The original documents are located in Box 58, folder "1976/09/30 HR8532 Hart-Scott-Rodino Antitrust Amendments Act of 1976 (4)" of the White House Records Office: Legislation Case Files at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE
WASHINGTON

Katie: These are research copies of the original Anti-Trust veto message and statement which were given to Bob Hartmann's office.

Judy 10/2

to DJS
10/1 12:25 am

STATEMENT BY THE PRESIDENT

I am pleased to sign into law today H.R. 8532 -- the Hart-Scott-Rodino Antitrust Improvements Act of 1976. I am confident that this antitrust legislation can contribute to a more competitive and healthy American economy.

COMPETITION AND ANTITRUST POLICIES

I am proud of my Administration's record of commitment to antitrust enforcement. Antitrust is a major tool in achieving competition and my Administration has always considered competition to be the driving force of our economy. This country has become the economic ideal of the free world because of its dedication to the free enterprise system and to full and vigorous competition. Competition rewards the efficient and innovative business and penalizes the inefficient.

Furthermore, promotion of competition is consistent with political and social goals, such as limited and decentralized power, and best serves the interests of individual citizens. Under competitive conditions, economic power is fragmented and no one firm can control prices or supply. Political power is also limited and decentralized by our public policy which stresses reliance on competition because there is then no need for massive governmental bureaucracies to oversee business operations.

In a freely competitive market, consumers enjoy the opportunity to choose from a wide range of VARIED products. ~~of all sizes, kinds, and varieties.~~ Consumers, through their decisions in the marketplace, show their preferences and desires to businessmen who then translate those preferences into the best products at the lowest prices.

I firmly believe that the Federal Government must play two important roles in protecting and advancing the cause of competition.

First, the policy of my Administration has been to vigorously enforce our antitrust laws, through the Antitrust Division of the Department of Justice and the Federal Trade Commission. During an inflationary period, this has been particularly important in deterring price-fixing agreements that would result in higher costs to consumers.

Second, my Administration has been the first one in forty years to recognize an additional way the Federal Government vitally affects the ~~competitive~~ environment ~~in which~~ FOR business ~~operate~~. COMPETITION Not only must the Federal Government seek to restrain private anti-competitive conduct, but OUR Government must also see to it that its own actions do not impede free and open competition.

All too often in the past, the ~~Federal~~ Government has itself been a major source of unnecessary restraints on competition. ~~Many of our most vital industries have over~~

the years been subjected to pervasive regulation. Although regulation has been imposed in the name of the public interest, there is a growing awareness that the consumer is often the real loser. My Administration has taken the lead in sharpening this awareness over the past two years and will continue this effort.

I believe that far too many important managerial decisions are made today not by the marketplace responding to the forces of supply and demand but by the bureaucrat. In many instances a businessman cannot raise or lower prices, enter or leave markets, or provide or terminate services without the prior approval of a federal regulatory body. As a consequence, the innovative and creative forces of some of our Nation's major industries are suffocated by government regulation.

This is not the economic system that made this country great. Government regulation is not an effective substitute for vigorous competition in the American marketplace.

To be sure, in some instances government regulation may well protect and advance the public interest. But the time has come to recognize that many existing regulatory controls were imposed during uniquely transitory economic conditions. We must repeal or modify those controls that suppress rather than support fair and healthy competition.

DURING MY

Administration ~~'s competition policy has been a commitment to change, and we have set in motion a far-reaching regulatory reform program~~, important progress has been made both in strengthening antitrust enforcement and in reforming government economic regulation.

In the last two years, we have strengthened the Federal ~~[illegible]~~ antitrust enforcement agencies. The resources for the Antitrust Division and the Federal Trade Commission's Bureau of Competition have been increased by over 50 percent since Fiscal Year 1975. For the Antitrust Division, this has ~~represented~~ BEEN the first real manpower increases since 1950. I am committed to ~~continuing to provide~~ PROVIDING these agencies with the necessary resources to do their important job.

This intensified effort is producing results. The Antitrust Division's crackdown on price-fixing resulted in indictment of 183 individuals during this period, a figure equalled only once in the 86 years since enactment of the Sherman Act. The fact that the Division presently has pending more grand jury investigations than at any other time in history shows these efforts are being maintained.

To preserve competition, the Antitrust Division is devoting substantial resources to investigating anti-competitive mergers and acquisitions. At the same time, the Division is litigating large and complex cases in two of our most important industries -- data-processing and telecommunications.

The cause of vigorous antitrust enforcement was advanced when I signed the Antitrust Procedures and Penalties Act of 1974, making violation of the Sherman Act a felony punishable by imprisonment of up to three years for individuals, and by a corporate fine of up to $1 million.

Also, in December 1975, I signed legislation repealing Fair Trade enabling legislation. This action alone, according to various estimates, will save consumers $2 billion annually.

On the second front of reducing regulatory actions that inhibit competition, I have signed the Securities Act Amendments of 1975 and the Railroad Revitalization and Regulatory Reform Act, which will inject strong doses of competition into industries that long rested comfortably in the shade of federal economic regulation. Contrary to industry predictions, more competition has not led to chaos in the securities industry, and I am confident it will prove to be beneficial in our railroad industry.

My Administration has also sponsored important legislative initiatives to reduce the regulation of other modes of transportation and of financial institutions. An important element of my regulatory reform proposals has been to narrow antitrust immunities which are not truly justified. Although Congress has not yet acted on these proposals, I am hopeful that it will act soon. All industries and groups should be subject to the interplay of competitive forces to the maximum extent feasible.

A full measure of my commitment to competition is the Agenda for Government Reform Act which I proposed in May of this year. This proposal would require a comprehensive, disciplined look at ways of restoring competition in the economy. It would involve in-depth consideration of the full range of federal regulatory activities in a reasonable -- but rapid -- manner that would allow for an orderly transition to a more competitive environment.

This competition policy of regulatory reform and vigorous antitrust enforcement will protect both businessmen and consumers and result in an American economy which is stronger, more efficient and more innovative.

HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976

I believe the record of this Administration stands as a measure of its commitment to competition and the action I am taking today should further strengthen competition and antitrust enforcement.

This bill contains three titles. The first title will significantly expand the civil investigatory powers of the Antitrust Division. This will enable the Department of Justice not only to bring additional antitrust cases that would otherwise have escaped prosecution, but it will also better assure that unmeritorious suits will not be filed.

These amendments to the Antitrust Civil Process Act were proposed by my Administration two years ago, and I am pleased to see that the Congress has finally passed them.

