The Merchants' Association of New York
233 BROADWAY, WOOLWORTH BUILDING
NEW YORK

March 10, 1938.

Hon. William E. Borah,
United States Senate,
Washington, D.C.

Dear Senator Borah:

For your attention and consideration as a member of the Senate Committee on the Judiciary, there is enclosed a copy of our letter of this date to Hon. Joseph C. O'Mahoney, Chairman of the Subcommittee of the Senate Judiciary Committee, formally registering with the Subcommittee this Association's opposition to the O'Mahoney-Borah Bill, S. 3072, requiring the licensing of corporations. Attached to that letter is a copy of the statement adopted by the Board of Directors of this Association, relating to this legislation.

We, therefore, respectfully urge that the Judiciary Committee and its Subcommittee act adversely upon that measure.

Very truly yours,

THE MERCHANTS' ASSOCIATION OF NEW YORK,

By

Louis K. Comstock,
President.

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March 10, 1938

Hon. Joseph C. O'Mahoney, Chairman,
Subcommittee of Senate Judiciary Committee,
State Office Building,
Washington, D.C.

Dear Mr. O'Mahoney:

For several months The Merchants' Association of New York has been carefully studying the O'Mahoney-Borah Licensing Bill, S. 3072; H.R. 9589. As you know, the bill vitally concerns practically every member of The Association, as well as a large proportion of all the business organizations in this area. Because of the deep anxiety which the bill has caused the members of The Association, the Board of Directors considered and discussed the measure at its meeting which was held today. The Board decided unanimously at this meeting that the proposed bill should not become law.

We are enclosing with this letter a statement to this effect, which has been approved and issued by the Board of Directors of The Association. You will note that the last paragraph of the statement reads:

> "The revised O'Mahoney-Borah Bill as set forth in the Feb. 19, 1938, Committee Print of S. 3072 and in the Feb. 21, 1938, Mead Bill (H.R. 9589) should therefore be opposed, because it vests in the Federal Trade Commission dictatorial power of the most drastic and far-reaching character over every essential feature of the entire economic life of the United States."

As you know from previous correspondence with us, it was not possible for The Association to present its views at the public hearings of the Subcommittee. We request, therefore, that the attached statement as well as this letter be made part of the record of the Subcommittee's hearings.

The principal objections to this bill mentioned in the statement of the Board of Directors may be summarized as follows:

Although the bill purports to apply to corporations having gross assets of more than $100,000, the conditions imposed by the bill would extend its scope to corporations having gross assets of less than $100,000.

The jurisdiction of the Federal Trade Commission would extend beyond the limits of monopoly, restraint of trade, unfair or deceptive practices and would establish dictatorial powers over production, processing and distribution.

The bill would furnish the Commission with authority to revoke licenses without court trial.

The corporate requirements imposed would seriously and adversely affect the status of existing corporations. Those prohibiting a corporation from holding the stock of other corporations and preventing officers and directors from being stockholders or employees of any other corporation in the same business, are regarded as particularly drastic.

The requirement that a certificate be filed by the applicant for a license, stating that the corporation "intends to engage in commerce subject to all Acts of Congress regulating such commerce" would prevent it from asserting in the future its constitutional rights against provisions of the bill.

In addition to the foregoing statement of the Board, many opinions have reached The Association from its members. You will perhaps permit us to express to you the principal and dominating reasons why these individuals have indicated opposition to the bill. The most emphatic and often expressed objections are as follows:

The bill would result in centralized control of business, with practically unlimited authority vested in a government body to exercise life and death powers over business.

A vast bureaucracy would be set up for administering the proposed law and for checking the activities of business, which would be very extensive and would probably cost $50,000,000 annually soon after the bill became effective.

The bill employs and extends the anti-American principle involved in the policeman-prosecutor-judge combination, which is the antithesis of Anglo-Saxon conception of justice.

Business is still in a state of depression and begs for relief from unnecessary government interference. Anxiety and uncertainty are caused by the requirements of the proposed law, many of which are not only new and experimental in principle, but involve more and more dictatorial power and regulate the existence of an ever growing circle of individuals and activities.

The reasons for the proposed law given in Section I of the bill do not justify the revolutionary nature of this legislation. For example, one of these reasons is "commerce with foreign nations." This type of activity is at best only a small portion of the nation's business. Why introduce revolutionary laws to cover this small fraction of the total? Why not legislate against such evils as may exist by making laws which apply specifically to this field?

