Statement of

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FEDERAL TRADE COMMISSION

Relative to Proposed Legislation Dealing with

Resale Price Maintenance

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A SUBCOMMITTEE

of the

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

UNITED STATES SENATE

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STATEMENT OF EVERETTE MACINTYRE

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

My name is Everette MacIntyre. I am an attorney presently employed on the staff of the Federal Trade Commission as the Chief of its Division of Investigation and Litigation and Assistant Director of the Commission's Bureau of Antimonopoly. I am appearing under the instructions of the Commission to present to you orally a statement of the Commission's position regarding certain proposed legislation dealing with the subject of resale price maintenance. Except where otherwise noted, this oral presentation represents in general the unanimous views of the Commission.

At the outset, the Commission fully recognizes that the necessity, desirability and merit of the proposed legislation are exclusively matters of legislative policy for determination by the Congress. It is fully recognized that the Commission was created to aid the Congress in the performance of its constitutional function of regulating commerce among the States and that the Commission was authorized to act solely in the public interest. In the light of these considerations the Commission's views upon the proposed legislation, which are based upon its experience with and study of the problem involved during the past thirty-six years, are submitted to you solely in the public interest.

Prior to August 17, 1937, when the Miller-Tydings Act amended section 1 of the Sherman Antitrust Act, discussions in a number of cases under the Sherman Law and the Federal Trade Commission Act made it clear that where a manufacturer maintained the retail price of his patented, copyrighted, trade-marked or otherwise identified goods by restrictions marked on the goods or otherwise communicated to the retailer, a violation of these restrictions did not create a cause of action in favor of the manufacturer either under the common law or under the patent of copyright laws, and that where a manufacturer maintained the resale prices of his identified goods by a system of contracts or equivalent cooperative methods, those contracts were void and such methods illegal under the Sherman law and the Federal Trade Commission Act.

The Miller-Tydings Act amended the Sherman Act to the extent of legalizing minimum resale price maintenance contracts respecting trade-marked or otherwise identified goods sold in interstate commerce provided that the commodities affected were resold in any State that had legalized this type of contract with respect to resales made within its boundaries. The Act contains a specific prohibition against horizontal agreements. It also amended the Federal Trade Commission Act by providing that the making of such contracts should not constitute an unfair method of competition under section 5 of that Act.

It is to be borne in mind, however, that the Miller-Tydings Amendment was not designed to prevent unfair practices, such as selling below cost for an ulterior purpose. It is designed to enable the manufacturer arbitrarily to impose and maintain minimum prices at levels fixed without relation to differences in cost among different distributors and dealers.

The Miller-Tydings Amendment removed the bar of illegality to the making of minimum resale price maintenance contracts covering commodities sold in interstate commerce if they were to be sold in a State where such contracts had been legalized with respect to intrastate sales.

A large number of States adopted the resale price maintenance laws in 1937, soon after the Supreme Court decision in the case of Old Dearborn Distributing Co. v. Seagram Distillers Corporation, 299 U.S. 183, declaring as constitutional the principal provisions, including the non-signer clause, of the Illinois Resale Price Maintenance Law. By 1941 45 States had adopted resale price maintenance laws.

In brief, the State resale price maintenance laws embrace the stipulation that no contract relating to the sale or resale of a commodity bearing the trademark, brand or name of the producer, distributor or owner, which commodity is in free and open competition with commodities of the same general class produced by others shall be deemed in violation of the law of the enacting State, by reason of the provisions in the contract that the buyer will not resell the commodity except in accordance with the price stipulations of the seller; that the vendee or producer require any dealer to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulations of the seller; also, the so-called non-signer clause, which declared that wilfully and knowingly advertising, offering for sale, or selling such commodities at less than the stipulated contract price, whether by a party to such contract or by some other party, is unfair competition actionable at the suit of any person damaged thereby.

Resale price maintenance (as practiced prior to the decision of the Supreme Court in Schwegmann Bros. v. Calvert Distillers Corporation, 341 U.S. 384 on May 21, 1951), in intrastate commerce in 45 States of the United States having resale price maintenance laws, and in interstate commerce with those States, is a system of pricing a trademarked, branded or otherwise identified product for resale in which, pursuant to laws legalizing such arrangements, the manufacturer, producer or brand owner prescribes by contract the minimum price or the resale price at which such product may be sold at wholesale, and the producer or manufacturer and his factors or wholesalers prescribe the minimum price or the resale price at which such product may be sold at retail in a specified State, or in a specified portion thereof, with the effect of legally binding all other distributors in a specified area to conform to such prices. This was done by entering into contract with at least one such distributor of such product and serving notice upon all other distributors who are thereupon obligated to maintain the minimum price or the resale price named in the contract. In some cases wholesale distributors, acting without the authorization of the manufacturer or brand owner, may have entered into contracts with retailers for the maintenance of retail prices.

In the Schwegmann case the respondents, Maryland and Delaware corporations, were distributors of gin and whiskey who sold their products

to wholesalers in Louisiana, who in turn sold to retailers. These respondents had contracts with some Louisiana retailers fixing minimum retail prices for respondents' products. The Louisiana law authorized enforcement of price fixing not only against parties to a "contract" but also against non-signers. The petitioner, a retailer in New Orleans, refused to sign a price fixing contract with respondents and sold respondents' products at cut-rate prices. Respondents brought suit to enjoin the petitioner from selling the products at less than the minimum prices fixed by their schedules.

In passing upon the question presented, the Supreme Court in substance held that the Miller-Tydings Act does not make binding upon non-signers resale prices fixed in contracts under State resale price maintenance laws insofar as interstate commerce is concerned. The Court relied heavily upon the fact that the Miller-Tydings Act does not specifically include the non-signer provision, stating: "The omission of the non-signer provision of the Federal law is fatal * * * unless we are to perform a distinct legislative function by reading into the Act a provision that was meticulously omitted from it." If Congress had intended to authorize a non-signer provision the Court felt that the pattern of the legislation would have been different.

The Court was obviously disturbed by both the coercive feature of the non-signer provision and the effects on competition. It did not believe that Congress intended to permit "a program whereby recalcitrants are dragged in by the heels and compelled to submit to price fixing." It pointed out that the Miller-Tydings Amendment prohibits horizontal price fixing and concluded that "when retailers are forced to abandon price competition they are driven into a compact in violation of the spirit of the proviso."

Since the decision in the Schwegmann case the United States Court of Appeals for the Third Circuit in Sunbeam Corporation v. Wentling, 192 F. 2d 7, decided November 1, 1951, in substance held that one who did not sign a price maintenance contract could not be subjected to the non-signer provisions of State fair trade law either as to sales made within the State or sales made to customers in other States, where interstate commerce was involved.