The second title of this bill will require parties to large mergers to give the Antitrust Division and the Federal Trade Commission advance notice of the proposed mergers. This will allow these agencies to conduct careful investigations prior to consummation of mergers and, if necessary, bring suit before often irreversible steps have been taken toward consolidation of operations. Again, this proposal was supported by my Administration, and I am pleased to see it enacted into law.

I believe these two titles will contribute substantially to the competitive health of our free enterprise system.

This legislation also includes a third title which would permit State attorneys general to bring antitrust suits on behalf of the citizens of their states to recover treble damages. I have previously expressed serious reservations regarding this "parens patriae" approach to antitrust enforcement.

As I have said before, the states have authority to amend their own antitrust laws to authorize such suits in state courts. If a state legislature, representing the citizens of the state believes that such a concept is sound policy,

it ought to allow it. I questioned whether the Congress should bypass the state legislatures in this instance.

However, Congress has narrowed this title in order to remove the possibility of significant abuses. Earlier, I urged that the scope of this legislation be narrowed to price-fixing violations where the law is clear and where the impact is most directly felt by consumers. Given the broad scope of the bill, I also recommended that damages be limited to those actually resulting from the violations. The Congress addressed these concerns by confining the scope of the controversial provision of measuring damages to price-fixing violations. Thus, as a practical matter, enforcement efforts under this bill will be focused on hard core antitrust violations.

I have also been concerned about the provision that would allow states to retain private attorneys on a contingent fee basis, thereby encouraging suits against businesses in which the motivation would be attorney enrichment. The present bill has been revised to narrow these arrangements and has required Federal court approval of all attorneys fees.

These and other changes that have been made in this title have improved this legislation. In this form, it can contribute to deterring price-fixing violations. Price fixers must be denied the fruits of their acts, and effective remedies must be available to those injured by price fixing. The approach in this title, if responsibly enforced, can

aid in protecting consumers. However, I will carefully review the implementation of these powers to assure that they are not abused.

Individual initiative and market competition must remain the keystones to our American economy. I am today signing this major antitrust legislation with the expectation that it will contribute significantly to our competitive economy.

to DJS 10/1 12:25 GAm

TO THE HOUSE OF REPRESENTATIVES:

I am returning without my signature H.R. 8532 -- the Hart-Scott-Rodino Antitrust Improvements Act of 1976. While I had hoped to be able to sign sound antitrust legislation which was consistent with my policies of increased economic competition and strong antitrust enforcement, I cannot accept the "parens patriae" title which is in this bill.

Insert

COMPETITION AND ANTITRUST POLICIES

I am proud of my Administration's record of commitment to antitrust enforcement. Antitrust is a major tool in achieving competition and my Administration has always considered competition to be the driving force of our economy. This country has become the economic ideal of the free world because of its dedication to the free enterprise system and to full and vigorous competition. Competition rewards the efficient and innovative business and penalizes the inefficient.

Furthermore, promotion of competition is consistent with political and social goals, such as limited and decentralized power, and best serves the interests of individual citizens. Under competitive conditions, economic power is fragmented and no one firm can control prices or supply. Political power is also limited and decentralized by our public policy which stresses reliance on competition because there is then no need for massive governmental bureaucracies to oversee business operations.

Insert

I am opposed to the "parens patriae" concept because:

- The Federal Government would be giving state attorneys general antitrust powers, including novel and untested damage provisions, which their state governments have not authorized. While sponsors have argued that this concept would benefit consumers, I believe just the reverse would be true. Private lawyers would be the major beneficiaries through permitted contingency fee arrangements.
- Small businesses would be unable to cope with this law. Local manufacturers and service firms would be subjected to large nuisance suits they would not have the resources to defend.

O.M.B. Back-up material

In a freely competitive market, consumers enjoy the opportunity to choose from a wide range of VARIED products, ~~of all sizes, kinds, and varieties.~~ Consumers, through their decisions in the marketplace, show their preferences and desires to businessmen who then translate those preferences into the best products at the lowest prices.

I firmly believe that the Federal Government must play two important roles in protecting and advancing the cause of competition.

First, the policy of my Administration has been to vigorously enforce our antitrust laws, through the Antitrust Division of the Department of Justice and the Federal Trade Commission. During an inflationary period, this has been particularly important in deterring price-fixing agreements that would result in higher costs to consumers.

Second, my Administration has been the first one in forty years to recognize an additional way the Federal Government vitally affects the ~~competitive~~ environment ~~in which~~ FOR business ~~operate.~~ COMPETITION. Not only must OUR Government seek to restrain private anti-competitive conduct, but the Federal Government must also see to it that its own actions do not impede free and open competition.

All too often in the past, the [redacted] Government has itself been a major source of unnecessary restraints on competition. ~~Many of our most vital industries have over~~

the years been subjected to pervasive regulation. Although regulation has been imposed in the name of the public interest, there is a growing awareness that the consumer is often the real loser. My Administration has taken the lead in sharpening this awareness over the past two years and will continue this effort.

I believe that far too many important managerial decisions are made today not by the marketplace responding to the forces of supply and demand but by the bureaucrat. In many instances a businessman cannot raise or lower prices, enter or leave markets, or provide or terminate services without the prior approval of a federal regulatory body. As a consequence, the innovative and creative forces of some of our Nation's major industries are suffocated by government regulation.

This is not the economic system that made this country great. Government regulation is not an effective substitute for vigorous competition in the American marketplace.

To be sure, in some instances government regulation may well protect and advance the public interest. But the time has come to recognize that many existing regulatory controls were imposed during uniquely transitory economic conditions. We must repeal or modify those controls that suppress rather than support fair and healthy competition.

During MY Administration ~~'s competition policy has been a commitment to change, and we have set in motion a far-reaching regulatory reform program~~, important progress has been made both in strengthening antitrust enforcement and in reforming government economic regulation.

In the last two years, we have strengthened the Federal ~~government~~ antitrust enforcement agencies. The resources for the Antitrust Division and the Federal Trade Commission's Bureau of Competition have been increased by over 50 percent since Fiscal Year 1975. For the Antitrust Division, this has ~~represented~~ been the first real manpower increases since 1950. I am committed to ~~continuing to provide~~ providing these agencies with the necessary resources to do their important job.

This intensified effort is producing results. The Antitrust Division's crackdown on price-fixing resulted in indictment of 183 individuals during this period, a figure equalled only once in the 86 years since enactment of the Sherman Act. The fact that the Division presently has pending more grand jury investigations than at any other time in history shows these efforts are being maintained.

