STATEMENT OF HENRY H. FOWLER

FOR THE MANUFACTURING CHEMISTS' ASSOCIATION, INC.

BEFORE THE

SUBCOMMITTEE ON ANTITRUST AND MONOPOLY

OF THE

SENATE COMMITTEE ON THE JUDICIARY

IN REFERENCE TO S. 11

MARCH 19, 1959

Mr. Chairman and Members of the Committee:

My name is Henry H. Fowler. I am a member of the firm of Fowler, Leva, Hawes, & Symington at 1701 K Street, N. W., Washington, D. C. My firm is general counsel for the Manufacturing Chemists' Association, Inc. I appear here today as a representative of that Association as I did during your 1957 hearings on the previous S. 11. I wish to thank you for this opportunity to testify again in connection with the present bill. I am authorized and directed by the Board of Directors of the Manufacturing Chemists' Association to record its strong opposition to the enactment of S. 11, for the same reasons that caused it to oppose the earlier bill.

I am also authorized by the Synthetic Organic Chemical Manufacturers Association of the United States to state that they are in complete concurrence with this statement and strongly support our position regarding the proposed legislation. This Association is a group of 85 companies engaged in the manufacture of synthetic organic chemical products, accounting for approximately 90% of total U. S. production of these products.

The Manufacturing Chemists' Association, Inc. was established in 1872 and is our oldest national chemical trade association. It is also the largest and only general chemical trade association in the United States. It has 173 members and represents more than 90% of the productive capacity of the United States chemical industry. According to estimates provided by the staff of the Association, over one-third of the membership of the Association is within the generally accepted category of small business.

Summary of Position

The Manufacturing Chemists' Association supports the basic principle of the Robinson-Patman Act, which it understands is designed to prevent price discrimination between customers unless justified by cost differences or required to meet the price of a competitor. It recognizes that this limitation on the right to compete has been established public policy since the enactment of Section 3 of the Clayton Act in 1914 and its further confirmation in the Robinson-Patman Act in 1936. It believes that this policy should continue to be applied under existing law by the courts and the Federal Trade Commission.

But the Association is concerned lest legislative attempts to alter this sound policy result in further restrictions on the right of free competition that will greatly diminish its effectiveness. The right to compete by meeting in good faith the price of a competitor for a given customer's trade is fundamental to a free economy. Preservation of this right has consistently been a basic purpose of our national policy. It should not be jeopardized by legislation such as S. 11 that makes unclear the circumstances in which a seller may so compete. The individual businessman must not be put in peril of being later found to have violated the law because of subsequent, unforeseeable effects of a price reduction given in good faith.

As Senator Wiley accurately said at the beginning of the 1957 hearings, the fundamental question in considering such legislation is whether the remedy will be worse than the disease. We believe that S. 11, in attempting to correct a few limited problems, will result in seriously restricting competition throughout the entire economy.

This Committee will undoubtedly wish to take into full account the impact of the proposed legislation on competition among manufacturing sellers. To assist the Committee in so doing, this presentation will be designed to provide relevant data regarding the chemical manufacturing industry so that the Committee may understand how the proposed legislation will adversely affect the public interest in the maintenance of competition throughout many areas of our economy.

Characteristics of the Chemical Industry Relevant to this Inquiry

1) The first characteristic of the chemical industry distinguishing it from many other major manufacturing industries is the diversity and complexity of competition at the primary or manufacturer-seller level. Nearly 8,000 chemicals are regularly produced in the United States. It is extremely difficult for any one company to gain exclusive control even for a short period over any appreciable

portion of this market. Competition in the chemical industry is manifested in four major areas: competition between products for similar markets, competition between processes, competition between alternative raw materials, and the customary sales competition between companies.

This diversity of competition among producers of chemicals makes it extremely difficult, if not impossible, to determine whether, in a given case, the meeting in good faith of a lower price of a competitor to a given customer without lowering the price to all "may substantially lessen competition or tend to create a monopoly" at the primary or manufacturer-seller level.