The proposed legislation pending before your Committee dealing with the subject of resale price maintenance is H. R. 5767, referred to as the McGuire Bill. On May 21, 1952, the Federal Trade Commission submitted to your Committee a report in opposition to this proposed legislation. The Commission desires that this oral presentation supplement that report.

The principal stated purpose of the proposed resale price maintenance legislation is to overcome the effect of the Schwegmann and Sunbeam decisions by re-enacting as an amendment to the Federal Trade Commission and Sherman Acts the presently existing Miller-Tydings Amendment of the Sherman Act with the addition of the non-signer clause and with the provision that resale price maintenance contracts and the enforcement thereof against a signer or non-signer shall not constitute a burden upon interstate commerce.

The legal principle of the State laws concerning resale price maintenance and of H. R. 5767 is not a mere authorization of contracts for the fixing of resale prices. That authorization now exists under the Miller-Tydings Amendment as interpreted by the Supreme Court in the Schwegmann case. The new principle introduced by this Bill is that the Congress shall specifically approve the so-called non-signer clause. Thus, if the proposed legislation is enacted, a private contract, the provisions of which would be determined without public hearing and apart from any public supervision as to reasonableness, would be made binding upon all dealers and the consuming public.

In an effort to prescribe the freedom of business enterprise the courts have been circumspect in recognizing even the authority of Governments to fix the prices that businessmen shall charge. Such price fixing is invalid unless it is undertaken for a public purpose and by some specified legislative standard subject to judicial review. In the State resale price maintenance laws and in the proposed legislation, however, the power to fix prices is to be entrusted, not to a government, but to private persons; the purpose to be served by the price fixing is whatever purposes these private persons may have, presumably that of serving their own pecuniary interests rather than that of public interest; and the prices fixed are not to be tested for reasonableness in accord with a legislative standard by any instrumentality public or private; nevertheless, a person who is not a party to this private contract is to be deemed guilty of unfair competition and subject to a suit for damages, or to a State criminal penalty, if he fails to observe the prices regardless of whether or not they are arbitrary or extortionate.

Such a principle is unparalleled in Federal jurisprudence. Even if price cutting by distributors is regarded as involving serious public evils and thus calling for a public remedy, there is no justification for such a grant of power to businessmen to coerce their competitors.

In granting to such private persons the power to fix prices, the proposed legislation goes much further than Congress saw fit to grant to the Federal Government itself in the National Industrial Recovery Act of 1933. In that Act consideration was given to labor and to the consuming public. There was always a representative of both who participated in the fixing of prices, while in the proposed legislation no consideration whatsoever is given to the interest of labor or the consuming public.

Moreover, when the non-signer clause is added to resale price maintenance, the effect is the de facto nullification of our Federal laws against horizontal conspiracy, notwithstanding the fact that the proposed legislation expressly prohibits horizontal price fixing. Nothing is more clearly established in Federal policy than the principle that horizontal price fixing shall not be tolerated.

The effect of the proposed legislation for resale price maintenance would be that not only the minimum but also the stipulated price fixed by contract with one retail distributor would become the price for all other retail distributors of the manufacturer's product who were placed upon notice of the existence of the contract. The rigidity and uniformity of the price would be exactly that of the most rigid horizontal price fixing conspiracy; the level of the price likely would be at least as high as in a horizontal conspiracy; and the public control over the reasonableness of the arrangement would be as non-existent as in the case of a horizontal conspiracy. Thenceforward any group of distributors desiring to fix prices horizontally would be foolish to take the direct road to that end. Instead, some one of their number should make a vertical contract with a supplier and then place the other members of the group on notice of the existence of the contract. Through this means the group could not only negate the objections of the government but could actually use the courts as devices to enforce the arrangement.

Throughout the period of its existence the Federal Trade Commission has dealt with the problem presented by resale price maintenance. Prior to the passage of the Miller-Tydings Act, in 1937, that problem was present in a number of unfair competition cases coming before the Commission. It has also been involved in a number of investigations and hearings conducted by the Commission.

A number of resale price maintenance cases handled by the Commission prior to the passage of the Miller-Tydings Act in 1937 resulted in orders by the Commission that the price fixing involved be discontinued. Some of those orders condemned resale price maintenance not only by means of contracts, agreements and understandings between manufacturers and their customers, but also by methods involving conspiracies between manufacturers, their distributors and customers "quite as effectual as agreements."1/ In such instances the orders of the Commission were sustained.2/

In one case the Court remarked that evidence and argument as to the evils of price cutting and selling below cost were unavailing as a defense, but "were better addressed to legislative bodies than to the courts."3/ And in the Dr. Miles case 4/ decided in 1911, prior to the creation of the Federal Trade Commission, the Supreme Court had specifically held that resale price maintenance contracts between brand owners and their distributors were illegal and in restraint of trade under the Sherman Act.

As early as December 2, 1918, the Commission called the attention of Congress to the fact that in complaints coming before it the Commission enforced the law laid down by the courts in these cases, even though it operated inequitably in some cases, because both resale price maintenance and price cutting, under certain conditions, were used for unfair purposes in trade, and said:

1/ Federal Trade Commission v. Beechnut Packing Co., 257 U.S. 441 (1922).
2/ Federal Trade Commission v. Beechnut Packing Co., 257 U.S. 441 (1922); Kobi v. Federal Trade Commission, 23 F. 2d 41 (C.A. 2, 1927).
3/ Hills Bros. v. Federal Trade Commission, 9 F. 2d 481, 486 (C.A. 9, 1926).
4/ Dr. Miles Medical Co. v. Park & Sons, 220 U.S. 373 (1911).

> It is urged, and the Commission believes with reason, that it would be unwise to vest with the manufacturers of articles the right, without check or review, both to fix and compel the maintenance of resale price * * *. It is similarly urged that manufacturers should be protected in their good will created by years of fair dealing and of sustained quality of merchandise * * *. There must be a common ground wherein the rights of producer, purveyor and customer may be fully secured and equity done to all * * *.5/

On June 30, 1919 the Commission again called the attention of Congress to this situation.6/

In 1927 the Commission began, and subsequently made, an extensive inquiry into the subject of resale price maintenance. The first report resulting from this study was made to the Congress on January 30, 1929 and the second on June 22, 1931.7/ In these reports the Commission expressed its opposition to legislation permitting resale price maintenance on the ground that the alleged evils it was designed to meet had been greatly exaggerated; that the fixing of resale prices would lead to substantial abuses; and that these abuses could not be avoided short of governmental control over the prices fixed.