The apprehension which the proposed bill is causing among people in both large and small businesses can scarcely be exaggerated. It is the earnest hope of The Association that Congress will not pass this bill and that as a result of the recommendations expressed by responsible bodies representing groups of citizens, the Subcommittee will decide to report the measure unfavorably. If you do not make this decision, we sincerely hope that you will

drastically alter the bill and greatly limit the powers which would be conferred by it if adopted in its present form. The Association will be very glad to assist you in any way it can in suggesting and effecting changes which would make the proposed law more generally acceptable to business.

Respectfully yours,

THE MERCHANTS' ASSOCIATION OF NEW YORK,

Louis K. Comstock,
President.

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STATEMENT APPROVED AND ISSUED BY THE BOARD OF DIRECTORS,
THE MERCHANTS' ASSOCIATION OF NEW YORK
MARCH 10, 1938

CONCERNING THE PROPOSED
"CORPORATION LICENSING ACT OF 1938"
(O'MAHONEY-BORAH LICENSING BILL – S. 3072; H.R. 9589)

In 1936 Senator O'Mahoney introduced a bill (S. 10) requiring that before a corporation can engage in interstate commerce it must obtain a federal license subjecting it to drastic federal control as regards minute details of its corporate structure, employee relations, and trade practices. Hearings were held on this O'Mahoney Bill in 1936, and on Nov. 30, 1937, it was supplanted by another bill (S. 3072) sponsored jointly by Senator O'Mahoney and Senator Borah. So strong was the opposition to this O'Mahoney-Borah Bill that it was again revised on Feb. 19, 1938, and hearings are now in progress before a Subcommittee of the Senate Judiciary Committee on the Feb. 19, 1938, Committee Print revision of this O'Mahoney-Borah Bill. Meanwhile in the House of Representatives Congressman Mead on Feb. 21, 1938, introduced a bill (H.R. 9589) substantially indentical with the Feb. 19 Committee Print revision of the O'Mahoney-Borah Bill. This report, therefore, deals with this revised O'Mahoney-Borah Bill as set forth in the Feb. 19, 1938, Committee Print and in this Feb. 21, 1938, Mead Bill.

Sec. 3(a) of the revised bill provides that corporations of $100,000 gross assets or less do not have to obtain licenses from the Federal Trade Commission before engaging in interstate commerce, but Sec. 7 of the revised bill provides that it shall be unlawful for any corporation of any size to carry on interstate commerce without conforming to all the "licensing conditions" applicable to corporations of more than $100,000 gross assets "where the effect in or upon commerce (i.e., interstate commerce) may be to give corporations not so conforming a substantial advantage in competition with licensees under this Act."

The Supreme Court has held that operations far removed from interstate commerce may nevertheless have an effect in or upon interstate commerce, and it is therefore obvious that almost any corporation of $100,000 gross assets or less may be brought within the prohibition of Sec. 7 of the revised bill, on the ground that its effect in or upon interstate commerce may be to give to such corporations of $100,000 gross assets or less "a substantial advantage in competition with licensees under this Act."

Sec. 7 of the revised bill provides that the Federal Trade Commission can hold hearings and issue an order against any corporation engaged in interstate commerce, whether it has more or less than $100,000 gross assets, "subjecting it to the provisions of this Act in the same manner and with like effect as corporations required by this Act to be licensed," if the Commission after a hearing shall find that "any article or commodity is being produced, manufactured, processed, or distributed to retail dealers by such corporation in such manner as to interfere with effective handling of similar articles or commodities by any licensee, or in such

manner as to give to the articles or commodities so produced, manufactured, processed, or distributed competitive advantages over similar articles or commodities handled by licensees, thereby tending to defeat the purposes of this Act."

This extends the Federal Trade Commission's jurisdiction far beyond the limits of monopoly, restraint of trade, and unfair or deceptive practices, and vests in the Commission dictatorial power of the most drastic and far-reaching character over every operation in production, manufacturing, processing and distribution throughout the entire United States.

Sec. 8 (a) of the revised bill provides that the District Courts of the United States may revoke a license after a court trial instituted by the Attorney General acting upon the Federal Trade Commission's request, but Sec. 7 of the revised bill provides that the Commission can short-circuit this, and that without any previous court trial the Commission can hold a hearing and issue an order against any corporation engaged in interstate commerce, whether it be above or below the size "required by this Act to be licensed," "subjecting it to the provisions of this Act in the same manner and with like effect as corporations required by this Act to be licensed."