To preserve competition, the Antitrust Division is devoting substantial resources to investigating anti-competitive mergers and acquisitions. At the same time, the Division is litigating large and complex cases in two of our most important industries -- data-processing and telecommunications.

The cause of vigorous antitrust enforcement was advanced when I signed the Antitrust Procedures and Penalties Act of 1974, making violation of the Sherman Act a felony punishable by imprisonment of up to three years for individuals, and by a corporate fine of up to $1 million.

Also, in December 1975, I signed legislation repealing Fair Trade enabling legislation. This action alone, according to various estimates, will save consumers $2 billion annually.

On the second front of reducing regulatory actions that inhibit competition, I have signed the Securities Act Amendments of 1975 and the Railroad Revitalization and Regulatory Reform Act, which will inject strong doses of competition into industries that long rested comfortably in the shade of federal economic regulation. Contrary to industry predictions, more competition has not led to chaos in the securities industry, and I am confident it will prove to be beneficial in our railroad industry.

My Administration has also sponsored important legislative initiatives to reduce the regulation of other modes of transportation and of financial institutions. An important element of my regulatory reform proposals has been to narrow antitrust immunities which are not truly justified. Although Congress has not yet acted on these proposals, I am hopeful that it will act soon. All industries and groups should be subject to the interplay of competitive forces to the maximum extent feasible.

A full measure of my commitment to competition is the Agenda for Government Reform Act which I proposed in May of this year. This proposal would require a comprehensive, disciplined look at ways of restoring competition in the economy. It would involve in-depth consideration of the full range of federal regulatory activities in a reasonable -- but rapid -- manner that would allow for an orderly transition to a more competitive environment.

This competition policy of regulatory reform and vigorous antitrust enforcement will protect both businessmen and consumers and result in an American economy which is stronger, more efficient and more innovative.

HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976

I had hoped that the Congress would submit to me additional legislation to further strengthen competition and antitrust enforcement. However, the omnibus antitrust bill which I am returning unsigned contains three titles, two of which my Administration has supported and one which has caused me serious concern.

The first title would significantly expand the civil investigatory powers of the Antitrust Division. It would enable the Department of Justice not only to bring additional antitrust cases that would otherwise have escaped prosecution, but it would also better assure that unmeritorious suits will not be filed. These amendments to the Antitrust Civil Process Act were proposed by my Administration two years ago and I support them.

The second title of this bill would require parties to large mergers to give the Antitrust Division and the Federal Trade Commission advance notice of the proposed mergers. This would allow these agencies to conduct careful investigations prior to consummation of mergers and, if necessary, bring suit before often irreversible steps have been taken toward consolidation of operations. Again, this proposal is supported by my Administration.

I believe these two titles would contribute substantially to the competitive health of our free enterprise system.

Unfortunately, this legislation also includes a third title which would permit State attorneys general to bring antitrust suits on behalf of the citizens of their States to recover treble damages. I have previously expressed serious reservations regarding this "parens patriae" approach to antitrust enforcement.

As I have said before, the States have authority to amend their own antitrust laws to authorize such suits in state courts. If a state legislature, representing the citizens of the State believes that such a concept is sound policy, it ought to allow it. I do not believe that the Congress should bypass the state legislatures in this instance.

While questioning the basic parens patriae concept, I also urged Congress to provide adequate safeguards that would prevent abuses of the parens patriae authority. Although Congress narrowed this title in some respects, important safeguards were ignored.

The present bill requires the award of mandatory treble damages in successful parens patriae suits. The view that federal penalties were inadequate, which has been used to justify mandatory treble damages in the past, I believe is no longer valid given the substantial increase in these penalties which I have previously signed into law. For example, a business can be fined $1 million and its officers imprisoned for three years. While no one condones price-fixing, the present bill would require the courts, without any discretion, to award treble damages which could bankrupt some companies, thereby adversely affecting innocent employees, shareholders and the local economy.

Also, the present bill continues to allow private attorneys to be hired by State attorneys general on a contingency fee basis, although it does eliminate percentage fee arrangements. My Administration has urged a flat ban against any such arrangements. By allowing private attorneys to seek out cases, the bill bypasses a State government's critical role in setting priorities for its citizens and appropriating the funds necessary to protect them.

I believe that the elimination of these safeguards could open the door to multi-million dollar "nuisance" suits by private attorneys who often are the major beneficiaries in such suits. Although proponents of this legislation have alleged that it will benefit consumers, in my view, consumers will

eventually pay the bill in the form of higher prices, while the lawyers instituting such litigation reap large legal fees. Ironically, it is also small businesses which will be hurt since they frequently cannot afford the costly litigation and are forced to settle suits which larger companies could successfully defend.

Congress was aware that I would veto the parens patriae provisions had they reached my desk standing alone. However, I was confronted with the more difficult burden of weighing the benefits provided by the Antitrust Civil Process Act amendments and the pre-merger notice provisions against my strong belief that the parens patriae provisions are not a responsible way to enforce the antitrust laws and my fear that these provisions could be misused. I have decided that I cannot sign any legislation including these parens patriae provisions.

I am returning the Hart-Scott-Rodino Antitrust Improvements Act of 1976 unsigned with the expectation that Congress will promptly enact the first two desirable titles of this legislation and send them to me for signature. The Senate can do this quickly and simply before adjournment by passing the two bills (H.R. 13489 and H.R. 14580) sent to it by the House earlier this year. This action can assure responsible and effective enforcement of the antitrust laws, without providing for the untested and unwise parens patriae authority. I urge the Congress to reconsider H.R. 8532 and in its place to pass H.R. 13489 and H.R. 14580.

THE WHITE HOUSE

Rec. 9/25/76 12:52 pm

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: September 25 Time: 1020am

FOR ACTION: Paul Leach
Max Friedersdorf
Dick Parsons
Bobbie Kilberg
Robert Hartmann

cc (for information): Jack Marsh
Jim Connor
Bill Seidman
Ed Schmults

233 to Ltc 9-27 9:10 Gkm

to DJS 9-27 3:19 GAm

FROM THE STAFF SECRETARY

DUE: Date: September 27 Time: 500pm

SUBJECT:

H.R. 8532-Hart-Scott-Rodino Antitrust Improvements Act,1976

ACTION REQUESTED:

____ For Necessary Action
____ For Your Recommendations
____ Prepare Agenda and Brief
____ Draft Reply
X For Your Comments
____ Draft Remarks

REMARKS:

please return to judy johnston, ground floor west wing

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

James M. Cannon
For the President

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

SEP 23 1976

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill H.R. 8532 - Hart-Scott-Rodino Antitrust Improvements Act of 1976
Sponsors - Rep. Rodino (D) New Jersey and 8 others

Last Day for Action

September 30, 1976 - Thursday

Purpose

Broadens powers of the Department of Justice in conducting antitrust investigations; requires advance notice to Justice and the Federal Trade Commission of certain corporate mergers or acquisitions; and authorizes State attorneys general to file suits to recover damages incurred by the State's residents as a result of certain antitrust violations.