On April 14, 1937, the Commission wrote the President, in response to his request for a recommendation on the then pending Miller-Tydings bill (S. 100, H. R. 7472), in part, the following:

> The Tydings-Miller bill would amend the antitrust laws so as to legalize contracts and agreements fixing minimum resale prices for goods sold in interstate commerce and resold within the jurisdiction of any State where such contracts or agreements as to intrastate commerce have been legalized. A number of States now have such statutes.
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> Many of these State laws and the Tydings-Miller bill are directly and irreconcilably in conflict with the present Federal law on resale price maintenance. Public policy since the passage of the Sherman Antitrust Act in 1890 has been opposed to resale price maintenance.
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> The position taken by both proponents and opponents of resale price maintenance are based on the belief that such maintenance of prices will limit retail competition. * * * The real crux of of the question, therefore, is whether injury done to the consumers' interests through the elimination of dealer competition with respect to price-maintained articles would be greater than the damage now alleged to be done to the interests of manufacturers and distributors of trade-marked, nationally advertised brands when they are used as leaders. Neither injury is capable of exact measurement, but, in the opinion of the Commission, the potential damage to consumers through price fixing would be much

5/Resale Price Maintenance, House Document No. 1480, 65th Congress, 3d Session.

6/Resale Price Maintenance, House Document 145, 66th Congress, 1st Session.

7/House Document No. 546, Parts I and II, 70th Congress, 2d Session.

greater than any existing damage to producers through this form of price cutting.

This report was transmitted by the President with his letter of April 24, 1937 to the Congress.8/ Among other things, the President stated:

> The present hazard of undue advances in prices, with a resultant rise in the cost of living, makes it most untimely to legalize any competitive or marketing practice calculated to facilitate increases in the cost of numerous and important articles which American householders, and consumers generally, buy.

The Commission was represented upon the Temporary National Economic Committee. The final report of that committee, made public in 1941, contains a recommendation regarding the Miller-Tydings Amendment which was concurred in by the Commission's representatives as follows:

> The Miller-Tydings Enabling Act, which legalizes resale price maintenance contracts in interstate commerce, results in some of those economic and social practices to be expected from private price-fixing conspiracies. The legal sanction of such practices tends to undermine the basic tenets of a competitive economy, and introduces rigidities into the pricing of certain goods which restrain trade. Consequently we recommend to the Congress the repeal of the Miller-Tydings Enabling Act.

On April 25, 1939, the Commission began and thereafter made a second very extensive investigation of resale price maintenance, covering the effects thereof on prices, margins, profits and competitive conditions in the manufacturing, wholesaling, and retailing of price-maintained and non-price-maintained articles since the enactment of the Miller-Tydings Act. The results of this investigation are contained in the Commission's Report on Resale Price Maintenance submitted to the Congress December 13, 1945. The general conclusions of this report are adverse to the resale price maintenance principle. In part they are as follows:

> 1. Minimum resale price maintenance was originally advocated by manufacturers of highly individualized, trade-marked, trade named, or branded prices as a means of protecting them from unrestrained price cutting among dealers to whom the products were sold outright. When finally enacted by the States, and by the Congress, however, its enactment was urged almost entirely by a few well-organized dealer groups as a means of eliminating price competition both of dealers using the same methods of distribution and of dealers using new and different methods of distribution.
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> 2. Leader merchandising, for the control of which resale price maintenance was advanced, is a form of price competition that obviously may be used for unfair or deceptive trade purposes, particularly when used by large concerns to eliminate weaker competitors. As a corrective of objectionable features of price competition, however, resale price maintenance makes no distinction between

8/Senate Document No. 58, 75th Congress, 1st Session.

price competition that is economically unsound or is unfairly used in trade, and price competition that is economically sound and in the public interest because it results in adequate service to the public at prices consistent with differences in consumer service rendered by dealers using different methods of distribution.

3. Both State and Federal resale price maintenance laws are entirely permissive in their application to manufacturers, merely granting permission to them to place their identified products under price maintenance if they so desire. In practice, however, resale price maintenance serves as a focal point for dealer cooperative effort to bring pressure to bear on manufacturers to place products under price maintenance at prices yielding dealer margins satisfactory to cooperating organized dealer groups. In some lines of trade, where the individual manufacturer has faced strongly organized dealer group pressure, the extent of his freedom of choice as to whether he will place his brands under resale price maintenance has been extremely limited.

4. Commodities to which resale price maintenance is most extensively applied are those possessing distinctive characteristics in the minds of customers. Included among such commodities are the following: Proprietary articles produced under secret formulas or under the protection of patents or copyrights so that the manufacturer can determine whether there shall be duplicates of them on the market; trade-marked, branded or otherwise identified products that are advertised directly to consumers so that there is developed a widespread belief that they are superior to less well-known competing brands in quality, construction or performance; products that are so trade named and advertised as to conceal from the majority of consumers the fact that identically the same substance, or article of equal quality, may be purchased under other names, and often at distinctly lower prices; and standard articles and specialties sold under well-known brands that over long periods have come to stand in the minds of consumers as marks of a particular degree of quality, mechanical excellence, durability, etc. As to such commodities, the question arises as to how far the distinctive characteristics may be developed and still leave the commodity in the free and open competition required by the law as a prerequisite to its price maintenance.

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5. Application of resale price maintenance, especially with respect to staple articles, has been fostered in certain industries where production is largely concentrated in the hands of a few manufacturers, as in the case of surgical dressings, or where a large number of manufacturers are organized in closely knit trade association groups, such as in proprietary drugs and medicines, and in certain lines of grocery items including some soap products, cooking oils, and firearms. When such associated groups of manufacturers face strongly organized trade groups of dealer proponents,

conditions are especially favorable to the adoption of resale price maintenance. The legalization of resale price maintenance unquestionably has fostered the formation of such cooperating trade association groups both among manufacturers and among retail dealers.

7. Maintenance of minimum resale prices has been more extensively applied in the drug, toilet goods, cosmetics, liquor, and sporting goods trades than in any other lines covered in this inquiry. This is due in part to the individuality lent to such products by branding, national advertising, proprietary secret formulas, and the like, and in part to the existence of strong cooperation trade groups of manufacturers, wholesalers, and retailers. Among manufacturers of surgical supplies, a cooperating group of large companies fixed by agreement the specific prices at which their products should be sold by themselves and their wholesalers to large users, and carried the system of maintaining noncompetitive prices among their products all the way to the small retail purchaser by placing retailers under contract to maintain prices that are uniform for the same products made by the different leading manufacturers.