Sec. 4 of the revised bill provides that the Federal Trade Commission can hold a hearing on any corporation applying for a license, in which any applicant may, without any previous conviction or court trial, be accused by the Commission of any violation of the Sherman Act, the Clayton Act, or the Robinson-Patman Act, and the Commission after its own hearing on its own accusation must deny a license to the applicant if after such hearing the Commission finds in support of its own accusation.

The Federal Trade Commission must also deny a license to a corporation in any of the following circumstances:

(1) Whenever a female employee "who performs services approximately equivalent to those performed by male employees shall be discriminated against as to rates of pay or in rights granted or in any other manner" (see Sec. 5 (a)).

(2) Whenever a "person less than sixteen years of age shall be employed by the licensee," or a "person less than eighteen years of age shall be employed by it in a hazardous occupation, or at any other time than between the hours of 7 antemeridian and 7 postmeridian" (see Sec. 5 (b)).

(3) Whenever a corporation in any way falls short in its observance of its employees' "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection" (see Sec. 5 (c)).

(4) Whenever a corporation organized after the enactment of this Act shall have "its chief place of business" or its "executive offices" or "the meetings of its board of directors" outside the State "under the laws of which it is organized" (see Sec. 5 (e)).

(5) Whenever a corporation organized after the enactment of this Act shall hold the stock of any corporation other than its own subsidiaries (see Sec. 5 (f)).

(6) Whenever the stock of a corporation shall be issued for property or services, unless such issuance "has been authorized upon application to a competent court and under its order finding upon competent and specific proof that such stock has been or is to be issued on a fair valuation of such property or services" (see Sec. 5 (i)).

(7) Whenever any officer or director of a corporation, "unless otherwise provided herein," shall be a stockholder or employee of any other corporation engaged in the same business," or shall be "a director, officer or employee of any corporation which has advanced or loaned money or property to such licensee" (see Sec. 19).

Whenever the Federal Trade Commission, on its own accusation and hearing, finds that any corporation has violated any of the "licensing conditions" prescribed in the revised bill, the following consequences result:

(a) The Federal Trade Commission must revoke the corporation's license, if the corporation has more than $100,000 gross assets, and if the corporation is below this size and has no license the Commission must issue against it "an order subjecting it to the provisions of this Act in the same manner and with like effect as corporations required by this Act to be licensed" (see Secs. 3, 7, 8).

(b) Every contract made by the corporation in violation of any of these "licensing conditions" shall be void, and the corporation cannot "bring or maintain any suit or proceeding in any court of United States unless it is organized, conducted and managed" as required by these "licensing conditions" (see Sec. 16).

(c) Every corporation violating any of these "licensing conditions" "shall, upon conviction thereof, … be subjected to a fine not exceeding per centum of its capital stock or, a perpetual injunction against engaging in commerce or both" (see Sec. 18. The amount of the per centum is left blank in the Feb. 19, 1938, Committee Print of the revised O'Mahoney-Borah Bill and in the Feb. 21, 1938, Mead Bill).

(d) Every person who "shall form, operate or act ... for a corporation .... with the effect of violating" these "licensing conditions" "shall be subjected to a fine not exceeding $10,000," and if the violation is willful with intent of defrauding or violating any Act of Congress, to such fine and to imprisonment for not exceeding five years" (see Secs. 17 and 18).

The revised bill provides that before any license is issued the applicant must file with the Federal Trade Commission "a certificate duly authenticated by its officers that by vote of its board of directors it intends to engage in commerce subject to all Acts of Congress regulating such commerce or limiting or affecting the rights, powers or duties of corporations ... engaged therein" (see Sec. 3 (b)).

This provision effectively prevents any corporation which applies for a license from ever asserting in the future any of its constitutional rights against any of the provisions of the revised bill, or any of the provisions in any other legislation which Congress hereafter may enact "regulating such commerce or limiting or affecting the rights, powers or duties of corporations ... engaged therein."

The revised O'Mahoney-Borah Bill as set forth in the Feb. 19, 1938, Committee Print of S. 3072 and in the Feb. 21, 1938, Mead Bill (H. R. 9589) should therefore be opposed, because it vests in the Federal Trade Commission dictatorial power of the most drastic and far-reaching character over every essential feature of the entire economic life of the United States.

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