Moreover, chemicals manufactured by different producers are frequently so similar as to be entirely interchangeable in use. There is little reason for Customer X to continue to pay to Competitor A a higher price than he would have to pay Competitor B. This is not true to the same degree in other key areas of competitive manufacturing, such as the automobile industry, where products are differentiated by quality and consumer preference, so that price is only one factor in competition.

2) The second important characteristic of the chemical industry is the diversity of competition at the secondary or consumer level. I have said that nearly 8,000 different chemicals are currently being produced commercially. Many of these, like sulfuric acid or ammonia, have thousands of intermediate and end uses. Some of these uses are competing; some are not.

S. 11 would thus require a manufacturer who sells a basic chemical to evaluate not only the impact of the price advantage to Customer X over the competitors of Customer X in the various product lines in which Customer X may use the basic material sold; he must also calculate the impact down to the second tier of the customers of Customer X and, perhaps, through a third or fourth tier. It is impossible for him to determine with any degree of certainty whether the effect of his action to meet in good faith the price of his competitor "may be substantially to lessen competition."

3) The third important characteristic of the chemical industry today is the major challenge it faces from the increasing importation of foreign chemical products. These imports are of two basic types: relatively low-priced chemicals having many general uses, which are imported in bulk; and smaller quantities of high-priced chemicals having highly specialized uses.

The principal threat posed by these imports is not that they compete with domestic products on a nationwide scale, but rather that they saturate local markets near the point of importation. Because of the localized nature of this threat, it is not economically feasible for domestic producers to respond by lowering their price to all customers throughout their sales area. Their only adequate means of countering the challenge is to meet the lower imported price in specific local markets close to the point of importation.

Effect of S. 11 on the Chemical Industry

Let us now look at the effect that S. 11 would have on the chemical manufacturing industry, its customers, and the related economy.

There are five such major effects I wish to mention.

1) In the first place, S. 11 would lessen competition in the manufacture and sale of chemicals by reducing price flexibility. It is frequently necessary, in order to compete successfully in many segments of the chemical industry, to preserve the freedom to sell to an individual customer at a price less than the price at which the product is sold generally in order to meet in good faith the price offered to that customer by a competing seller. It is important that a seller be permitted this flexibility while he reconsiders his whole price structure. He will be put under severe pressure to cut costs or to provide better service.

Consider for a moment what happens when chemical manufacturer A meets the price of Competitor B in good faith without simultaneously adjusting his price schedule to all other competing customers. First, the competing Customer X who receives the lower price gets an advantage which, in all likelihood, in whole or in part will be passed on down the line. Second, the other Customers Y and Z of Manufacturer A soon learn of the new price, and pressures develop to adjust the over-all price schedule. These pressures are increased if Competitor B manifests interest, not only in the single customer whom he is seeking to capture, but also in A's other customers in the market. As a result, Manufacturer A will be required to consider seriously a general price adjustment.

This disruption by the outsider, shaking prices down, is the way competition works, and the consumer receives the benefits. In the end, the over-all price structure in the area is likely to be adjusted, not by legislative fiat but through the natural workings of the economic system.

Any law or regulation that arrests this process creates price rigidity and very often thereby "lessens competition" or "tends to create monopoly." Insofar as the chemical industry is concerned, the proposed change in the law would damage and lessen competition at the manufacturing level by promoting rigid adherence to a single price system in the industry. This damaging effect would be felt by wholesalers and retailers, and, indeed, by all who use chemicals.

2) In the second place, S. 11 creates complete uncertainty for the manufacturer-seller of chemicals as to when he can meet a competitive price. The complexity of chemical competition and products at both the primary and secondary levels makes the approach contained in S. 11 particularly unworkable in this industry. The best-intentioned chemical manufacturer does not have time to conduct an extended inquiry to determine the legality of his proposed action. If he does, he will lose his customer. But if he guesses wrong, he can be treated as a lawbreaker and subjected to substantial treble damage actions. A law vitally affecting thousands of daily transactions must not be so indefinite.