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9. For these nationally advertised brands of drug-store merchandise that were covered in the Commission's survey, the effect on consumer prices most often noted was that the prices of chain stores, department stores, and certain independent stores that were selling below the minimums set by resale price maintenance contracts in resale price maintenance territory were obliged to increase prices. Individual druggists, reporting from memory, on the other hand, generally reported some price decreases in the same territory. Thus, whether a given customer paid a higher or a lower price under resale price maintenance would depend on whether he purchased from a store that was obliged to increase prices or from a store that voluntarily decreased prices after resale price maintenance went into effect. While this was happening in the resale price maintenance territory, the trend for the same brands in non-price-maintenance territory often was downward in all types of stores.

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18. One of the principal arguments advanced for the legalization of resale price maintenance was that it was needed to enable manufacturers to control undesirable leader merchandising and "sales below cost." Proponents emphasized extreme price wars and the impression was created that before resale price maintenance became effective many nationally advertised brands were sold, especially by chain stores and other large distributors, at or below invoice cost. In general, sales below invoice cost are exceptional. The records of chain stores, department stores, and super markets examined in the present inquiry indicate that

although the average prices of such large distributors often were lower than those of independent stores before resale price maintenance became effective, those lower prices yielded substantial average gross margins over invoice cost of goods in all market areas visited.

After resale price maintenance became effective the price advances forced upon large distributors, especially for a number of brands handled by the drug trade, yielded larger gross margin percentages to large retail distributors than to individual drug stores as a class in the same markets, although the latter, in general, sold the brands at higher prices than the former. Thus, it would seem that the large distributors had a real advantage in pricing their goods, possibly because they purchased in larger quantities directly from manufacturers whereas small retailers were purchasing in smaller quantities from wholesalers and paying higher prices.

19. An important defect in the Tydings-Miller Act is that the right to enter into minimum resale price contracts is not explicitly limited to the brand owner or to a distributor authorized by him to place the manufacturer's product under such contracts. In those States having laws which also omit this explicit limitation, the resale price maintenance contract has been used in attempts by cooperating groups of wholesalers, or of both wholesalers and retailers, to fix prices to be maintained for branded goods without the consent, and sometimes against the will, of manufacturers or producers who own the brand. Such wholesaler-retailer contracts likewise are being interpreted by some groups as enforceable under the non-signer clause, likewise without the consent or assistance of the brand owner. So used, resale price maintenance obviously may be perverted from its announced purpose of protecting the brand owner's interest against unrestrained dealer price competition, and be made the means of effectuating price enhancement and restraint of dealer competition by horizontal agreements among dealers, the existence of which may be difficult to prove.

20. As the result of its investigations in antitrust cases, the United States Department of Justice has stated that, as an amendment to the antitrust laws, the Tydings-Miller Act does not serve the purposes which were urged upon Congress as a reason for its passage in that it sanctions arrangements inconsistent with the purpose of the antitrust laws, and becomes a cloak for many conspiracies in restraint of trade which go far beyond the limits established in the amendment. The conclusion of the Department of Justice is that the actual effects of resale price maintenance have been those which are to be expected from private price fixing conspiracies unregulated by public authority, whether or not they enjoy the sanction of law. The department has further stated it to be its belief that if its Antitrust Division had sufficient men and money to examine every resale price maintenance contract

written under State and Federal Legislation, and to proceed in every case in which the arrangement goes beyond the authorizations of the Tydings-Miller amendment, there would be practically no resale price maintenance contracts, and that, in the absence of such wholesale law enforcement, the system of resale price legislation fosters restraints of trade such as Congress never intended to sanction.

The Federal Trade Commission, which shares with the Department of Justice the function of enforcing the antitrust laws, likewise finds both its personnel and funds insufficient to adequately investigate and proceed in all matters involving possible use of resale price maintenance contracts in violation of law.

21. The essence of resale price maintenance is control of price competition. Lack of adequate enforcement of the antitrust laws leaves a broad field for the activities of organized trade groups to utilize it for their own advantage and to the detriment of consumers. The expenses of State and local fair trade committees, all of which are trade managed and trade financed, tend to increase or to prevent decreases in distribution costs. Manufacturers and dealers alike contribute to the expense of these committees for shoppers and investigators to obtain evidence of violations of prices and to pay lawyers employed by the committees in prosecution of cases. Manufacturers joining in such proceedings for the enforcement of their contract prices likewise must incur additional investigational, legal and other expense, and accused dealers must either supinely fall into line or incur similar legal and other expense and loss of time in contesting cases before courts whose dockets already often are overcrowded to the point where further appropriation of public funds becomes necessary to expedite the handling of cases. The net result in enhancement and maintenance of high living costs is no less real because it is concealed in the prices at which goods reach the consumer in such a way that it is not subject to direct measurement.

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24. In 1931, when the Capper-Kelly bill was under consideration in the Congress, the Commission pointed out that effective supervision in the public interest of prices maintained by contract for a multiplicity of products to which resale price maintenance might be applied would present very great, if not insurmountable difficulties, as well as probably be a poor substitute for dealer competition as an effective regulator of prices to consumers. It was also pointed out that under resale price maintenance without Government regulation, competition among manufacturers would be the only remaining regulator of consumer prices with respect to price-maintained articles. In its previous reports, going back as far as 1918, the Commission has pointed out that both price competition and the maintenance of prices may be used for unfair purposes in trade.

25. Both the results of the Commission's present special study of the operation of legalized resale price maintenance and information developed over a period of many years in connection with complaints strongly confirm these earlier conclusions and point to the further conclusion that in the absence of effective Government supervision in the public interest, resale price maintenance, legalized to correct abuses of extreme price competition, is subject to use as a means of effecting enhancement of prices by secret agreements and restraint of competition by coercive action on the part of interested cooperating trade groups of manufacturers, wholesalers, and retailers in such ways and to such an extent as to make it economically unsound and undesirable in a competitive economy.

As stated at the outset of this report, the maintenance of retail prices at a fixed and uniform level, prior to the passage of the Tydings-Miller amendment, was against the policy of the antitrust laws, and prior to the enactment of said amendment, a contract aimed at obtained this result was illegal. The purpose of this amendment, as this report shows, is not to legalize contracts whose object is to prevent predatory price cutting for an ulterior purpose. The antitrust laws do not condemn such contracts. The Tydings-Miller amendment legalizes contracts whose object is to require all dealers to sell at not less than the resale price stipulated by contract without reference to their individual selling costs or selling policies. The Commission believes that the consumer is not only entitled to competition between rival products but to competition between dealers handling the same branded product.