Agency Recommendations

Office of Management and Budget	Approval (Signing statement attached)
Federal Trade Commission	Approval
Department of Commerce	Does not recommend veto
Small Business Administration	Cannot support enactment
Department of the Treasury	Disapproval
Department of Justice	No recommendation received

Discussion

H.R. 8532 is a controversial antitrust bill that has been the subject of extensive negotiations between the Administration and the Congress. The first of the three titles in the bill resulted from an Administration proposal. The second is a congressional initiative which is now acceptable to the Administration since

certain objectionable provisions were deleted by the Congress. The third title (regarding parens patriae) has been strongly opposed by the Administration. While labor and consumer groups have supported H.R. 8532, there has been a great deal of opposition to the entire bill from the American business community, and overwhelming opposition to the parens patriae title.

The enrolled bill passed the Senate by 69-18 and the House by 242-138. In another significant vote, the House rejected a motion to recommit to the Judiciary Committee a bill just containing a parens patriae provision by 223-150.

Major Provisions

Title I - Antitrust Civil Process Act Amendments

Current law (the Civil Process Act) authorizes the Department of Justice to serve a "civil investigative demand" (CID) -- a pre-complaint subpoena -- on suspected violators of the antitrust laws, the so-called "targets." The CID helps the Department determine, in advance of filing a suit, whether in fact a violation has occurred. It may only be used to obtain documents and only from "other than natural" persons (e.g., corporations) that Justice has reason to believe are violating or have violated the law.

The enrolled bill would amend the Civil Process Act to authorize Justice to

-- issue CID's not only to "targets" of the investigation but also to (1) third parties (e.g., customers, suppliers, competitors) who may have information relevant to an antitrust investigation and (2) individuals (e.g., witnesses to a meeting) as well as business firms.

-- obtain answers to oral and written questions, as well as documents, from the CID recipients.

-- issue CID's relating to the investigation of mergers and acquisitions prior to their consummation.

-- authorize access by the Federal Trade Commission (FTC) to materials received by Justice in response to CID's.

H.R. 8532 would also provide certain safeguards to protect persons against governmental overreaching in the use of CID's. Anyone asked to give a deposition could be accompanied and advised by an attorney, who may advise his client, in confidence, to refuse to answer questions on the grounds of self-incrimination or any other lawful grounds. If a disagreement arises about the propriety of any question, a witness could refuse to answer, and the Department would have to obtain a court order to compel a response. A witness could obtain a copy of the transcript of his testimony unless, for good cause, the Assistant Attorney General in charge of the Antitrust Division only permits the witness to inspect the transcript.

This title of the bill is substantially similar to legislation submitted to the Congress by the Department of Justice, and would provide the Department with powers now possessed by the Federal Trade Commission and other Federal agencies. In a March 31, 1976 letter to Rep. Rodino, Chairman of the House Judiciary Committee, you indicated your "... support of amendments to the Antitrust Civil Process Act which would provide important tools to the Justice Department in enforcing our antitrust laws..." and urged "... favorable consideration" of this legislation.

Title II - Premerger Notification

H.R. 8532 would require companies with total assets or net sales of $100 million or more that plan to acquire companies with total assets or net sales of $10 million or more to provide 30 days advance notice to the Department of Justice and the FTC, if the acquisition results in the acquiring company holding either (1) 15 percent of the stock or (2) assets and stock in excess of $15 million in the acquired company.

The companies would have to supply FTC and Justice with documentary material and information relevant to the proposed acquisition. Twelve classes of transactions would be exempt from this requirement, including regulated industry and bank mergers, real estate acquisitions for office space, formation of subsidiary companies, and acquisitions exempted under FTC rules with the concurrence of the Assistant Attorney General in charge of the Antitrust Division.

Other provisions in this title would

-- require a 15 day advance notice period for cash tender offers;

-- authorize FTC or Justice to extend the 30 day notice period for an additional 20 days (10 days for a cash tender offer) and allow Justice and the FTC to terminate the notice period in individual cases; and

-- make anyone who fails to comply with this title liable to a penalty of not more than $10,000 a day.

Title II of H.R. 8532 would be effective 150 days after enactment of the bill, except that a provision authorizing the FTC to prescribe rules relating to this title would be effective immediately upon enactment.

The business community contends that because the values of stock, used for consideration in mergers and acquisitions, would fluctuate during the period of advance notice to Justice and FTC, there is a real danger that this title could disrupt legitimate business combinations. On the other hand, the Justice Department does not believe that existing law gives the Department an adequate opportunity to learn about and take action against mergers or acquisitions that violate the antitrust laws. Due to strong opposition by the Administration and others, a provision in earlier versions of the legislation that would have provided for an automatic injunction against the consummation of mergers and acquisitions by Federal enforcement authorities was deleted. (The Administration has not objected to this title of the bill since that provision was dropped.)

Title III - Parens Patriae

H.R. 8532 would authorize State attorneys general to bring suits in Federal district court on behalf of State residents for violations of the antitrust provisions of the Sherman Act. Treble damages would be awarded in successful suits and would either be distributed to individuals in a manner approved by the court or be considered a civil penalty and deposited with the State as general revenues. In price-fixing cases, damages could be proved in the aggregate by using statistical sampling or other measures without the necessity of proving the individual claims of, or amount of damage to, each person on whose behalf the suit was brought.

The Attorney General would be required to provide State attorneys general with (a) written notification of instances in which Justice has brought antitrust actions and he believes the States could bring action under this title on the same grounds, and (b) investigative files or other materials, to the extent permitted by law, which may be relevant to a course of action under this title.

While the bill would prohibit State attorneys general from hiring outside lawyers to be paid with a contingency fee based on a percentage of the settlement or recovery, it would allow the court to award "reasonable" fees to such lawyers which could be determined on a non-percentage contingency basis.

The amendments made by this title would not apply to any injury sustained prior to the date of enactment of this bill.

