Statement of

WILLIAM C. KERN

MEMBER OF THE FEDERAL TRADE COMMISSION

Before the

ANTITRUST SUBCOMMITTEE OF THE

COMMITTEE ON THE JUDICIARY,

HOUSE OF REPRESENTATIVES

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I am here in response to the request of your Chairman to make known my individual views on H. R. 11 and H. R. 8395.

H. R. 11

As I have already informed your Committee by my letter of March 1, 1956, I endorse H. R. 11. This letter gives a detailed analysis of the legal and philosophical reasons why I believe H. R. 11 should be passed. Rather than to reiterate those reasons at this time, I request that that letter be inserted in the record at this point.

H. R. 11 would largely overturn the Standard Oil of Indiana decision (Standard Oil Co. (Indiana) v. FTC, 340 U.S. 231 (1951)) by limiting the defense of "meeting competition in good faith" to situations where the consequence of the

price discrimination was somewhat less than a lessening of competition or a tendency toward creation of a monopoly. This would remove the grave potentialities for an impaired antitrust policy that are inherent in the Standard Oil holding, by reinstating the original concept of the Robinson-Patman Act.

The legislative history of that law makes it plain to me that a showing that a discrimination was the product of a good-faith effort to meet an equally low price of a competitor was intended as a mere procedural defense, to be employed solely for rebutting a prima facie case made out by proving a difference in prices: it was not meant as a means of enabling a discriminator to prevail when he had produced a substantial injury to competition or a tendency toward monopoly. This was the official view of the Federal Trade Commission throughout its Standard Oil proceeding; it was a premise of the original cease-and-desist order issued at the close of that proceeding; and it was the position taken by the Commission before the courts.

I am frank to admit that I believe the Supreme Court's holding in Standard Oil of Indiana to have been founded on a misapprehension of the legislative purpose behind the good-faith proviso and, indeed, behind the Robinson-Patman Act

generally. If I seem to treat the Court's judgment cavalierly, let me point out to the Committee that of the eleven jurists who performed the judicial review of the first Standard Oil order, six rejected the absolute-defense argument that emerged as the law of the case. These were Chief Justice Vinson, Mr. Justice Black, and Mr. Justice Reed, and Judges Kerner, Minton (now Mr. Justice Minton), and Duffy of the Seventh Circuit Court of Appeals. I do not recommend this counting of judicial noses as a sound method of jurisprudence, but I think it does serve to show that a respectable group of keen legal minds have found fault with the argument that the good-faith meeting of a competitor's prices was intended as a complete defense in the face of substantial lessening of competition or tendency toward monopoly caused by price discrimination.

Under the now-controlling Standard Oil decision, any price discrimination that is otherwise a violation of the Robinson-Patman Act is lawful as long as the discriminator can convince the trier of the facts that he made his discriminatory price "in good faith" to meet the price of a competitor. I use the words "now-controlling" advisedly, for every government agency is of course bound to a faithful observance of the mandates and interpretations of the highest court and there

can be no question that the Standard Oil of Indiana decision is settled law until Congress determines otherwise. It was felt by the five-justice majority of the Supreme Court, and the opinion is held in other quarters, that such a proposition is necessary for the preservation of competition. To my mind this makes a meaningless shibboleth of the word "competition". Whose competition? Where an undoubted competitive injury has ensued from an unjust differential in prices between competing buyers, do we not exalt and enhance the seller's right to compete to the disadvantage of those whom the antitrust laws were to protect when we grant the absolute defense of "meeting competition"?

It is all very well to pay our respects to the abstract virtue of competition -- all elements of the business world can do that in good conscience -- but it seems to me that every so often we ought to check our bearings and recall the purpose of the Robinson-Patman Act. That was a statute for the relief of small business, particularly small retailers. Now I cannot believe that it was in the minds of Senator Robinson and Representative Patman and their fellow legislators to enact a purportedly remedial bill that would perpetuate a major weakness of the Clayton Act and enthrone the competition of giant business entities at the expense of the competition of their small customers. Yet such is the present state of affairs under the law they enacted, thanks to the Standard Oil decision.

If price discrimination is to be allowed as a defensive tactic of large sellers in competing with themselves or in attempting to crush upstart wild-catters, irrespective of the injury thereby inflicted on those of their customers whom they do not favor, then I say that the law in its present form is promotive of monopoly, for its natural result will be to squeeze small business to the wall. The large seller who trades in many markets can compensate for his lower, discriminatory prices by charging higher prices elsewhere. Thus he has an unquestionably unfair advantage over his small competitors who operate in single markets. And what is more, his favored customers are benefited to the detriment, and possible ruination, of non-favored customers competing with them. Hence small business is assailed on two levels.

It was a basic assumption of the Robinson-Patman Act, and the Clayton Act as well, that price discrimination is an instrument of monopolistic growth. Why, then, should it be treated as a legitimate business method when it is practiced as a means of "meeting competition"? We must remember that it was the failure of the Sherman Act to arrest the march toward monopoly that led to these implementing statutes aimed at throttling monopoly in its incipiency. I fail to perceive the wisdom of a policy which broadly condemns price discrimination as subversive of competition and then turns around and

approves the same practice, provided that it is utilized as a means of countering the seller's competitor, when in either event competition among those least able to defend themselves is sacrificed. I would suppose, rather, that practices which lessen competition or which tend to create monopoly, in any line of commerce, should be suppressed without regard to the motivation of the actors.