It is the expressed opinion of the Commission that economic conditions are not the same at the present time as existed in 1937 which prompted the enactment of the Miller-Tydings Act. At present there is no necessity for the Federal resale price maintenance legislation with respect to interstate commerce. Furthermore, the Congress has already pointed the way toward elimination of the evils, which sponsors of the Miller-Tydings Act sought to remedy, through legislation prohibiting price discrimination and other unfair methods of competition. It is the elimination of these evils rather than legislation legalizing price fixing which will minimize the inequities between the smaller businessman and his more powerful competitor.

Mr. Chairman, our oral presentation up to this point, as I have stated, represents in general the unanimous views of the Commission. Since a discussion of the significance of price discrimination and its relation to the problem before you is substantially an economic matter, Dr. John Blair has been instructed by the Commission to present to you that part of our oral presentation. Therefore, that part of our statement will be discussed by Dr. Blair, the Assistant Chief Economist of the Federal Trade Commission. Following his discussion of that subject I shall undertake to close our oral presentation with a statement of the Commission's recommendations concerning the problem.

From this point to its conclusion our oral presentation represents the views and position of the Commission but without the concurrence of one member of the Commission.

While the Commission is opposed to the resale price maintenance laws, it is not blind to the economic practice which was primarily responsible for their existence. That practice is price discrimination.

Although there were other forces at work, the resale price maintenance laws were principally a defensive effort on the part of small merchants designed to protect themselves against the invasions by the chain stores during the early 'thirties. According to figures published by the Department of Commerce, chain stores and mail order houses increased their share of total retail sales from 21 percent in 1929 to 27 percent in 1933. During this period, thousands of independent druggists, grocers, and other small merchants closed their doors. A significant portion of these casualties can be traced directly to the discriminatory practices of the chain stores. Some idea of the character and extent of these discriminations can be gathered from the findings of the Federal Trade Commission in its Chain Store Investigation (74th Congress, 1st Session). In this investigation, the Commission found:

> 1. That it had been the persistent policy of the chain stores to seek out and demand special and unwarranted price concessions on the goods they bought; and
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> 2. That the chains in many instances discriminated in the resale of merchandise by maintaining higher prices in localities where competition was absent or weak and cutting prices aggresively in those localities where aggressive competition was encountered.

In the final report of the investigation, submitted on December 14, 1934, the Commission summarized the results of a statistical survey which it had undertaken of the extent of special discounts and allowances made to chain stores as against those made to independent wholesalers. For the purpose of the survey, special discounts and allowances were defined as, "All those forms of allowances made to distributors not appearing on the face of the invoice." On the basis of reports received from several hundred manufacturers of drugs, groceries, and tobacco, covering their sales and allowances to a large number of selected distributors in each of two successive years, the Commission concluded that:

> The chains apparently benefit to a much greater extent than the wholesalers from these special discounts and allowances. The Commission's figures indicate that more manufacturers make allowances to chains than make such allowances to wholesalers, and the proportion of chain accounts carrying allowances was far greater than the proportion of wholesale accounts. . ." (p. 57)

Specifically, the Commission found that the total allowances granted by the drug manufacturers surveyed amounted to $3,798,000, of which $2,848,000, or 75 percent, went to drug chains; total allowances by the grocery manufacturers amount to $6,439,000, of which the grocery chains received $5,840,000, or 91 percent; and total allowances made by the tobacco manufacturers amounted to $6,928,000, of which the tobacco chains received $6,122,000, or 88 percent. Expressed as a percentage of sales, allowances received by chains were several times those obtained by the independent wholesalers. Thus, in 1930 the rate of special allowances on total sales for drug chains was 5.19 percent, as compared with only 1.11 percent for independent drug wholesalers; for grocery chains, the rate was 2.02 percent, as compared with 0.91 percent for grocery wholesalers; and for tobacco chains, the rate was 3.57 percent, as compared with 0.71 percent for tobacco wholesalers. Here it should be noted that a rate of 2 or 3 percent on sales for any item with a high turnover such as drugs, groceries, or tobacco products, represents a very significant competitive advantage.9/

Numerous specific examples of discriminations granted to chain stores were cited in hearings before the so-called Patman Committee of the 74th Congress.10/ For example, these hearings list the discounts, rebates, additional compensation, and allowances made to Liggett Drug Co., amounting to $797,386, in 1934.11/ Similarly, a witness testified that the special allowances made available by manufacturers to the United Drug Co. amounted to about 4 percent of its total business.12/

During the late 1930's, following the enactment of the Robinson-Patman Act, the Commission proceeded to challenge discriminations practiced by the American Optical Company 13/ and Bausch and Lomb Optical Company.14/ Those discriminations required small businessmen to pay prices 25 percent higher than the prices "big dealers" were required to pay. Under the Robinson-Patman Act the Commission ordered those discriminations stopped. In a more recent case the Commission found that one large merchandiser distributing items competitive with those sold in retail drug and grocery stores had been able to buy those items at discriminatory prices. The discriminations in some of the instances were so great that the independent merchants were found to be paying prices 33 percent higher than this large favored merchandise. The Commission ordered that the practices upon which these discriminations were based be discontinued.15/

These and numerous similar examples, together with the comprehensive findings of the Commission itself, make it abundently clear that during the 1930's chain stores were receiving price discriminations of such

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9/Ibid., p. 58.

10/74th Congress, 1st Session, Hearings before the Special Committee on "Investigation American Retail Federation and Investigation of the Trade Practices of Big Scale Buying and Selling," H. Res. 203 and 239, 1936.

11/Ibid., No. 2, pp. 74-80.

12/Ibid., p. 58.

13/28 FTC 109.

14/28 FTC 186.

15/FTC Docket No. 4933.

magnitude as to give them an insurmountable competitive advantage over independent merchants. No matter how efficient they might be, the independent merchants could not possibly compete against a rival which was gaining the benefit of such widespread concession on its merchandise.

In its report on the chain store investigation the Commission found:

> An important aspect of chain store price policy is the frequent use of "leaders" consisting of specially low-selling prices on particular items. A large part of the prevalent public belief that chain-store prices are lower than those of independents has its root in that policy.16/

The economic significance of the "loss leader" practice and the price discriminations from which the practice stemmed, and without which its widespread and general use could not continue, was discussed not only in the Commission's report to Congress on its chain store investigation but also in other reports recently submitted to the Congress. For example, on April 18, 1951, in a report to the Senate Committee on the Judiciary, the Commission called attention to the deleterious effects upon small business flowing from price discriminations. In that report the Commission stated:

> Discriminatory selling has long been recognized as a practice which works to the advantage of big business and toward the destruction of small business. Discriminatory selling has thus long been recognized as a practice which works in two ways toward the creation of monopoly. First, discriminatory selling is a practice by which large sellers destroy smaller competing sellers. This is true whether or not the large seller intends any injury to his smaller rivals. Second, discriminatory selling results in advantageous purchase terms to big buyers and in disadvantageous purchase terms to the small buyer.

