrust as well as consumer protection activities. Assuming the FTC's consumer protection programs were merged into a Department of Consumers, we would be left with the problem of where to place the FTC's quasi-judicial functions and its antitrust responsibilities.

A possible solution seems to be to assign the FTC's quasi-judicial functions to an independent "Trade Court" and to assign the FTC's antitrust responsibilities to the Department of Justice. However, section 5 of the FTC Act creates difficulty by encompassing both antitrust regulation and consumer protection authority. The tentative suggestion here is to divide the section 5 authority of the FTC, giving "unfair or deceptive acts or practices" to the Department of Consumers, although admittedly a complete evaluation of this suggestion requires considerably more study.[211] Consideration must also be given to the difficulties involved in separating consumer-oriented functions from other functions of government departments and to the temporary management problems involved in creating any new department in the federal government.

The technical and political difficulties make it unlikely that a bill to create a Department of Consumers will be passed this year.[212] However, the ultimate prospects for such legislation seem favorable. Apart from the demonstrable advantages of a consolidation of consumer protection programs, the bill to create a Department of Consumers seems likely to become an emotional goal, or "cause," with some consumer groups.[213] They view the bill as offering a voice

211. A complete evaluation should include a study made of the FTC's consumer protection activities by actual observation of FTC daily routine to determine whether, in practice, the transfer would cause any unanticipated problems. If upon the completion of this study, the split between "unfair methods of competition" and "unfair or deceptive acts and practices" seemed undesirable, other alternatives would be available to establish a unified department regulating consumer protection. These alternatives include transfer of the FTC in its entirety to the Department of Consumers, or splitting the FTC's antitrust responsibilities between the Department of Consumers and the Department of Justice by drafting new statutory powers for both agencies.

212. Two legislative experts, Sens. R. Kennedy aud Javits have predicted that the creation of a Department of Consumers will probably not come in this session of Congress. *House Hearings* 123, 131, 138.

213. The National Commission on Food Marketing and the President's Consumer Advisory Council are reported to have recommended the establishment of a Department

for the little man in the federal government and as belatedly raising the consumer to the same status as the farmer (represented by the Department of Agriculture), the business man (represented by the Department of Commerce), and the worker (represented by the Department of Labor).[214] Recent history indicates that congressmen are not likely to vote against consumer "causes."[215]

The creation of a Department of Consumers will cause a radical change in the structure of the executive branch of the government. The danger is that ill-conceived legislation will be enacted without deliberate and intelligent consideration of the many jurisdictional and statutory changes which will result from this reorganization and that the legislation may not transfer even the most fundamental consumer protection programs (*e.g.*, FTC's consumer protection activities) to the new Department. Ideally, there would be appointed now a committee having the stature of the Attorney General's Committee to Study the Antitrust Laws which could offer authoritative and constructive suggestions for the new division of responsibility among government agencies.[216] Alternatively, law reviews would ask noted authorities and commentators to offer suggestions for such a reorgan-

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of Consumers. *See* Address by Rep. Benjamin S. Rosenthal to the New York Consumer Assembly, in New York City, Jan. 14, 1967.

214. *See, e.g., House Hearings* 31, 36, 39, 75, 83, 110, 124, 155, 163, 208; *Senate Hearings* 28-29, 53.

215. The most reeent example of consumer muscle in Congress involved the Fair Packaging and Labeling Act. Opponents of the bill managed to hold it in committee from 1961-1966, but when the bill reached the floor of Congress it passed by an overwhelming vote. This is a fairly typical example of consumer protection legislatiou and suggests that however congressmen may act in committees, when the vote is taken they generally wish to be recorded in favor of the consumer. *See, e.g.*, Austern, *Sanctions in Silhouette: an Inquiry into the Enforcement of Federal Food and Cosmetic Act*, 18 FOOD DRUG COSM. L.J. 617, 620 (1963), reporting the passage of the 1962 Drug Amendments by a unanimous vote. Sen. Hart, sponsor of the bill which became the Fair Packaging and Labeling Act, authored an article for the *Michigan Law Review* entitled *Can Federal Legislation Affecting Consumers' Economic Interests Be Enacted?*, 64 MICH. L. REV. 1255 (1966). He suggested that perhaps only a disaster could move Congress to enact consumer protection legislation. *Id.* This lament is difficult to understand in view of the volume of consumer protection legislation enacted in the 1950's and the 1960's. *See* note 196 *supra* and the final vote on the Fair Packaging and Labeling Act.

216. The need for a study of the relationships of various administrative agencies engaged in consumer protection activities is patent. The *Second Citizens Advisory Committee Report on the Food and Drug Administration* recommended: "A comprehensive study should be made of the jurisdiction of various federal agencies with the ultimate objective of reducing overlaps and improving coordination." 17 FOOD DRUG COSM. L.J. 581, 675 (1962). Similarly in hearings hefore the House of Representatives, Professor Daniel Jay Baum called for: "A study of Federal Trade Commission activity in the area of consumer protection." *House Hearings* 304. It is virtually impossible to examine the maze which now constitutes consumer protection activities of the federal government and fail to conclude that there should be an easier, more simple procedure. The type of study which is required is not just legal research but an intensive observation and review of the daily activities of these agencies.

ization.[217] The essential need is for intelligent and constructive suggestions during the formative period of the proposal. When a bill to create a Department of Consumers reaches the floor of Congress, it is likely to move quickly, and political rather than legal considerations will probably determine its form and the likelihood of its enactment. The lawyers will then be left to do the best they can with the flotsam of the various political interest groups.

217. The closest law review articles to this subject are found in *Symposium on Consumer Protection,* 64 MICH. L. REV. 1197 (1966). This symposium contains general articles on consumer protection but does not focus upon the problems inherent in consolidating our consumer protection laws.