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APPROVED
SEP 30 1976

89/30/76

Statement issued 9/30/76

THE WHITE HOUSE
WASHINGTON

September 29, 1976

MEMORANDUM FOR: THE PRESIDENT
FROM: JIM CANNON *Jani*
SUBJECT: Enrolled Bill H.R. 8532 --
Hart-Scott-Rodino Antitrust
Improvements Act of 1976

Posted
9/30/76

archives
10/1/76

THE BILL

H.R. 8532 has three titles:

- Title I broadens the powers of the Department of Justice in conducting antitrust investigations using civil investigative demand ("CID") subpoenas.
- Title II requires advance notice to Justice and the Federal Trade Commission of larger corporate mergers and acquisitions.
- Title III authorizes State attorneys general to file so called "parens patriae" suits in Federal courts to recover damages incurred by the State's residents as a result of violations of the Federal antitrust provisions of the Sherman Act.

The bill is described more fully in OMB's Enrolled Bill memorandum at Tab A.

BACKGROUND DISCUSSION

The bill has been the source of great controversy on the Hill, between your Administration and the Congress and within the Administration. While labor and consumer groups support H.R. 8532, business groups strongly oppose the entire bill and are vehemently opposed to the parens patriae title.



The first title in the bill is derived from a similar Administration proposal. In a March 31, 1976, letter to Congressman Rodino, you indicated your support for CID legislation which would help Justice in enforcing our antitrust laws.

The second "premerger notification" title is a Congressional initiative to which the Administration has not objected since Congress dropped a provision for an automatic injunction against the consummation of mergers and acquisitions.

The parens patriae title has been strongly opposed by the Administration and your earlier objections have not been fully satisfied. In your March 17, 1976, letter to Representative Rhodes you questioned the whole parens patriae concept. In addition, you indicated several concerns with specific provisions, e.g., opposition to mandatory treble damage awards and to compensation of private attorneys by a contingency fee based on a percentage of the settlement or recovery.

CONGRESSIONAL SITUATION

The bill passed the Senate by 69-18 and the House by 242-138 (an earlier test vote was 223-150). Max Friedersdorf indicates that there is a reasonably good chance the House would vote to sustain a veto of H.R. 8532. Also, see letter from John Rhodes at Tab B.

It should be noted that Titles I and II of this bill have been passed by the House in essentially identical form as separate bills and are presently before the Senate. Thus, these two titles of H.R. 8532 could conceivably be passed by the Senate in the current session if your veto of the whole bill were successful. However, given the press of time, this is unlikely.

ARGUMENTS FOR SIGNING

- The bill is supported by labor and consumer groups.
- Veto could be easily interpreted as anti-consumer and pro-Big Business.

- Congress has been "cooperative" in eliminating the objectionable parts of the CID and merger notification titles and improving the parens patriae title.
- "The more focused and restricted Title III, plus the desirable features of Title I and the now unobjectionable provisions of Title II, outweigh the potentially harmful effects of the parens patriae provisions". (OMB argument)
- The CID title is similar to legislation proposed earlier by Justice as a helpful new tool for enforcing our antitrust laws.
- The merger notification title would help Justice and the FTC obtain timely, relevant information about proposed mergers and acquisitions which violate the antitrust laws.
- The parens patriae title "could provide an effective deterrent to Sherman Act violations in general and price fixing in particular" (FTC argument)

ARGUMENTS FOR VETO

- The bill is generally opposed by business, which strongly objects to the parens patriae title.
- There is a reasonably good chance that your veto would be sustained.
- Titles I and II of the enrolled bill have been passed by the House in essentially identical form as separate bills and could conceivably be passed by the Senate before the end of the current session.
- Business groups argue that the merger notification title could disrupt legitimate business combinations.
- The parens patriae title provides State attorneys general with access to federal courts even when state legislatures have not decided to provide similar authority in State courts.

- Congressional and business opponents of the parens patriae title assert that it would (1) overburden the Federal courts with needless litigation, (2) enhance the power of politically ambitious State attorneys general to prosecute businesses in highly publicized actions, and (3) impede business growth due to firms' impaired access to financing when exposed to large potential liabilities through antitrust suits.
- SBA argues this last point and claims further that "this type of litigation is inherently conducive to 'blackmail settlements'."
- The parens patriae title covers all violations of the Sherman Act, not just price fixing. (However, Attorney General Levi and Phil Buchen note the aggregation of damage provision only applies where there has been a determination that a defendant agreed to fix prices and thus, as a practical matter, the parens patriae provisions will probably only be used in cases of alleged price fixing).
- Under the parens patriae title, courts would have the power to award "reasonable" fees to private lawyers on a non-percentage contingency basis.
- Under Title III, mandatory treble awards are still permitted.