When large sellers are not permitted to discriminate in price between purchasers located in different communities, with the effect of smothering a small seller operating on only one of them or when they are not permitted to discriminate between large and small buyers competing in the same community, the "hardest" kind of competition will result. This is the kind of competition which places upon sellers the necessity of lowering prices generally in order to sell at all. To relieve sellers from this necessity and permit them to discriminate in price results in the "softest" kind of competition.

As a result of the widespread price discriminations of the 'thirties, small business, faced with the threat of imminent extinction, sought to obtain protective legislation. This it secured in two forms -- the resale price maintenance laws and laws against price discrimination.

16/FTC Chain Store Investigation, op. cit., p. 38.

The Federal Trade Commission disapproves of one of these two forms of protection, resale price maintenance, and approves of the other, the Robinson-Patman Act. Essentially, it is opposed to the former on two grounds: first, it is a price-fixing measure, giving manufacturers the right to fix the exact level of retail prices; and second, it ignores the question of efficiency. The Commission approves of the Robinson-Patman Act on precisely the opposite grounds: first, the Robinson-Patman Act gives to no one the power to fix prices but merely provides that they shall be reasonably equal as made by a single seller to different buyers; and second, it does not ignore the question of efficiency, but, rather, permits discriminations based on savings in costs.

With regard to the first consideration resale price maintenance laws, as heretofore pointed out, are price-fixing measures. They give to private individuals the right to fix prices at all levels of trade without providing protection for the public interest. In effect, they confer upon private individuals rights and powers not even delegated to public bodies.

In contrast, the Robinson-Patman Act is not a price-fixing measure. It does not give to the manufacturer, or to the distributor, the <u>right</u> to fix the price at which goods shall be sold. Rather, it places sellers under an <u>obligation</u> -- the obligation to treat all buyers on more or less equal terms.

Thus, resale price maintenance, by conferring upon producers a right which enables them to secure the same objective as would result from a horizontal conspiracy, has the effect of injuring competition. In contrast, the Robinson-Patman Act, by putting all buyers on much the same footing, has the opposite effect of promoting competition.

With regard to the second consideration, that of efficiency, there is no "cost defense" under the resale price maintenance laws. It is a normal tendency for manufacturers to seek as widespread a distribution of their product as possible. Hence, under resale price maintenance, they generally tend to set their resale prices at sufficiently high a level as to enable the most inefficient distributors to remain in business.

Under resale price maintenance, there is not sufficient incentive for a merchant to go to the trouble of doing all of the things necessary to cut costs. There is not sufficient incentive for him to strive for greater productivity out of his employees, to keep a careful inventory control, to eliminate non-productive operations or to carry on similar cost-cutting operations, when the retail price at his store can be no lower than the retail price at the most inefficient store and he knows that at the other stores the prices will be no lower than his.

In this sense, the resale price maintenance laws are "anti-efficiency" measures. And, by the same token, they are "anti-consumer" measures. They represent the negation of the spirit of enterprise under which the man who builds a better or cheaper mousetrap is entitled to have the

world beat a path to his door. Just as Henry Ford was permitted and encouraged to pass on to the consumer the benefits of the mass-production system, so also should the independent druggist who wants to improve his efficiency and thereby gain a bigger trade be permitted to do so.

In contrast to the resale price maintenance laws, the Robinson-Patman Act does recognize the principle of efficiency. Under that Act, the cost defense is a complete defense. That is to say, it permits price discriminations which reflect savings in costs. Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, reads:

> Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered.

In short, the one form of protection obtained by small business, resale price maintenance, may be said to be anti-competitive and anti-efficiency, whereas the other, the Robinson-Patman Act, may be said to be pro-competitive and pro-efficiency.

Suggested Amendment to the Clayton Antitrust Act, as amended to meet the "fair trade" problem.

We have pointed out that it is the expressed opinion of the Commission that economic conditions are not the same at the present time as existed in 1937, which prompted the enactment of resale price maintenance legislation in the form of the Miller-Tydings Act. We have also pointed out that in our opinion the evil which the sponsors of resale price maintenance seek to remedy can more appropriately be dealt with through legislation prohibiting price discrimination than through resale price maintenance legislation. It is obvious to those of us who have given close study to the pending proposed resale price maintenance legislation that it will not reach the core of the problem its sponsors want eliminated. For example, during the course of the hearings on proposed resale price maintenance legislation before Committees in the House, a few weeks ago, many illustrations were presented by sponsors and supporters of the legislation showing that large and powerful tradesmen were selling merchandise at prices below the prices paid for similar merchandise by their small retailer competitors. It appears that such illustrations impressed members of the Committees of the House, and in fact the membership of the House. Therefore that portion of the record of the hearings in the House probably contributed substantially to the strong position taken in the House favoring resale price maintenance legislation.

We believe that faith in resale price maintenance legislation in that respect is misplaced. The proposed legislation cannot be relied upon to eliminate situations of that character about which complaints were made to the members of the House Committees. For example, the Federal Trade Commission, proceeded against Sears, Roebuck & Co. on a

complaint which charged that Sears was selling sugar at prices below cost. In that connection Sears advertised "You save 2 to 4 cents on every pound" (258 Fed. 307). After the Commission, on the basis of the record, found that Sears had sold sugar below cost, it concluded its case and in one provision of its order commanded Sears to cease selling sugar below cost. The Court set aside that portion of the Commission's order and in so doing stated: "We find in the statute no intent on the part of Congress, even if it has the power, to restrain an owner of property from selling it at any price that is acceptable to him or from giving it away."

Now what does that problem have to do with the problem before you? Simply this. Sugar and many other staple items sold at retail in the many thousands of grocery and drug stores throughout this country are available in packages with and without trademarks. Some bear the private labels or trademarks of the retailer. In such situations the retailer under the proposed legislation pending before you would be as free to sell at retail such merchandise at prices below cost as the Court informed us Sears was free to sell or give away its sugar. Of what consolation would it be for the sponsors and supporters of the pending proposed retail price maintenance legislation to awake to the realization that they have secured approval of the legislation, but without effect on the situations about which they appear to be most concerned?

