TRADE ASSOCIATION LAW AND PRACTICE. By George P. Lamb and Sumner S. Kittele. Boston: Little, Brown & Co., 1956. Pp. xxiii, 284. $10.00.

THERE has been a considerable metamorphosis in prevailing attitudes toward trade associations since Adam Smith commented in *Wealth of Nations* that "people of the same trade seldom meet together even for merriment and diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices."[1] The change is particularly manifest in a statement by a former Chairman of the Federal Trade Commission, relative to the trade association attaining "its true destiny as a bulwark of American business freedom."[2] Similarly, this change is evident in *Trade Association Law and Practice*, which is written on the assumption that "the trade association is an 'enlightened member of the community' and an instrument that keeps alive our 'common liberties,' our ideas of freedom in economic and political spheres."[3]

In a reading and analysis of this book, two factors should be remembered: this is certainly the most satisfactory work in this area since 1922, when Franklin D. Jones wrote *Trade Association Activities and the Law*; and the book was written for trade association executives, trade association members and their legal advisers. The compromises and variants from the usual approaches that had to be made in order to satisfy the needs of both lawyers and non-lawyers were not easily accomplished. A classic authority is not produced by seeking mass appeal, but the authors nevertheless have produced an excellent work.

The outline and emphasis of the book are generally correct. A few pages are devoted to a discussion of the various types and structures of trade associations, and to antitrust philosophy regarding trade associations. The legal aspects of the numerous trade association activities are then discussed. This discussion covers over half the book. In effect, this portion states the "dos" and "don'ts" of trade associations and trade association ventures. The concluding part of the text discusses the organization and operation of trade associations.

This review is restricted to a discussion of the areas where the federal government influences trade associations by affecting either the industry (and hence the association) or merely the association itself. The primary work of associations, gathering business information, has little to do with the federal government. However, the more difficult problems arise in the "federal government-trade association" area.

The authors observe that "trade associations underestimate the importance of maintaining continuing relations with Congress" (*i.e.*, lobbying in the broad sense). But after making this statement, they do not indicate what is to be

1. 1 SMITH, WEALTH OF NATIONS 117 (Everyman's ed. 1910).

2. Address by Edward F. Howrey, *The Federal Trade Commission Looks at Trade Associations*, AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW 20, 28 (1955).

3. P. ix.

done. Of course, the authors are correct in stating that effective Washington representation should be characterized by competence rather than by "influence" and that the effectiveness of "influence" has been exaggerated. In fact, strong party affiliation by a trade association representative is undesirable. But some indication of what constitutes effective representation should have been made. There are only four short paragraphs discussing the techniques of dealing with Congress, which, for practical purposes, are of little or no value. Rather than to preclude discussion, the fact that this is a delicate area would seem to emphasize the necessity for delineating appropriate techniques. The subject deserves a more direct and broader treatment than it has been given.

Initially it should be noted that "lobbying" is used in the neutral sense with no adverse historical overtones.[4] The largest and most inveterate lobbyist in Washington is the executive branch of the federal government. No one suggests that this is improper. Hence, there should be no feeling that "lobbying" by trade groups is improper. It is also assumed that "lobbying" means dealing with Congress in the broad sense and is not restricted to the more narrow indicia of the Federal Regulation of Lobbying Act.[5]

An illustration of the type of comments which the authors could have made on lobbying techniques may be found in the tax field. Assume a tax bill proposed by an industry as a relief measure affecting the entire industry. Prior to or simultaneously with its introduction, the representatives of the industry should discuss the merits of the bill with the staffs of the House Ways and Means Committee and the Joint Committee on Internal Revenue Taxation. Then there should be some consultation with the Legal Advisory Staff of the Treasury Department, the Technical Planning Division at the Internal Revenue Service and at the Tax Division of the Department of Justice, if the Department's opinion on the proposed bill is requested. The bill is then introduced, preferably by both a Republican and Democratic member of the House Ways and Means Committee. Statements for public committee hearings may have to be prepared. Appearances should be made by a member of the industry or by a trade association official, not by legal counsel. One constituent is worth a hundred lawyers. A daily and careful following of the progress of the proposed bill should be made for many reasons, including the prevention or paring down of proposed committee or floor amendments which might defeat the ultimate purpose of the bill.

Congressional enactment is not the end. In 1956, two tax bills were pocket vetoed.[6] Hence, during the constitutional ten day interval, it is necessary to make sure that the appropriate executive department will make the "signing" recommendation to the President. This might include, in the case of a tax bill, further talks with the Treasury Department and perhaps with the office of the Special Counsel to the President.

4. See HORSKY, THE WASHINGTON LAWYER (1952).
5. 60 STAT. 839 (1946), 2 U.S.C. § 261 (1952).
6. H.R. 4392; H.R. 7643, 84th Cong., 2d Sess. (1956).

Probably most relationships between Congress and trade associations are more general. Usually, the association merely states the industry position on a pending measure at the request of a congressional committee. However, trade associations sometimes are responsible, in part, for the passage, defeat or modification of some legislation. The most recent example is the so-called "automobile dealers' day-in-court bill"[7] which was strongly supported by the National Automobile Dealers Association.