For the past 23 years problems of interpretation have arisen in construing provisions of the present law. The working understanding of its operation which has been developed during this period would be overturned by passage of S. 11. The new uncertainties thus created would require another long period of time to resolve and would seriously hamper businessmen in the daily conduct of their business.

A major example of the uncertainty that would be thus created is the attempted distinction between the test of injury to a competitor and injury that may substantially lessen competition. We are fully aware of previous efforts in this Committee to indicate a difference between these two concepts.

Even if the distinction has a theoretical validity, its application remains wholly conjectural when applied to the sale of many chemicals. As four of the Senators on the Senate Judiciary Committee stated last year, in opposing S. 11:

> "This asserted distinction between a price which may 'lessen competition' and a price which may 'injure, destroy, or prevent competition' is not only fine spun and technical, but it seems to have escaped detection by the courts and the Federal Trade Commission in 21 years of enforcement of the Robinson-Patman Act." */

Representative Celler, Chairman of the House Judiciary Committee, has aptly foreseen that the inevitable consequence of this unworkable distinction will be to make the two tests synonymous, thus eliminating the good faith defense:

> "***The difficulty is that the courts have never distinguished between a 'substantial lessening of competition' and an 'injury to competition' with any person. In fact, in every case that has dealt with the Robinson-Patman amendment since it was passed in 1936, the courts have assumed that the two phrases were synonymous. Since nobody has ever attempted to distinguish these two phrases, the effect of the bill would be to eliminate the 2(b) proviso of good faith from the statute altogether." **/

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*/ Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, Report No. 2010, 85th Cong., 2d session, 28 July 1958, p. 31.

**/ 102 Congressional Record, June 11, 1956, p. 10038.

We recognize that the test proposed in S. 11 is appropriate to Sections 3 and 7 of the Clayton Act, prohibiting tying clauses and mergers. These questions arise infrequently and allow time for careful study. The same may often be true when a company is considering the competitive effect under Section 2 of a price to be offered initially to a given customer. But the question whether a company will meet a competitor's offer to one of its customers arises frequently and suddenly. It requires immediate decision. It is unrealistic to suggest that the same test as to competitive effect applied in Sections 3 and 7, or in the case of an initial sale under Section 2, should apply to meeting the price of a competitor.

3) Thirdly, S. 11 would hamper small and moderate sized chemical manufacturers in competition with manufacturers who are large mass producers or who produce their own raw materials. The small manufacturer must be free to meet the challenge of a distant larger producer who seeks to capture his best customer. If he is able to lower his price to that customer individually, he can continue to compete with his larger opponent. If, on the other hand, he is required by S. 11 or similar legislation to reduce his price simultaneously to all his other customers, he is likely to be unable to afford to continue in business. His only alternative under such legislation will be to abandon his best customer to the large competitor, with serious adverse effects upon his business. Moreover, as the Supreme Court recognized in the Standard Oil of Indiana case, the economic consequences to the competitors of that customer will be the same because the customer will still get the lower price from the large seller.

4) The fourth consequence of S. 11 would be to limit the sources of supply for buyers of chemicals. It is not merely manufacturers of chemical products who would be injured by passage of S. 11. Buyers of these products would also suffer, because the effect of this legislation would be to reduce the number of available sellers in the market.

The customers in the chemical industry would prefer to have more than one dependable source of supply. In fact, the more sellers available, the better for the buyer. Without the economic protection of the good faith defense, a buyer's sources of supply are always reduced by one or more when other sellers in the market cannot afford to extend their competitor's price to all their customers.

