**STATEMENT OF COMMISSIONER PERTSCHUK
TO THE SUBCOMMITTEE ON
ANTITRUST AND RESTRAINT OF TRADE ACTIVITIES
AFFECTING SMALL BUSINESS**

September 9, 1982

I have voted to allow Mr. Campbell to testify so that the Committee could hear his views about Robinson-Patman Act and resale price maintenance enforcement. However, I wish to make clear that I disagree with both the economic philosophy of Mr. Campbell, as well as Chairman Miller and Antitrust Division Chief Baxter, in regard to these two areas, and with the antitrust enforcement strategies they appear to favor.

The law concerning resale price maintenance is quite clear. The Supreme Court has stated more than once in the last few years, in the Sylvania 1/ case in 1977 and again in the Midcal 2/ case in 1980, that resale price maintenance is per se unlawful. The Commission (Chairman Miller, dissenting) has also recently stated that resale price fixing is per se illegal. 3/

Congress in 1975 repealed the Miller-Tydings Act in order to end the practice of immunizing resale price fixing from antitrust scrutiny through state Fair Trade laws. This measure was advocated by the Ford administration in the name of fighting high

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1/ Continental T.V. v. G.T.E. Sylvania, Inc., 433 U.S. 36 (1977).

2/ California Retail Liquor Ass'n v. Midcal Aluminum, Inc. 445 U.S. 97 (1980).

3/ Russell Stover Candies, Inc., Docket No. 9140 (final order, July 7, 1982).

prices for consumer goods by spurring competition. The Senate Report for the bill repealing Miller-Tydings stated:

> Repeal of the fair trade laws was called for by President Ford, consumer groups, the Justice Department, the Federal Trade Commission, the Council on Wage and Price Stability, discount stores and smaller business associations. Editorials in newspapers across the country unanimously favored repeal.
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> Opponents were primarily service-oriented manufacturers who claimed retailers would not give adequate service unless they were guaranteed a good margin of profit. However, the manufacturer could solve this problem by placing a clause in the distributorship contract requiring the retailer to maintain adequate service. Moreover, the manufacturer has the right to select distributors who are likely to emphasize service. ...
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> Studies by the Department of Justice which were cited in a 1969 Economic Report of the President, indicate that the consumer would be saved $1.2 billion a year by the elimination of the fair trade laws. Updated for inflation this figure comes to $2.1 billion. Another study of the Department of Justice estimated that fair trade laws increase prices on fair traded goods by 18-27 percent. For example, a set of golf clubs that lists for $220 can be purchased in non-fair trade areas for $136; a $49 electric shaver for $32; a $1,360 stereo system for $915 and a $560 19-inch color television for $483.

We would do well to remember the results which followed from that action. Prices for many consumer goods dropped dramatically and discounting became a frequent practice for stereos, radios, luggage, and other consumer items.

Now, the principal antitrust officials appointed by President Reagan want to turn back the clock on these developments and to impose by administrative fiat a version of

ntitrust law at odds with Supreme Court opinions. I do not uestion the sincerity of their beliefs or their right to try to ersuade Congress to change the law. I do, however, have serious oubts about their authority to try to change the law on their wn.

A related disagreement I have with the Reagan dministration's policies concerns the distinction between llocation of resources to the most significant or egregious ases of law violations and adopting a policy which de facto mmunizes certain conduct which is unlawful. For example, both he FTC and Justice should commit more resources on national orizontal price-fixing cases than to local cases. However, to he extent that interstate commerce requirements are met, we ould never want to signal to potential price fixers at the local evel that they are immune from FTC or Justice scrutiny. The mall chance that they will be pursued, together with their clear nderstanding of the rules they must obey, result in widespread ompliance with the prohibitions on horizontal price-fixing.

Similarly, we should concentrate on resale price maintenance nd Robinson-Patman violations which are most significant and ompetitively harmful, as a matter of prosecutorial discretion. he Commission has done this, for example, in bringing obinson-Patman cases. Over the last decade, in particular, the ommission has focused on Robinson-Patman violations where more ignificant injury occurred. Some reports in the trade press, owever, suggest that many manufacturers are beginning to believe rom the public statements of federal antitrust officials that

they are effectively immunized from resale price maintenance or Robinson-Patman enforcement at the federal level. When Mr. Campbell or Chairman Miller or Mr. Baxter say they want to bring resale price maintenance or Robinson-Patman cases when they "make economic sense" or "harm consumers," it's hard to disagree with such an abstract proposition. The real question is whether that position amounts, in practice, to changing the law without telling the rest of us.

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