We have stated that we believe the faith of the small businessmen in resale price maintenance legislation is misplaced. That thought is based in part upon the kind of situation described as follows:

> A manufacturer of a nationally-advertised and trademarked items sells it for $8.00 to small independent retailers. The manufacturer requires such retailers under resale price maintenance law to resell such item at retail at $12.75. At the same time the manufacturer is selling the same item to a large chain retailer at $6.00. In the latter instance the item bears the private brand of the large chain retailer. The large chain retailer resells the item at $8.00, in competition with the small independent retailers who are selling the item bearing the manufacturer's regular and nationally-advertised brand. The public becomes aware of the fact that the quality of the item is essentially the same, whether sold under the manufacturer's regular and nationally-advertised brand or under the large chain retailer's private brand. As a result of the described circumstances trade is diverted from the small independent retailers where the item sells for $12.75 to the large chain retailer where it sells for $8.00. The small independent retailers cannot move to meet that problem. They are required to maintain their price at $12.75 under the resale price maintenance law and lose their customers to their large competitor who is unaffected by the resale price maintenance law. In that situation the small businessman has a resale price maintenance law but has lost his business.

We believe that it behooves small businessmen to make a closer study of this problem and what is likely to happen to them under these resale price maintenance laws before Congress takes final action on the pending proposals. We appreciate that for the businessmen and the Congress the problem is a serious one. We recommend a thorough re-examination of the problem before final action on the pending proposals.

It is the belief of the Commission that the best way of meeting this problem is to attack it at its source, that is, through an effective law against price discrimination. The Commission pointed out that the present law against price discrimination, the Robinson-Patman Act, differs from resale price maintenance laws in that (a) it gives to no one the right to fix the price at which goods shall be sold but rather places sellers under the obligation to treat all buyers on more or less equal terms and (b) it recognizes the principle of efficiency by containing a cost defense which is a complete defense.

While the principles upon which the Robinson-Patman Act is based are thus thoroughly in accord with the fundamental objectives of antitrust policy, it must nevertheless be recognized that it has weaknesses which seriously interfere with its effectiveness.

One of the recognized weaknesses in the Clayton Antitrust Act, as amended by the Robinson-Patman Act, is that in its present status it permits a seller to favor one buyer over a competing buyer through discrimination in price, even when the result is the destruction of competition, when it can be shown that the favored buyer had been offered an equally low price by a competitor of the seller, and such low price was met in good faith. That loophole in the law presents difficulties in its enforcement. When a large buyer such as any of the large retail grocery or drug chains is able to secure from any prospective supplier a low price and then reports that fact to a large supplier of that commodity, the latter is supplied with a basis for an argument for discriminating in price in favor of the large chain and against its small competing retailer.

If there is to be an effective law against the practice which gave rise to "Fair Trade," it is essential that as a first step the "good faith" loophole in the Robinson-Patman Act be closed. To that end consideration should be given to a recommendation which has already been made by the Commission to the House Judiciary Committee, namely, that good faith be retained as an absolute defense to a charge of price discrimination, where the effect of the discrimination is limited to the injury of a competitor but that good faith not be a complete defense where the effect of the practice is of such proportions as to result in a substantial lessening of competition.

Prohibiting Sales Below Costs at Retail. An amendment along the lines suggested above would provide an effective law against price discrimination where the discrimination involves commodities of like grade and quality. It would, however, fail to reach another type of discriminatory practice which is also of concern to the proponents of "Fair Trade,"

namely, discriminations as among different products, or, as it is sometimes termed, the "Loss Leader" practice. This is the practice of a seller, who handles many products or product lines, cutting prices on a single product or a single product line, with only an insignificant loss to himself, but with disastrous losses to the small competitors who depend heavily on those particular products subjected to the price cuts.

The present law places no really effective restraint upon discriminations as between different products or different product lines. Moreover, the practical problems of enforcement are such as to probably make it impracticable to devise as broad a restraint for discriminations among different products as is imposed against discriminations for a single product. It would seem feasible, however, to place some restraints on this type of discrimination, at least insofar as retail trade is concerned. Specifically, the Robinson-Patman Act could be amended to prohibit resellers from selling below cost at retail, with cost defined as invoice purchase price plus cost of delivery, excise taxes, and any other costs incident to acquiring ownership of the goods at the buyer's place of business.

It is recognized, of course, that in purely competitive markets the price of a commodity depends solely upon supply and demand; and such a competitive price may tentatively fall below both actual and replacement costs. The practical problem of enforcing any prohibition against below-cost selling must be, therefore, to distinguish between competitive price declines due to seasonal or excess inventories, distressed stocks, etc., on the one hand, and the deliberate, systematic and wilful manipulation of prices on the other hand. The present exemptions appearing at the end of section 2 (a) pertaining to changing marketability of goods, obsolescence of seasonal goods, etc., would appear to provide adequate qualifications to the general prohibition which is suggested.

Insofar as the question of good faith is concerned, the same defense suggested above to apply to the law against price discrimination should also apply to the proposed prohibition against sales below cost. That is to say, good faith would be a complete defense to a charge of selling below cost where the effect of the practice is limited to injury to a competitor, but good faith would not be a complete defense where the effect was so widespread as to injure competition.

Broadening the "Commerce" Provision. In order for the sales-below-cost amendment suggested above to be effective, it would be necessary to broaden the "in commerce" restriction which has been placed upon the Clayton Act and make the applicability of this law to commerce as broad as the applicability of the Sherman Act. Consequently, in the draft bill which is here submitted the words "or affecting" have been inserted between the words "in" and "commerce," now appearing in section 2 (a) of the Clayton Act.

In the draft new language is enclosed in brackets and proposed deletions of existing language is indicated by striking through such language.

A BILL

To amend an act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (15 U.S.C.A. Sec. 13), as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of an Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended is hereby further amended to read as follows:

Sec. 2 (a) That it shall be unlawful for any person engaged in / or affecting / commerce, in / or affecting / the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in / or affecting / commerce, / or to discriminate between or among different commodities or similar commodities of different grade and quality by reselling at retail in or affecting commerce any commodity at less than net cost of such commodity delivered to the retailer's place of business / where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, / That unless the effect of the discrimination or sale below cost may be substantially to lessen competition or tend to create a monopoly in any line of commerce it shall be a complete defense for a seller to show that / his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Giving Finality to Orders under the Clayton Act. Another important shortcoming of the Robinson-Patman amendment to the Clayton Act, as it now stands, is the requirement that under the Clayton Act the Federal Trade Commission itself must seek affirmance of its orders by the courts.