The proponents of this title claim that it is necessary in order to assist large numbers of consumers who may be injured by antitrust violations on a continuing basis although in individually small amounts (e.g., a million consumers might be overcharged an average of a penny a week for a 2 year period on a product like a loaf of bread). In such cases, it is argued, relief is almost impossible to obtain under present law, since individual antitrust law suits are out of the question and class action suits are usually determined to be unmanageable by the courts because of their size and complexity. Hence, the proponents state that "Title III is the legislative response to the present inability of our judicial system to afford equal justice to consumers for violations of the antitrust laws."

In a March 17, 1976 letter to Representative Rhodes, you indicated your "serious reservations concerning the parens patriae concept..." and said:

> "I question whether federal legislation is desirable which authorizes a state attorney general to sue on behalf of the state's citizens to recover treble damages that result from violations of the federal antitrust laws. The states have the ability to amend their own antitrust laws to authorize parens patriae suits in their own courts. If a state legislature, acting for its own citizens, is not convinced the parens patriae concept is sound policy, the Administration questions whether the Congress should bypass the state legislatures and provide state attorneys general with access to the federal courts to enforce it."

You also indicated your concern over specific provisions of the legislation then being considered in the House, as follows:

-- "The present bill is too broad in its reach and should be narrowed to price fixing violations." (H.R. 8532 is not limited to price-fixing but covers all violations of the Sherman Act.)

-- "... the Administration is opposed to mandatory treble damages awards ..." (H.R. 8532 authorizes treble damages.)

-- "The Administration opposes extension of the statistical aggregation of damages... to private class action suits..." (H.R. 8532 does not extend such techniques to private class action suits.)

The Administration had also opposed a provision in earlier versions of this legislation which would have allowed State attorneys general to hire private lawyers to assist them in parens patriae cases and compensate those attorneys by a contingency fee based on a percentage of the settlement or recovery. As noted above, while contingency fees per se are not permitted under the enrolled bill, courts can award fees to such lawyers on a non-percentage contingency basis.

Congressional and business opponents of this title have asserted that it would (1) overburden the Federal courts with needless litigation, (2) enhance the power of politically ambitious State attorneys general to pillory corporations in highly publicized actions, and (3) impede business growth due to firms' impaired access to financing when exposed to huge contingent liabilities by massive antitrust litigation.

Agency Views

Secretary Simon, in a memorandum to you which is enclosed with the Treasury views letter, strongly recommends that you veto the enrolled bill because of title III. He objects to the provisions which extend its scope beyond price-fixing to the Sherman Act, allow mandatory treble damages, and permit certain contingent fee arrangements for private lawyers. The Secretary argues that:

> "These provisions would give State Attorneys General, nearly all of whom are elected officials (and many of whom are openly competing with other elected State officials), an open invitation to pursue antitrust claims with very little risk to them or the State governments and with a great likelihood of political gain for themselves. State governments would incur little cost in prosecuting antitrust claims against business firms since they would be able to retain private counsel under contingent fee arrangements. Since both elected

> officials and the private antitrust bar would stand to gain from prosecuting parens patriae actions, the potential for abusing this power by promoting unfounded antitrust litigation against business concerns seems manifest.
>
> Business firms [especially small businesses] confronted with such litigation may be forced to settle, irrespective of the merits of the State's case, because they cannot obtain a clean auditor's opinion so long as they are exposed to such a magnified contingent civil liability.
>
> Title III also represents an unwarranted intrusion of the Federal Government upon the States."

The Small Business Administration (SBA) also "cannot now support enactment of H.R. 8532." In its attached views letter, SBA argues that "... smaller firms may become leading victims of parens patriae claims under Title III. A smaller firm ... may be unable to stand the risk of a potentially astronomical exposure. This type of litigation is inherently conducive to 'blackmail settlements,'..." SBA also claims that small business firms, faced with parens patriae actions, may have their ability to obtain financing severely curtailed.

While the Commerce Department does not recommend a veto of H.R. 8532, it has a "deep concern as to the potentially adverse effects that certain provisions of Title III may have upon the business community and consequently upon the economy." The Department notes in its views letter that Titles I and II of the enrolled bill have been passed by the House in essentially identical form as separate bills which are now pending in the Senate and could be passed before the end of the current session.

FTC recommends approval of the enrolled bill and states that it "believes that Title III could provide an effective deterrent to Sherman Act violations in general and price-fixing in particular."

No recommendation has been received from the Justice Department on H.R. 8532 and we have been informally advised by Justice staff that the Attorney General will personally convey his views to you on this matter.

OMB Recommendation

The issue presented by the enrolled bill is whether the parens patriae title, even though somewhat narrowed in scope and effect to meet certain Administration objections, still represents such poor public policy that it justifies disapproving the bill despite the other desirable features of H.R. 8532.

This enrolled bill presents a very close call. On balance, we reluctantly recommend your approval. While it would be preferable if H.R. 8532 did not contain title III, Congress has narrowed the parens patriae provisions in response to Administration objections by (1) confining the statistical aggregation of damages to price-fixing cases, and (2) requiring Federal court approval of arrangements for paying attorneys fees on any contingent fee basis. The more focused and restricted title III, plus the desirable features of title I and the now unobjectionable provisions of title II, outweigh, in our view, the potentially harmful effects of the parens patriae provisions.

Attached for your consideration is a draft signing statement.

Paul H. O'Neill
Acting Director

Enclosures

SIGNING STATEMENT

I have today signed into law H.R. 8532, the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

This bill contains three titles. The first title will significantly expand the civil investigatory powers of the Antitrust Division. These amendments to the Antitrust Civil Process Act originated with the Administration two years ago, and I am pleased to see that the Congress has passed them.

The second title of this bill will require parties to very large mergers to give the Antitrust Division and the Federal Trade Commission advance notice of the proposal. This title was not objected to by the Administration and I intend that it be carefully monitored in operation to assure that it does not hamper legitimate business combinations.

This antitrust bill also includes a third title, about which I have previously expressed serious reservations. It would permit State attorneys general to bring antitrust suits (parens patriae suits) on behalf of the citizens of their States to recover treble damages.

The States have ample authority to amend their own antitrust laws to authorize such suits in State courts. I question whether the Congress should bypass the State legislatures and provide State attorneys general with access to Federal courts to enforce Federal laws.