For example, suppose that Buyer A, who uses a substantial quantity of an intermediate chemical in his manufacturing process, buys that chemical from two small or moderate sized producers, B and C, located nearby. Suppose that subsequently an additional source of supply, Company D, comes into the market and offers to supply Company A's requirements at a lesser price than A is paying B and C. If B and C cannot afford to lower their general price level to meet the new price, as S. 11 would require, in order to retain a portion of A's business, the buyer is confronted by a serious dilemma. He must either continue to purchase part of his chemical requirements at a higher cost from the old suppliers B and C; or, if he wants to achieve maximum economy, he must give his entire business to the new single supplier D. By contrast, under the present law B and C would be free to meet D's price to A individually, and A could therefore enjoy the advantage of three suppliers at the lower price by splitting his business among them.

5) The fifth consequence of S. 11 would be to make it extremely difficult for the domestic chemical industry to meet the increasing challenge of foreign products. I have already described how a large proportion of these imported chemicals is marketed in areas near the points of importation. These markets, although frequently not large geographically, are extremely important. A domestic producer cannot afford to abandon them to low-priced foreign competition. But neither can the domestic producer afford, in order to meet the price of imports in New York City, for example, to reduce his price to all customers throughout the vastly wider East Coast area that some court or other tribunal may later decide to be competitive with the New York market.

Earlier testimony before this Committee demonstrates that this danger is not illusory. Representative Dorn, among others, appeared before this Committee at its previous hearings in 1957 to show that the same threat is found in numerous other industries. He pointed out that if domestic producers, in order to continue to compete in such important local markets, were obliged to lower their price to customers throughout a far wider sales area, they might easily be forced out of business altogether. Yet this is what S. 11 would require them to do. They would thus be deprived of their only economically feasible defense against low-priced foreign competition: the right, guaranteed to them under existing law, to meet the lower foreign price in specific markets where the threat exists.

Conclusion

In conclusion, let me repeat that the Manufacturing Chemists' Association is in sympathy with the underlying philosophy of those who sponsor this legislation. The Association contains many small businesses. We believe that small business should be given appropriate protection. But S. 11 fails to accomplish its purpose in two respects: First, it would do great injury to many small businessmen, both producers and distributors; and second, it would not achieve the policy it is designed to promote. It would not penalize the large coercive buyer depicted as the target of this legislation. Nor does it provide a workable yardstick for the countless daily sales transactions in which the question of meeting a competitive price demands immediate decision.

We believe strongly that S. 11 would weaken competition and injure small business. This result directly violates the philosophy of the antitrust laws that S. 11 is supposed to further. The New York State Bar Association, to take one persuasive example, opposed S. 11 on the specific ground that "the net effect of the bill is in fact to lessen competition and to promote monopoly." */ Competition would be reduced:

First, by causing prices to lose the flexibility essential to competition;

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*/ Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, March 1957, Part 1, p. 498.

Second, by placing excessive economic burdens on small sellers who cannot afford either to forego a major customer or to reduce prices to all customers;

Third, by limiting the sources of supply available to buyers;

Fourth, by causing nationwide sellers to abandon local areas to a lower-priced local seller rather than reduce prices over a wide area, thereby encouraging a local seller's monopoly;

Fifth, by encouraging sellers to deal exclusively with a single large buyer in order to avoid application of the law by eliminating competitive purchasers;

Sixth, by encouraging vertical integration of distribution facilities on the part of producers who are denied the right to meet lower prices offered to their jobbers by competitors; and

Seventh, by placing domestic industry at an increased disadvantage in competition with imported products.

It is both unwise and unnecessary to overturn existing law by drastic and far-reaching changes of unpredictable effect applying to the entire economy, only a small segment of which has sustained injury. It is particularly unwise to seek to do this when Congress and the courts have consistently found Section 2(b) in its present form entirely adequate to meet the over-all needs of our economy.

We believe that a law restricting the right to free competition is not consistent with wise public policy. The right to compete by meeting in good faith the price of a competitor should not be limited.

The policy of our nation has thus far consistently been to preserve and make workable a freely competitive system. This is the underlying premise of our economy. We believe deeply that the effect of S. 11 would be to restrict sharply the economic freedom that it has always been our purpose to preserve. For this reason we strongly oppose its enactment.

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