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THE WHITE HOUSE

WASHINGTON

JAN 23 1975

ACTION

MEMORANDUM FOR THE PRESIDENT

FROM: ~~ROY L. ASH~~

SUBJECT: Repeal of the Fair Trade Enabling Legislation;
i.e., Miller-Tydings Act and McGuire Act

Issue:

During discussions preparatory to the State of the Union address, the Justice Department strongly recommended that you propose repeal of the Federal legislation which permits States to establish "fair trade" laws. These laws, where they exist, permit manufacturers to establish the retail price at which their merchandise shall be sold. Senator Brooke introduced such repealing legislation toward the end of the 93rd Congress; however, no hearings were held. He has asked for Administration support for similar legislation which he intends to introduce in the 94th Congress.

Background:

Fair trade legislation was originally enacted in 1937, with the passage of the Miller-Tydings Act. This legislation, exempted from the antitrust laws (both the Sherman Act and the FTC Act) agreements between manufacturers and retailers specifying the price at which a product would be sold. Without this legislation, such agreements would be per se illegal price fixing.

Immediately following enactment of Miller-Tydings many State laws were passed which contained "nonsigner" clauses, making a pricing contract between a manufacturer and any reseller binding upon all others reselling the same product.

The Supreme Court ruled in 1951 that Miller-Tydings did not exempt such nonsigner clauses from the antitrust law. Consequently, great pressure was put on the Congress resulting in the passage of the McGuire Act in 1952 which in effect overturned the Supreme Court decision.

Such laws have a number of negative consequences. Fair trade price lists are often used by manufacturers in both fair trade and non-fair trade ("free") States. In the free States, the lists are often utilized as "suggested retail price" lists. There is some indication that these prices are frequently adhered to in free States as well as fair trade States, thus creating a spillover effect of the higher fair trade prices.

In addition, these practices encourage other clearly illegal collective restraints, frequently giving rise to agreements among competing wholesalers, competing retailers, and among manufacturers competing at different distribution levels. Fair trade prices introduce undesirable rigidities into the retail price structure since retailers are unable to respond to special market conditions, changing costs of doing business, and new levels of competition. Finally, there is some evidence that fair trade practices contribute both to the maintenance of inefficient wholesalers and retailers and to excess capacity and costs in the distributional chain.

For these and other reasons, there has been a substantial erosion of State fair trade laws in recent years. In ten States, these laws have been eliminated altogether; in others, the nonsigner clauses have been repealed or declared unconstitutional. Nevertheless, 36 States still authorize resale price maintenance. Of these, 14 still retain the nonsigner provision. (These 14 States, which include New York, California, New Jersey, Illinois and Ohio, comprise almost half of the population in the country.)

In addition, fair trade policies have been abandoned by many manufacturers. It is estimated, however, that approximately 7% of the total U. S. retail sales are still covered by fair trade, including such commodities as cameras

and photographic supplies, clocks and watches, liquor, books, sporting goods, small appliances, auto supplies, hardware, clothing and shoes. The total value of all goods sold under fair trade is estimated to be as high as \$35 billion. There is a consensus among economic observers that fair trade practices result in higher prices. In fact, the purpose of fair trade practices is to maintain a minimum retail price. Although quantifying this cost is somewhat difficult, the Council of Economic Advisors estimates the annual cost to be \$1.5 billion. Other estimates have stated that the potential savings to consumers from repeal could be as high as \$7.0 billion.

Elimination of fair trade would contribute to the fight against inflation, and would not appear likely to create serious adverse consequences, even for traditional retailers. Where States have eliminated these laws, the negative impacts have been modest and manageable. In addition, fair trade has been completely abandoned over the last two decades by Canada, Sweden, Denmark and France, and largely banned (with some exemptions) in England, Japan and the Netherlands. The experience in these countries has been favorable, with limited dislocations and price levels falling from 10-20 percent on most items. Recent surveys in this country have indicated price differentials on some commodities may be as high as 35% between fair trade and free States. While repeal of these laws will be seen to disadvantage some small retailers and some manufacturers which believe strongly in the use of fair trade practices to protect their public image, in fact the impact on individual firms will be minimal.

Efforts to repeal the Federal enabling legislation have been made in the past without success. These efforts did not, however, have the unified support of the Administration then in office, and the necessary public consensus did not exist. The public climate today is considerably different, as more and more attention is focused on high prices and their causes. Recent statements calling for repeal by persons within and outside the Administration (the Attorney General, the Assistant Attorney General, the FTC Chairman, Forbes Magazine, etc.) have met with virtually unanimous public support. Congressional support for repeal can be expected from the tradi-

tional advocates of antitrust and those interested in reducing government intervention in the free market.

Options:

- (1) Announce the Administration's support of Senator Brooke's proposed legislation. This would fit with the Administration's economic program, adding to the general thrust of regulatory reform in freeing markets from non-justified rigidities.
- (2) Do not support repeal of the fair trade enabling legislation.

Decision:

Option (1) MRJ

Supported by: Justice,
Treasury, Commerce
HEW (Office of Consumer
Affairs), CEA, OMB,
COWPS, SBA

Option (2) _____

See Me _____