Congress has, however, narrowed this title so as to reduce the possibility of significant abuses. I had urged that the scope of this legislation be narrowed to price-fixing activities where the impact is most directly felt by consumers. The Congress responded to this suggestion by confining the scope of the most controversial provision, which would authorize the statistical aggregation of damages, to price-fixing violations. Thus, this bill will be confined to hard-core antitrust violations.

I was also concerned about the provision that would allow States to retain attorneys on a contingent fee basis, thereby encouraging suits against business in which the principal motivation would be enrichment for attorneys rather than restitution for the consumer. The present bill, while not prohibiting all contingent fee arrangements, has proscribed those kinds that have been subject to most abuse. I remain concerned about this provision, but I think it has been improved.

With these and other changes that have been made in this title since its introduction, this legislation has been focused and limited. In this form, it may well prove the deterrent to price-fixing that it is supposed to be.

I am signing this major antitrust legislation with the belief that the parens patriae authority will be responsibly enforced and in the knowledge that the Antitrust Civil Process Act amendments and pre-merger notification provisions will strengthen Federal antitrust enforcement.

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE SECRETARY

SEP 23 1976

The Honorable James T. Lynn
Director, Office of Management
and Budget
Executive Office of the President
Washington, D.C. 20503

Dear Mr. Lynn:

This is in response to your request for the views of the Federal Trade Commission upon Enrolled Bill H.R. 8532, 94th Congress, 2d Session, an act "To improve and facilitate the expeditious and effective enforcement of the antitrust laws, and for other purposes."

H.R. 8532, the Hart-Scott-Rodino Antitrust Improvements Act of 1976, is a comprehensive measure containing three separate titles designed to increase the effectiveness of antitrust enforcement. Title I would expand the investigative authority of the Department of Justice to obtain information that is necessary or appropriate to the enforcement of the antitrust laws. Title II would create a mechanism to provide advance notification to the antitrust authorities of large mergers prior to their consummation. Title III would authorize State attorneys general to bring private treble damage actions on behalf of natural persons residing in their State for violations of the Sherman Act.

Title I would amend the Antitrust Civil Process Act of September 19, 1962 (15 U.S.C. § 1311) which authorizes the Antitrust Division to issue compulsory process (called a "civil investigative demand") to investigate violations of the antitrust laws prior to the filing of an action. H.R. 8532 would broaden the scope of this Act by authorizing the Division, through the use of a civil investigative demand, to investigate mergers and acquisitions prior to consummation, to obtain relevant evidence from natural persons and third parties, and to take oral testimony and written interrogatories. As expressed in its statement of May 7, 1975 regarding S. 1284, 1/ the Commission supports the effort to strengthen the investigative authority of the Department of Justice but defers to the Department with respect to the specific provisions of Title I.

1/ Statement of Lewis A. Engman, Chairman of the Federal Trade Commission before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee on S. 1284, May 7, 1975.

Of particular interest to the Commission is Section 103 of Title I which authorizes access by the Commission to materials produced in response to the Antitrust Division's civil processes. This section provides that the custodian of such materials may deliver copies to the Federal Trade Commission, pursuant to a written request, for use in connection with an investigation or proceeding under the Commission's jurisdiction. We believe that this provision will avoid duplication of effort by the antitrust enforcement agencies and is consistent with the current policy of the Commission and the Antitrust Division to share, where appropriate, information secured during investigation or trial of a civil matter.

Title II of H.R. 8532 would amend the Clayton Act (15 U.S.C. § 12 et seq.) to establish a premerger notification procedure which would require notification to the antitrust authorities and a 30-day extendible waiting period prior to the consummation of large acquisitions. The procedure would apply to stock or asset acquisitions between companies with net sales or assets of at least $100,000,000 and $10,000,000, which result in holdings of at least 15% or more than $15,000,000 in the stock or assets of the acquired company.

The Commission previously has expressed support for the concept of premerger notification, emphasizing the need for a reasonable and compulsory notice period prior to the consummation of large acquisitions. 2/ As it is doubtful whether the Commission now has the authority to require a waiting period through its current premerger notification program, 3/ it often has difficulty obtaining and analyzing information in time to challenge an unlawful acquisition prior to its consummation. After consummation, assets often become so commingled that divestiture may prove to be an inadequate remedy. Thus, the Commission believes there is a

---

2/ Statement of Lewis A. Engman, Chairman of the Federal Trade Commission before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee on S. 1284, May 7, 1975; Statement of Paul Rand Dixon, Acting Chairman of the Federal Trade Commission before the Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee, March 10, 1976; Letter of July 11, 1975, to the Honorable Philip A. Hart, Chairman, Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee.

3/ The Commission's present premerger notification program calls, generally, for 60 days advance notice of covered transactions;

need for a prenotification waiting period to enable the antitrust enforcement agencies to evaluate the information received with respect to a particular acquisition prior to its consummation.

Title III of the proposed legislation would amend the Clayton Act (15 U.S.C. § 12 et seq.) to authorize State attorneys general to bring civil actions, as parens patriae on behalf of natural persons residing in their State, to secure monetary relief for injury sustained by such persons to their property by reason of any violation of the Sherman Act. Although the Commission defers to the Department of Justice, which is charged with enforcement of the Sherman Act, for more detailed comments about this title, the Commission believes that Title III could provide an effective deterrent to Sherman Act violations in general and price-fixing in particular.

In view of the foregoing discussion, the Federal Trade Commission recommends Presidential approval of H.R. 8532.

By direction of the Commission.

Charles A. Tobin
Secretary

3/ (Cont'd)

but authority to enforce this requirement has been questioned. The almost universal compliance with this program, however, appears to indicate that it imposes no inordinate burden on affected companies.

THE UNDER SECRETARY OF COMMERCE
Washington, D.C. 20230

SEP 2 2 1976

Honorable James T. Lynn
Director, Office of Management
and Budget
Washington, D.C. 20503

SEP 2 2 1976

Attention: Assistant Director for Legislative Reference

Dear Mr. Lynn:

This is in reply to your request for the views of this Department concerning H.R.8532, an enrolled enactment

> "To improve and facilitate the expeditious and effective enforcement of the antitrust laws, and for other purposes,"

to be cited as the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

H.R.8532 contains three separate titles which (i) amends the Antitrust Civil Process Act (15 U.S.C. 1311 et seq.), (ii) amends the Clayton Act (15 U.S.C. 12 et seq.) by adding pre-merger notification requirements, and (iii) adds to the Clayton Act authorization for parens patriae actions by State attorneys general. In addition, the enactment officially designates the Sherman, Clayton, Wilson Tariff, and Webb-Pomerene Acts by those names.

