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FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

OFFICE OF
THE CHAIRMAN

COMMISSION AUTHORIZED

January 17, 1986

Honorable Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

Thank you for the opportunity to comment on S. 1849, a bill to "protect consumers and franchised automobile dealers from unfair price discrimination in the sale by the manufacturer of new motor vehicles, and for other purposes." For the reasons set forth below, the Federal Trade Commission ("Commission") opposes enactment of this legislation.

I. Background

Section 102 of S. 1849 would require that manufacturers of automobiles or trucks 1/ sell or lease all similarly equipped new vehicles of the same model to all persons at the same price. Such price would be defined under § 101 to "include" incentives such as discounts, rebates, promotional services, additional equipment, and other inducements or benefits provided by the manufacturer to the person purchasing from the manufacturer or to the ultimate purchaser. 2/ In addition, the bill would require that all new vehicles carrying such incentives be offered to all ultimate purchasers, that dealers be notified in advance of such incentives, and that all such incentives remain in effect for a minimum of fourteen days.

Section 103 of S. 1849 would provide for several exceptions to the bill's requirements. Sales by a manufacturer to another manufacturer, to non-dealer employees of the manufacturer, to government agencies, to the American Red Cross, and to dealers purchasing demonstration vehicles would be specifically exempt.

1/ Manufacturers would be defined under §101(3) to include middlemen who purchase vehicles primarily to sell to others, who in turn sell to ultimate purchasers.

2/ "Ultimate purchaser" would be defined under §101(6) to mean "with respect to any new automobile or truck, the first person who purchases or leases such new automobile or truck for purposes other than resale."

In addition, in various circumstances, the bill's requirements would not apply to extensions of credit to ultimate consumers or to dealers.

The Commission's primary objections to S. 1849 are that the bill: (1) could hinder rather than aid the competitive process and, therefore, harm consumers; (2) could create an overly broad class of potential private plaintiffs; and (3) could encourage the manufacture of vehicles that contain accessories not desired by consumers. These objections are discussed below.

II. The Bill Could Hinder Rather Than Aid the Competitive Process and, Therefore, Harm Consumers

The stated purpose of S. 1849 is to protect consumers and franchised dealers from unfair price discrimination by the manufacturer. Existing federal law, however, prohibits sellers from discriminating in price between different purchasers when substantial injury to competition may result. Robinson-Patman Act §2(a), 15 U.S.C. §13(a). Unlike the Robinson-Patman Act, S. 1849 would ban all price differences without regard to their effects on competition. The bill would even prohibit manufacturers from discriminating in price between purchasers that do not in turn compete with each other. In fact, one apparent objective of the bill is to ban the allegedly widespread practice by motor vehicle manufacturers of selling new motor vehicles to fleet purchasers at lower prices or with more valuable incentives than are offered to dealers; it appears doubtful, however, that fleet purchasers, such as corporate fleet owners and rental companies, compete to any meaningful extent with dealers in the resale of new automobiles. In addition, S. 1849 apparently would not permit the defenses to a price discrimination suit, such as a showing that the lower price was justified by cost savings or was offered in good faith to meet the equally low price of a competitor, that are provided by the Robinson-Patman Act.

Unintended harm to the competitive process could result from the inflexibility of the proposed statute. For example, § 102(a) of the bill would appear to require a manufacturer to charge a single, uniform nationwide price to all purchasers and lessees. However, unlike the Robinson-Patman Act, S. 1849 apparently would not permit the manufacturer to show that a difference in price is justified by reduced transportation costs for delivery to a dealer closer to the factory. Thus, under this bill a dealer in Hawaii would arguably be entitled to sue a Michigan manufacturer for charging a higher price to that dealer than to one located a mile from the factory. It also appears that S. 1849 would bar

manufacturers from passing along any savings in selling or delivery costs to large volume purchasers, such as large rental and leasing firms that purchase thousands of vehicles a year. The Commission believes that the bill's absolute ban on price differences without regard to competitive effects or to cost savings would foster price rigidity and inefficiency in distribution, and ultimately harm consumers.

Under S. 1849, manufacturers would be prohibited from adopting a variety of pricing and incentive schemes that are procompetitive and presently lawful. To the extent that discrimination in sales, whether in terms of price, service or other dimensions of competition, is causing competitive injury, the Robinson-Patman and Federal Trade Commission Acts provide adequate means of addressing such problems.

III. The Bill Provides For An Overly Broad Class of Potential Private Plaintiffs

Section 104, the bill's enforcement provision, would provide that "[a]ny person may bring an action . . . to require compliance" (emphasis added) and seek damages not to exceed two times the value of "the manufacturer's incentive involved in the violation." Unlike the Robinson-Patman Act, S. 1849 contains no clear requirement that plaintiffs establish actual or threatened injury, or even that plaintiffs be purchasers of vehicles. If the bill would create a cause of action for persons who are not injured by violations of the bill, S. 1849 could result in the unjust enrichment of some persons while imposing large costs on manufacturers. In addition, if S. 1849 were enacted, persons who are injured by price discrimination could possibly recover damages under both the Robinson-Patman Act and S. 1849. There is no apparent justification for such cumulative damages as compensation for injury or as a penalty or deterrent for discriminatory prices.

IV. The Bill May Encourage the Manufacture of Vehicles that Contain Accessories Not Desired by Consumers

Finally, because the price discrimination prohibition applies only to "similarly equipped" new vehicles, the bill may encourage manufacturers to introduce minor physical differences, such as different accessories, in order to differentiate among vehicles and thus avoid the operation of S. 1849. The use of product differentiation to evade a statute, rather than in

response to consumer demand, is generally inefficient. While product differentiation used as an evasion tactic is also possible under the Robinson-Patman Act, 3/ S. 1849 leaves such little room for price differences (i.e., no cost justification or meeting competition defenses are allowed) that manufacturers may be more likely to resort to product differentiation techniques to circumvent S. 1849 than is the case with respect to the Robinson-Patman Act.

V. Conclusion

For the foregoing reasons, the Commission opposes the enactment of S. 1849. The absolute ban on price differences without regard to competitive effect would restrict the ability of manufacturers to adjust their price and incentive structures to competitive levels and would likely injure competition and consumers.

By direction of the Commission.

Terry Calvani
Acting Chairman

3/ That Act applies to the sale of commodities of like grade and quality. Robinson-Patman Act § 2(a), 15 U.S.C. § 13(a).