SIGNING STATEMENT/VETO MESSAGE

Whether you decide to sign or veto this bill, it would be beneficial to place the action into the context of your overall antitrust and competition policy. The draft signing statement at Tab F and the draft veto message at Tab G are designed to call attention to your overall antitrust and pro-competition record.

These have been approved by Doug Smith.

AGENCY AND STAFF RECOMMENDATIONS

OMB, Bill Seidman and the FTC recommend that you sign the bill.

Commerce does not recommend veto.

Attorney General Levi (see Tab C), Secretary Simon (see Tab D), the SBA, Phil Buchen, Ed Schmults and Max Friedersdorf recommend veto.

CEA (MacAvoy) recommends veto, citing the adverse economic effects of fewer mergers and the likely harassing effects of the parens patriae amendments.

RECOMMENDATION

I recommend that you sign H.R. 8532 because of the improvements in the bill and the importance of the issue in the eyes of the public.

DECISION

Sign H.R. 8532 at Tab E and issue signing statement at Tab F.

Approve

A handwritten signature in dark ink, appearing to be "NR 9", written over a horizontal line.

Veto H.R. 8532 and sign veto message at Tab G.

Approve _____



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 anti-trust 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."

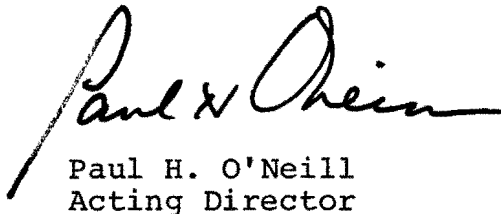
No recommendation has been received from the Justice Department on H.R. 8532 and we have been informally advised by Justice staff that the Attorney General will personally convey his views to you on this matter.

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

JOHN J. RHODES
1ST DISTRICT, ARIZONA

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ROBERT J. SCANLAN

Office of the Minority Leader
United States House of Representatives
Washington, D.C. 20515

H-232, THE CAPITOL
WASHINGTON, D.C. 20515

JOHN J. WILLIAMS
DENNIS J. TAYLOR
J. BRIAN SMITH
CLARA POSEY

September 27, 1976

The President
The White House
Washington, D. C.

Dear Mr. President:

You now have before you H.R. 8532, the Hart-Scott-Rodino Antitrust Improvement Act of 1976, commonly called the Parens Patriae bill. I urge you to veto this ill-advised legislation.

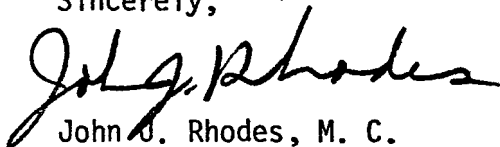
The premerger notification and civil investigative demands titles are not in controversy. The main issue is parens patriae. Your letter to me of March 17, 1976, stated your serious reservations with the parens patriae concept as well as with other provisions of the bill. Our efforts to make the legislation acceptable were rebuffed, and it remains a bad bill.

The "good faith" defense was rejected for treble damages in price fixing cases and the threat of economic ruin hangs over the head of business for any violation, regardless of intent or good faith. The aggregation of damages also remains in price fixing cases and is sure to increase significantly the punitive treble damages assessed against business concern. In addition, the bill permits contingency fees -- a provision which would undoubtedly increase the number of cases as well as the amount of damages sought.

It would be my hope that you veto H.R. 8532 and urge Congress to promptly enact legislation for premerger notification and CID. On September 16 the House voted on accepting the Senate amendments to the bill, and we opposed the previous question in order to amend the bill. 177 Members supported the amendments by voting against the previous question. Even on the final vote agreeing to the Senate amendments 138 Members opposed the legislation. There is strong opposition both in Congress and in the private sector to H.R. 8532 in its present form.

I urge you to veto this bill.

Sincerely,



John U. Rhodes, M. C.
Minority Leader

JJR/tp

Department of Justice
Washington, D.C. 20530

September 27, 1976

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

Dear Mr. Lynn:

In compliance with your request, I have examined a facsimile of the enrolled bill 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 strengthen federal and state enforcement of the federal antitrust laws.

Title I would amend the Antitrust Civil Process Act of 1962 and expand the authority of the Antitrust Division to investigate civil antitrust violations.

Under the 1962 Act, the Division is authorized to issue a Civil Investigative Demand to a person suspected of violating the antitrust laws, requiring that person to submit relevant documentary material to the Division. Title I of H.R. 8532 would permit the Division to issue a CID to any person who has information relevant to an antitrust violation. In addition to obtaining documentary material, Title I would allow the Division to take oral testimony from CID recipients. Title I contains substantial safeguards, including the right to counsel, to assure that these powers will not be abused, and all CID material is expressly exempt from the Freedom of Information Act.