The Clayton Act is one of the two basic statutes enforced by the Commission, the other being the Federal Trade Commission Act. Orders to cease and desist issued by the Commission under the Federal Trade Commission Act, as amended by the Wheeler-Lea Act of 1938, automatically become final unless a petition for review is filed within 60 days.

There is no similar provision under the Clayton Act. The Commission's orders issued under that Act do not automatically become final within any specified period of time. Rather, in order to give finality to its orders under the Clayton Act, the Commission itself must seek affirmance by the Circuit Court of Appeals, a laborious, time-consuming and expensive procedure. Moreover, during the period between the issuance of the Commission's order and its affirmance by the court, the practice against which the order is directed can be, and frequently is continued, even though it has the effect of substantially lessening competition and promoting monopoly.

In order to secure uniformity of enforcement, the Federal Trade Commission has in the past recommended that its orders issued under the Clayton Act, like those issued under the Federal Trade Commission Act, automatically become final, unless a petition to review is filed within 60 days after the issuance of the order. This could be accomplished by an appropriate amendment to Section 11 of the Clayton Act, along the lines recommended by the Commission in its letter to the Chairman of the House Judiciary Committee, dated May 29, 1951, in the statement of the Chariman of the Federal Trade Commission before the Committee on Interstate and Foreign Commerce, House of Representatives, February 14, 1951, and in the Annual Report of the Federal Trade Commission for fiscal year ended June 30, 1951. We here submit the draft of a bill providing for what has been suggested in that respect:

A BILL

To amend an act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (38 Stat. 730), as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 11 of an Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U.S.C., title 15, sec. 21), is hereby amended to read as follows:

"SEC. 11. (a) That authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested: in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce.

"(b) Such authority shall be exercised as follows:

"Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7, and 8 of this Act, it shall issue an serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the commission or board, to intervening and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission or board. If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share, capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this Act, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a United States

court of appeals, as hereinafter provided, the commission or board may at any time, upon such notice, and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

"(c) The commission or board may apply to the United States court of appeals, within any circuit where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, enforcing, or setting aside the order of the commission or board. The findings of the commission or board as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section 1254 of title 28, United States Code.

"(d) Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said United States court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside: Provided, however, that petition to review an order of the Federal Trade Commission under this section shall be filed within sixty days from date of service of the Commission's order. A copy of such petition shall be forthwith served upon the commission or board, and thereupon the commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, enforce, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order, and the findings of the commission or board as to the facts, if supported by substantial evidence, shall in like manner be conclusive.

"(e) The jursidiction of the United States court of appeals to enforce, set aside, or modify orders of the commission or board shall

be exclusive; and such proceedings in the United States court of appeals shall be given precedence over cases pending therein, and shall be in every way expedited. No order of the commission or board or the judgment of the court to enforce the same shall in anywise relieve or absolve any person from any liability under the antitrust Acts.

"(f) Complaints, orders, and other processes of the commission or board under this section may be served by anyone duly authorized by the commission or board, either (1) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (2) by leaving a copy thereof at the principal office or place of business of such person; or (3) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

"(g) An order of the Federal Trade Commission entered pursuant to this section shall become final--

(1) Upon the expiration of the time allowed for filing a petition for review, if no petition has been duly filed within such time; or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the commission has been affirmed, or the petition for review dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the order of the commission has been affirmed or the petition for review dismissed by the court of appeals; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

"(h) If the Supreme Court directs that the order of the Federal Trade Commission be modified or set aside, the order of the commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the commission shall become final when so corrected.

"(i) If the order of the Federal Trade Commission is modified or set aside by the court of appeals and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly

filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the commission shall become final when so corrected.

"(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Federal Trade Commission for a rehearing, and if (1) the time allowed to filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the commission rendered upon such rehearing shall become final in the same manner as though no prior order of the commission had been rendered.

"(k) As used in this section the term 'mandate,' in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

"(l) After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Federal Trade Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: Provided, however, That the said person may, within sixty days after service upon him of said report or order entered after such a reopening, obtain a review thereof in the appropriate United States court of appeals and such order shall become final in the same manner and under the same terms and conditions as are provided for in this section as to original orders.

"(m) Any person who violates an order of the Federal Trade Commission entered pursuant to this section after is has become final and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the commission each day of continuance of such failure or neglect shall be deemed a separate offense.

"(n) Whenever the Federal Trade Commission has reason to believe that any person is liable to a penalty under this section, it shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought for the recovery of the penalties herein provided.

"SECTION 2. In the case of an order to cease and desist served by the Federal Trade Commission on or before the date of the enactment of this Act, the sixty-day period referred to in section 11(d) of the Clayton Act, as amended by this Act, shall begin on the date of the enactment of this Act."

The need for such legislation was demonstrated one week ago when the Supreme Court of the United States, on May 26, 1952, handed down its decision in Case No. 448, October Term 1951, Federal Trade Commission, Petitioner, v. The Ruberoid Company. There it was held that the courts under the present status of the law are without authority to issue orders commanding obedience with Commission's orders to cease and desist entered under the Clayton Act unless and until it has proved a case that the respondent has violated such order. In that connection the Court stated:

> "The Commission argues, first, that the provision authorizing it to apply for enforcement 'if such person fails or neglects to obey such order' is merely 'a Congressional directive to the Commission as to the circumstances under which it may go into court to seek enforcement,' which does not amount to a prerequisite to the court's granting of enforcement. We cannot subscribe to this argument, which disregards the unequivocal language of the statute and its consistent interpretation over the thirty-eight year period of its existence. Congress, in 1938, amended similar language in the Federal Trade Commission Act, so that the reviewing court is not plainly required, upon affirmance, to enforce an order based upon violation of that Act. The Commission has repeatedly sought similar amendment of the Clayton Act provisions involved in this case. We will not now achieve the same result by reinterpretation in the face of Congress' failure to pass the bills thus brought before it. Effective enforcement of the Clayton Act by the Commission may be handicapped by the present provisions, but that is a question of policy for Congress."

Justice Jackson who wrote the dissent in that case stated:

> "I see no real sense, when the case is already before the court and is approved in requiring one more violation before its obedience will be made mandatory on pain of contempt."

Mr. Chairman, in conclusion we wish to thank you and your Committee on behalf of the Commission for your patience and kindness in hearing these statements of why the Commission believes the proposed legislation pending with you is inappropriate and why it is believed the Congress should act in the particulars enumerated to strengthen the Clayton Antitrust Act, as amended.