By amendments to the Antitrust Civil Process Act, Title I of H.R.8532 expands the Justice Department's pre-complaint antitrust civil investigative powers by authorizing the issuance of civil investigative demands (CIDs) to obtain evidence from natural persons and third parties and to take oral testimony and written interrogatories, in addition to documentary evidence. It also authorizes the use of CIDs to obtain evidence for use in pending regulatory agency proceedings and to investigate mergers and acquisitions prior to consummation.

Title II would require 30-day pre-merger notification to the Justice Department and the Federal Trade Commission for mergers and acquisitions between two companies with assets or sales exceeding $100 million and $10 million, respectively, when such transactions involve either 15 percent of the stock or $15 million of assets or stock of the acquired company. Companies would also be required to submit specific economic data. Certain transactions, including those involving regulated industries, banking, real estate, subsidiary formation and non-voting stock, are exempted from the notification requirement. Tender offers are subject to special notification requirements.

Title III amends the Clayton Act to permit State attorneys general to recover treble-damages for violations of the Sherman Act on behalf of natural persons residing in their State. In actions involving price fixing, Title III provides that damages may be proved in the aggregate without separately establishing the fact or amount of each person's individual injury or damage. In addition to treble-damages, a court would be authorized to award to the State the cost of suit, including reasonable attorney's fees. Percentage contingency fees are prohibited; however, non-percentage contingency fees are authorized if determined by the court to be reasonable.

Although we have previously expressed reservations to certain provisions of Title I, the Department does not pose any objections to the enactment of Titles I and II of H.R.8532. The Department continues, however, to harbor deep concern as to the potentially adverse effects that certain provisions of Title III may have upon the business community and consequently upon the economy.

Specifically, our concern is that the potential damage exposure posed by parens patriae suits under Title III may contribute substantial uncertainty to the business community and cause significant problems in such areas as capital formation. There is also the issue of survival for many firms that are subject to massive, unforeseen damage awards.

Much of the uncertainty is due to the requirement for mandatory treble damage awards rather than single or actual damages as the President strongly recommended in his letter of March 17, 1976 to Congressman Rhodes. The awarding of treble damages, based on aggregated estimates in the case of price fixing violations, raises the specter of damage recoveries of unlimited dimension that may be well beyond the ability of many businesses to pay.

Additional uncertainty stems from the availability of parens patriae suits to any violation of the Sherman Act, rather than just to price fixing violations as recommended by the President in his March 17 letter. The Sherman Act is often applied one day to conduct previously thought permissible at an earlier time. This is especially true in such contentious areas as the permissible scope of patent license restrictions, marketing arrangements and cooperative activities.

While the Department is not recommending a veto of H.R. 8532 because of the shortcomings of Title III, we nevertheless believe that the adverse effects that may result from these shortcomings should be seriously considered and weighed against the benefits to be derived. In this regard it should be noted that Titles I and II of the enactment have been passed by the House in essentially identical form as separate bills -- H.R. 13489 and H.R. 13131, respectively -- and are presently before the Senate. Thus, these titles of H.R. 8532 could be acted upon and passed by the Senate in the current session.

Enactment of this legislation would not involve any increase in the budgetary requirements of this Department.

Sincerely,

Edward O. Vetter

Edward O. Vetter

U.S. GOVERNMENT
SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF THE ADMINISTRATOR

SEP 2 2 1976

Mr. James M. Frey
Assistant Director for
Legislative Reference
Office of Management and Budget
Washington, D. C. 20503

Dear Mr. Frey:

This is in response to your request for the views of the Small Business Administration regarding H.R. 8532, an Enrolled Bill "To improve and facilitate the expeditious and effective enforcement of the antitrust laws, and for other purposes."

As sent to the President on September 16, 1976, the "Hart-Scott-Rodino Antitrust Improvement Act of 1976" included three major provisions:

Title I: Antitrust Civil Process Act Amendments

Authorizes the Justice Department's Antitrust Division to issue civil investigate demands (CIDs), in the course of investigating potential antitrust violations, to natural persons and third parties (such as competitors or suppliers) and to compel production of oral testimony and answers to written interrogatories. CIDs also could be issued in connection with investigations of planned mergers and regulatory agency proceedings.

Title II: Premerger Notification

Requires 30-50 days advance notice to the Antitrust Division and the Federal Trade Commission to allow investigation of mergers involving companies worth $100 million or more and companies worth $10 million or more, if such transaction involves acquisition of more than $15 million in stock or assets, or 15 per cent of the voting securities of the acquired company. Material filed with the Government under this provision would be exempt from disclosure under the Freedom of Information Act.

Title III: Parens Patriae

Authorizes state attorneys general or their retained private counsel to bring treble damage suits in Federal court on behalf of state citizens injured by violations of the Sherman Act. In cases involving price-fixing, the state could prove the amount of damages to be awarded "in the aggregate by statistical or sampling methods, by the computation of illegal overcharges" or other reasonable system approved by the court -- instead of proving the exact amount of each individual claim. States could notify citizens of a parens suit by general publication, but courts could require other forms of notice. States could not pay private counsel conducting parens suits a contingency fee based on a percentage of the expected damage award or on any other basis, unless the court approves the amount as reasonable. Courts could award reasonable attorney's fees to a prevailing defendant if the state suit was brought in bad faith. Recovered damages must be distributed according to court order or treated as general state revenue. The U.S. Attorney General would be required to notify state attorneys general of Federal antitrust cases that could inspire state parens suits, and to provide state attorneys general with relevant materials upon request. A provision of of this title provides that a state could pass a law invalidating this authority to bring parens suits. Suits could not apply to violations committed before enactment.

The sponsors of this Act have stated that this legislation is not intended to create any new antitrust liability. It is merely to provide for an effective procedure for enforcing existing antitrust law. The legislation is intended to return power to the states by delegating antitrust enforcement power to the state attorneys general.

The Small Business Administration previously expressed support for these three titles when they were a part of S. 1284. However, SBA now has reservations about the impact of Title III on small business. It would appear that the potential exists for misuse of the authority granted by Title III.

SBA is not sure that Title III will achieve its professed purpose of compensating consumers victimized by large corporations' price fixing conspiracies for which no adequate redress is said to exist. In any event, overshadowing any conceivable Title III benefits is the potential for punitive

or political abuse of power inherent in authorizing 50 state attorneys general to file in the name of millions of state residents huge damage claims against business firms.