The Department believes that these expanded powers, which are similar to powers enjoyed by a number of other federal agencies, are necessary to allow it fully to investigate possible civil antitrust violations and to make an informed judgment as to whether a complaint should be filed. Title I is in all respects consistent with previously articulated Administration positions on

such amendments. As recently as March 31, 1976, President Ford informed the Congress of his support for these changes in the Antitrust Civil Process Act.

Title II would require parties to very large mergers to give the Department of Justice and the Federal Trade Commission advance notice of the proposal. This will allow the antitrust enforcement agencies to investigate the competitive impact of such potentially significant proposals and to bring suit, if suit is warranted, before the parties have taken irreversible steps toward consolidation of operations.

As originally introduced, the pre-merger notification proposal contained a provision that would have required a court to enjoin consummation of a proposed merger automatically upon the request of the Department or the FTC. The Administration opposed this provision, and it was deleted from the bill. As so modified, the Department fully supports Title II. Advance notice of important mergers is fundamental to the Department's ability to obtain meaningful relief in Clayton Act cases.

Title III, the so-called *parens patriae* provisions, would permit state attorneys general to bring antitrust suits on behalf of the citizens of their states to recover treble damages. Damages may be determined by using statistical methods of aggregation in suits in which an agreement to fix prices has been proven. In the prosecution of *parens patriae* suits, states may not retain any person on a contingency fee basis based upon a percentage of monetary relief awarded. The amount of an attorney's fee, if any, must be determined by a court.

The *parens patriae* mechanism was designed to assure that antitrust violations injuring a large number of people do not go unredressed merely because the damage suffered by each person is insufficiently material to induce him to bring a private treble-damage action. To avoid the possibility of unfair application or abuse, however, such a mechanism should apply only to those areas in which legal standards are clearly established.

As a result of such concerns, Title III, as passed, is considerably more narrow than the *parens patriae*

proposals from which it originated. The aggregation of damages provision applies only to cases involving price-fixing agreements, and it is reasonable therefore to expect that this parens patriae authority will be used principally if not exclusively in cases charging price fixing.

Since the illegality of price-fixing activities is firmly established, there is little possibility that liability will be imposed upon unsuspecting defendants who could not have foreseen the illegality of their conduct. For similar reasons, it is unlikely that parens patriae actions will have a chilling effect upon the development of substantive antitrust law.

The Department has strongly endorsed enactment of Titles I and II because of their direct impact upon federal enforcement of the antitrust laws. Title III has been limited extensively. As a result, we believe that H.R. 8532, as a package, will measurably advance the cause of antitrust enforcement.

The Department of Justice recommends Executive approval of this bill.

Sincerely,

A handwritten signature in black ink, reading "Michael M. Uhlmann". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

Michael M. Uhlmann
Assistant Attorney General



Office of the Attorney General

Washington, D. C. 20530

September 27, 1976

MEMORANDUM FOR THE PRESIDENT

My recommendation is that you veto the antitrust bill. But I believe the decision is a close one and there is a substantial argument the other way.

The argument for signing the bill is that the civil investigative demand and premerger sections have been revised to meet the Administration's wishes. If this is accepted, then the remaining problem is with the *parens patriae* section. This also has been modified to bring it somewhat closer to the views you have expressed, although your objections, with which I agree, were more sweeping.

I assume the Administration is committed to the civil investigative demand and premerger notification provisions. I personally question the importance of the premerger notification provision, although I suppose it has some symbolic value. The Antitrust Division believes it is necessary because of the difficulty otherwise of obtaining sufficient evidence to sustain a preliminary injunction. I dislike the civil investigative demand which can require oral testimony. The argument that this power has been given to other Federal agencies does not seem to me to be a reason for a further extension of Federal intrusive power. But my dislike for the extension of the civil investigative demand to oral questioning may be based more on a general view about government than the likelihood of abuse in this instance. And it is the civil investigative demand provision which the Antitrust Division particularly wants, arguing that it is frequently better to use this form of investigatory power than to use a grand jury. I agree this is true in some cases.

The changes in the *parens patriae* section in the bill which may make it more palatable are as follows: While it is not limited to price fixing agreements or section one of the Sherman Act violations, but applies to any violation of the Sherman Act, the aggregation of damage section only applies where there has been a determination that a defendant agreed to fix prices. The likelihood of nuisance

actions brought by State Attorneys General is slightly diminished by the provision that the court may award a reasonable attorney's fee to a prevailing defendant upon a finding that the State Attorney General has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. The contingent fee section, also, has been substantially altered, and the court must approve the fee.