Now it is of course true that since the Standard Oil decision there has been no Federal Trade Commission proceeding in which the good-faith defense has been successfully offered. Nevertheless the defense exists and is available whenever a discriminator can point to a competitor's individual prices which his own discriminatory price or prices were designed to meet in good faith (in contradistinction to the meeting of a competitor's entire pricing system, in which case the good-faith defense is not acceptable (FTC v. A. E. Staley Mfg. Co., 324 U.S. 746 (1945)). Whether or not competition has been met in good faith is basically a question of fact, not of law, and there can be no assurance that over the years the Federal Trade Commission as presently constituted or in the future will not find the defense to have been made out, on factual situations similar to those of recent proceedings in which it was disallowed. I firmly believe that on so vital a question the business world is entitled to have the guide of a definite

policy embedded in clear statutory language. We must assume that most businessmen obey the law -- statutory and decisional -- without waiting for the Federal Trade Commission to institute proceedings. The Standard Oil decision transformed the procedural good-faith defense into an absolute defense. We cannot tell how many businessmen and their legal counsel have taken the Supreme Court at its word and have participated in discriminatory transactions, or have been deterred from complaining of the discriminations of others, in the belief that such acts were fully justified as a good-faith meeting of competition.

The proposed amendment would continue the good-faith plea as an absolute defense, as long as the effect of the discrimination would not be substantially to lessen competition or to tend to create a monopoly in any line of commerce. I take it that this would mean that the defense would be available in cases where, in the language of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, the discrimination only affects competition with a "person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

Although the precise difference between these two degrees of competitive injury is not spelled out, presumably the drafters of H. R. 11 understand the concepts "substantial

lessening of competition" and "tendency to create a monopoly" to involve more than a mere injury, destruction, or prevention of competition with an individual market trader. I would therefore look for the Commission and the courts to delimit these two types of injury case by case, requiring perhaps a higher degree of proof for the former than for the latter.

I am confident H. R. 11 is a just measure that will go far toward equalizing the competitive opportunities of small business, while permitting the more powerful elements of the commercial world to meet one another's competition by nondiscriminatory means or in situations where neither competition is substantially injured nor monopoly promoted.

H. R. 8395

I concur fully in Chairman Gwynne's statement in opposition to H. R. 8395, and since his statement covers completely the basis of such opposition, an extended statement from me on the bill would be tedious repetition.

However, I do wish to emphasize what I conceive to be the vital importance of one of these grounds and that is the danger of amending a statute which has, I believe, been judicially construed in harmony with the Congressional intent. I speak feelingly about the matter because as a trial attorney I was

down in the front-line trenches fighting the legal battles which made this judicial interpretation possible. I tried for the Commission the cases of Revlon Products Corporation, Docket No. 5685, Harley-Davidson Motor Company, Docket No. 5698, Anchor Serum Company, Docket No. 5965, and Dictograph Products, Inc., Docket No. 5655. The latter two cases were appealed to the courts and the cease-and-desist orders of the Commission therein were upheld by the Sixth and Second Circuits, respectively, in opinions I consider to be landmarks in the field of antitrust. Thus the most important contribution that I made during my service as trial attorney was to assist in bringing what I feel to be a clear-cut illumination by way of guiding precedents to Section 3 of the Clayton Act. I am deeply disturbed at the proposed amendment of Section 3. It may destroy this achievement. I fear that the present clarification will be beclouded by almost insoluble problems of interpretation. Those who seek to weaken, rather than strengthen, the antitrust laws will inevitably be the gainers from such a situation.

Moreover, may I point out that in two of the cases above mentioned, Harley-Davidson and Dictograph Products, respondents had not only violated Section 3 of the Clayton Act by entering into exclusive-dealing conditions, understandings and agreements, but they had also employed acts of intimidation, threats

and coercion which fell short of a violation of Section 3 but were charged as violations of Section 5 of the Federal Trade Commission Act. These charges were all sustained. This indicates that Section 5 of the Federal Trade Commission Act may constitute a far more appropriate vehicle for reaching much that is attempted to be reached under H. R. 8395.

Touching on another feature of the bill, may I say that as a citizen and as a taxpayer I strongly oppose the proposition that an unsuccessful plaintiff in an antitrust action should be paid costs and attorney's fees by the United States if the court shall have certified that the suit is founded upon probable cause. Whenever the Government undertakes the burden of supporting private litigants, everyone will be in court and no one will be happy about it but the lawyers. Small businesses as well as large would lose by the time-consuming nature of the vast amount of litigation engendered. Further than that, the procedures suggested by the bill for obtaining such a recovery would require a vast staff of additional lawyers within the Government legal framework. The clog upon legal processes would be unbearable. In my judgment the proposal is most unsound.

Again I say that I share fully the views which my colleague Chairman Gwynne has previously expressed on this measure.