There is no mention in the book of government-industry relations on the state level. This also is important, and for the most part the same considerations apply as on the federal level, even though the governmental structure is different. Some of the decided tax cases have involved beer and trucking associations functioning on the state level.[8]

The authors assert that in the antitrust field the official attitude toward trade associations during the 1950's has been markedly better than that which prevailed during the 1940's. Although this is a very significant proposition, the authors do not cite any authority for it. A comparison of an official statement in the 1940's [9] with two official statements in the middle 1950's [10] does not necessarily reveal this change in attitude. Moreover, in the past four years a number of antitrust complaints have been filed in which trade associations were named as defendants.[11]

However, there is no doubt that the "conversation" heard today in the halls of the Antitrust Division of the Department of Justice and the Federal Trade Commission is of a less zealous nature than in the 1940's. Such conversation is reflected in the complaints filed. Thus, to some extent the conclusion of the authors is obviously correct. For instance, there is no longer the "guilt by association membership" approach to which the authors refer.

Even more significant, however, is the fact that trade associations have come of age, and, under advice of legal counsel, are disciplining themselves. More-

7. 70 STAT. 1125, 15 U.S.C.A. § 1221 (Supp. 1956).

8. Smoky Mountains Beverage Co., 22 T.C. 1249 (1954); McClintock Trunkey Co., 19 T.C. 297 (1952), *rev'd on other grounds*, 217 F.2d 329 (9th Cir. 1954).

9. Address by Wendell Berge, "Trade Associations and the Antitrust Laws," Washington Trade Association Executives meeting, May 16, 1945.

10. Howrey, *supra* note 2, at 20; Barnes, *The Antitrust Division Looks at Trade Associations*, AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW 29 (1955).

11. Some of the antitrust suits filed in 1956-57 involving trade associations are: United States v. Concrete Form Ass'n of Cent. New Eng., Civil No. 57216 S, Crim. No. 57535, D. Mass., March 1, 1957; United States v. Erie County Malt Beverage Distributors, Crim. No. 14870, W.D. Pa., January 3, 1957; United States v. Memphis Retail Appliance Dealers Ass'n, Inc., Civil No. 3061, W.D. Tenn., November 1, 1956; United States v. Garden State Retail Gasoline Dealers Ass'n, Civil No. 482-55, Crim. No. 154-55, D.N.J., September 19, 1956; United States v. Haverhill Fuel Oil Dealers Ass'n, Civil No. 56-532 S, Crim. No. 53-118, D. Mass., September 18, 1956; United States v. Philadelphia Radio & Television Broadcasters Ass'n, Crim. No. 18872, E.D. Pa., June 27, 1956; United States v. Memphis Retail Package Stores Ass'n, Civil No. 2672, Crim. No. 8315, W.D. Tenn., June 15, 1956; United States v. Shoulder Pad Manufacturers Ass'n, Crim. No. 25068, S.D. Cal., June 15, 1956.

over, most current antitrust suits are filed against the smaller and more regional (mostly single-city) associations. Self-imposed limitations thus reflect a more desirable situation.

The authors' treatment of the question of federal taxation of trade associations is adequate and complete with two exceptions, one of which constitutes a significant development. The latter is found in the extended discussion of the deduction of trade association dues. For instance, in *Addressograph-Multigraph Corp.* [12] the Internal Revenue Service unsuccessfully sought to disallow the dues paid to the National Association of Manufacturers on the ground that the amounts so paid constituted a contribution to an organization seeking to influence legislation. The recent development not discussed is that the Service is now seeking to disallow deduction for dues in an amount equivalent to the proportion that lobbying bears to an association's total activities. In other words, if seven per cent of an association's activities constitute lobbying, then that percentage of dues will be disallowed as a deduction. This question is now under active consideration in the Service and has been for about three years.[13]

The other point not discussed is that a trade association found to be violating the antitrust laws might be affected taxwise. There is no decided case where the issue has been raised on the exemption side, and it would be difficult to see how such an argument could be successful against a national trade association carrying on the usual functions. However, dues paid to an association are not deductible if its primary purpose is the elimination of competition between the various members. Thus, in *Domenico E. Fazzio*,[14] such contributions or dues were disallowed as business expenses because they were paid to certain associations whose "primary purpose" was "the restraint of trade by the prevention of competition." The Tax Court felt public policy required a holding that such an expenditure was not a necessary expense within the meaning of the statute. However, this case may not be of much precedent value as there were certain criminal aspects to the restraint.

It is doubtless unfair to find fault with so admirable a text merely for its failure to cover a broader field, particularly when its entire discussion is so uniformly sound. No lawyer handling trade association problems and no trade association executive can afford to be without its aid and assistance.

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12. 4 CCH Tax Ct. Mem. 147 (1945).

13. This treatment was first suggested in Note, 67 HARV. L. REV. 1408 (1954), and subsequently in 2 CUM. BULL. 131 (1954). *Cf.* Los Angeles & S.L.R.R., 18 B.T.A. 168, 177 (1929). Apparently, the first action was taken on this new approach against the members of the American Association of Railroads. The issuance of final Treasury Regulations under INT. REV. CODE OF 1954, § 162 has been held up for over a year because of consideration of this point.

14. 2 CCH Tax Ct. Mem. 737 (1943).

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