Title III also has the potential for abuse by private antitrust entrepreneurs working through willing state officials. This is recognized in several Title III "protective" amendments to the Clayton Act:

(1) Section 4C(d)(2) would require the court to determine the plaintiffs' attorneys' fees;

(2) Section 4C(d)(1) would authorize payment of defendants' attorneys' fees if the suit is brought "in bad faith, vexatiously, wantonly, or for oppressive reasons"; and

(3) Section 4C(c) would require notice and court approval before a suit could be settled.

However, the proposed Section 4C(d)(1)'s provision for determination of plaintiffs' attorneys' fees by the court adds nothing to existing law, and the criteria for fee awards remain highly uncertain. Section 4C(d)(1)'s discretionary authorization for attorneys' fees awards to a prevailing defendant, upon a "finding that the State attorney general acted in bad faith, vexatiously, wantonly, or for oppressive reasons" is no match for the mandatory attorneys' fees granted to prevailing plaintiffs by Section 4C(a)(2).

Although portrayed as recapturing corporate "ill-gotten gains" from price fixing conspiracies involving bread, milk, and other consumer products, Title III goes far beyond hard-core price fixing violations. Through ever-broadening court interpretations of the Sherman Act's elastic ban on "restraint of trade," it may penalize an open-ended catalogue of business activities. Therefore, huge antitrust liabilities under parens patriae actions may also create heavy antitrust exposures for smaller firms and professional and service organizations. Actually, under recent judicial interpretations of the Sherman Act and Justice Department actions against advertising and fee restrictions by professional and service organizations, smaller firms may become leading victims of parens patriae claims under Title III.

A smaller firm, charged as an antitrust co-conspirator with joint and individual liability for an alleged industry-wide conspiracy, may be unable to stand the risk of a potentially astronomical exposure. This type of litigation against smaller firms is inherently conducive to "blackmail settlements," since they often cannot carry the risk or the costs of an effective antitrust defense.

An inevitable negative impact of Title III upon the country's economic well-being, would be curtailment of financing opportunities on the part of small business firms faced with multimillion-dollar liabilities when named in massive parens patriae actions. Potentially huge contingent liabilities may affect their access to financing and capital markets. Banks and lending institutions will take such substantial contingent liabilities into account in their lending decisions.

Without further reassessment of this legislation's impact on small business the Small Business Administration cannot now support enactment of H. R. 8532.

Thank you for the opportunity to comment on this legislation.

Sincerely,

Mitchell P. Kobelinski
Administrator

THE GENERAL COUNSEL OF THE TREASURY
WASHINGTON, D.C. 20220

SEP 22 1976

Director, Office of Management and Budget
Executive Office of the President
Washington, D. C. 20503

Attention: Assistant Director for Legislative Reference

Sir:

Reference is made to your request for the views of this Department on the enrolled enactment of H.R. 8532, "To improve and facilitate the expeditious and effective enforcement of the antitrust laws, and for other purposes."

The enrolled bill is designed to provide more stringent legal tools for the enforcement of antitrust legislation.

Title III of this bill, the parens patriae provision, would authorize State Attorneys General to bring civil action on behalf of private persons who have sustained damage to their property by reason of any violation of the Sherman Act.

The Secretary objects strongly to this provision and he has registered his opposition in a memorandum to the President (enclosed).

In his memorandum, the Secretary has raised the potential problems which could be created by the bill, the detrimental impact on industry, especially small businesses, and the unwarranted intrusion of the Federal Government upon the States.

Under the bill, State governments could pursue private antitrust claims with little cost to themselves and substantial potential political gain. In many cases, businesses would not be able to sustain the cost, in time and in money, of such litigation. In addition, the legislation would provide for mandatory treble damages, even in "good faith" situations. Further, such authority of the State Attorneys General would extend to State-regulated businesses exempted from State antitrust law.

In view of these serious concerns, the Department recommends that the enrolled enactment not be approved by the President.

Sincerely yours,

General Counsel
Richard R. Albrecht

Enclosure

THE SECRETARY OF THE TREASURY
WASHINGTON 20220

SEP 22 1976

MEMORANDUM FOR THE PRESIDENT

Subject: Antitrust Legislation

I strongly recommend that you veto the recently passed Antitrust Improvements Act of 1976. The antitrust legislation before you does not satisfy the concerns raised in your letter to Congressman John Rhodes on March 17, 1976, in which you expressed serious reservations concerning the parens patriae concept set forth in the then pending House legislation.

First, the parens patriae provisions are not limited to price fixing violations, but extend to all violations of the Sherman Act. While State Attorneys General would be able to prove the measure of damages through statistical aggregation only in price fixing cases, they would still be free to bring parens patriae suits to redress violations of any provision of the Sherman Act.

Secondly, the legislation provides for the mandatory award by the courts of treble damages in any parens patriae suit. In this regard it deletes the House provision that would have permitted the court to award only actual damages in good faith situations.

Thirdly, it provides for the mandatory award of attorneys' fees and would permit the State Attorneys General to hire private attorneys under contingent fee arrangements, subject only to the requirement that such arrangements be approved by the courts--much in the manner in which attorneys' fees are routinely approved in derivative suit litigation.

These provisions would give State Attorneys General, nearly all of whom are elected officials (and many of whom are openly competing with other elected State officials), an open invitation to pursue antitrust claims with very little risk to them or the State governments and with a great likelihood of political gain for themselves. State governments would incur little cost in prosecuting antitrust claims

against business firms since they would be able to retain private counsel under contingent fee arrangements. Since both elected officials and the private antitrust bar would stand to gain from prosecuting parens patriae actions, the potential for abusing this power by promoting unfounded antitrust litigation against business concerns seems manifest.

Business firms confronted with such litigation may be forced to settle, irrespective of the merits of the State's case, because they cannot obtain a clean auditor's opinion so long as they are exposed to such a magnified contingent civil liability. This is especially so for small businesses, which lack the financial resources to finance a long and expensive litigation, even if they would ultimately prevail.

Title III also represents an unwarranted intrusion of the Federal Government upon the States. By giving the State Attorneys General authority to enforce Federal antitrust law against State-regulated businesses exempted from State antitrust law, the parens patriae provisions of Title III could upset the delicate political balances established in this regard by many States.

In conclusion, I firmly believe that the parens patriae provisions of Title III are fundamentally unsound in that they pose the threat of political lawsuits and private lawyer enrichment at the expense of the entire business community and the general public. Accordingly, I recommend that you veto the Antitrust Improvements Act of 1976.

(Signed) Bill Simon

William E. Simon