The harassment of separate suits in district courts in many States is somewhat mitigated by the provision that the judicial panel on multi-district litigation may consolidate and transfer without the consent of the parties, for both pretrial purposes and for trial, any action brought.

I understand one objection which has been advanced to the parens patriae section is that it may be too easy to prove price fixing where there is conscious parallelism or very little evidence of intentional price fixing. I find this a difficult argument to make since it is tantamount to urging that the Federal jurisprudence against price fixing is too strict, which I do not believe to be the case. My guess is that the provision will make the courts more careful in determining in governmental cases that there has been an adequate proof of price fixing. But the courts have been going in the direction of greater care in any event.

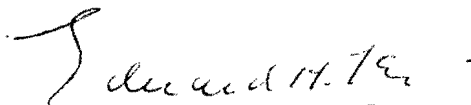
I believe there is a more legitimate argument that the parens patriae provision may catch defendants in the aftermath of change-of-law cases; that is, for example, where professional fees have been arranged according to customary practices which for one reason or another were thought to have been lawful. The effect is conjectural; it may make courts more cautious in the interpretation of the law in government cases.

Presumably parens patriae will be used most frequently where the Federal government has won a final judgment or decree which may be used as prima facie evidence in the parens patriae case. This point is sometimes made as a way of suggesting that parens patriae will not have a deleterious effect. I do not think this follows, although the existence of parens patriae may give added emphasis to consent decrees. The argument does suggest that new initiatives in the interpretation of the antitrust laws through parens patriae may be minimized.

The main argument against *parens patriae* remains that it adds another element of substantial uncertainty to the cost of doing business. It is not clear that there may not be multiple damage recoveries, with both possible State and Federal court proceedings, and with other actions brought, in addition to the representation of natural persons by the State Attorney General in the *parens patriae* proceeding, by business entities in the chain of distribution. Aggregation of damage formulas can be unfair; this has added force when the damages are trebled. The law against price fixing, with the increased criminal penalties which the Congress has recently provided, has not been shown to need this reinforcement. The risk of new large damage awards based upon a formula can compel settlements when the enterprise cannot take the larger risk. One can seriously damage the antitrust laws and their continuation with this kind of overkill. The courts have been concerned with the excesses of class actions in other areas. The *parens patriae* provision seems to ignore this experience.

In my view the provision remains a bad one, and if the bill is viewed in terms of this provision it ought to be vetoed. I do not know whether this can be done in such a way as to show support for the antitrust laws. Since the bill was a compromise it is possible that without the *parens patriae* provision, a new bill would have the kind of pre-merger notification measure which the Administration might think went much too far.

Overall I think it is important that the Administration show its support of the antitrust laws, since this is an essential part of a dedication to a competitive free enterprise system of individual effort. I believe it has been generally assumed that the Administration (particularly in view of apparent earlier Administration approval) has been on a road toward a compromise. A basic question is whether the Administration can convincingly show support for the antitrust laws if there is a veto of a bill which contains two provisions (and for some persons a third provision) which so many dedicated believers in the antitrust laws regard as important.


Attorney General



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

OMB

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;

The Honorable James T. Lynn

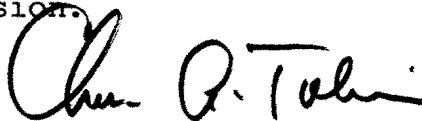
- 3 -

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.



SEP 22 1976

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

SEP 22 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.

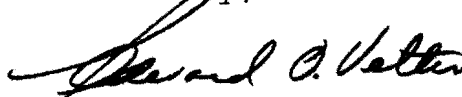
Much of the uncertainty is due to the requirement for mandatory treble damage awards rather than single or actual damages as the President strongly recommended in his letter of March 17, 1976 to Congressman Rhodes. The awarding of treble damages, based on aggregated estimates in the case of price fixing 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



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

OFFICE OF THE ADMINISTRATOR

SEP 22 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.

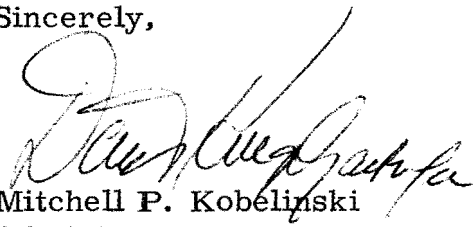
A smaller firm, charged as an antitrust co-conspirator with joint and individual liability for an alleged industry-wide conspiracy, may be unable to stand the risk of a potentially astronomical exposure. This type of litigation against smaller firms is inherently conducive to "blackmail settlements," 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

THE WHITE HOUSE
WASHINGTON

9/25

I would sign while at the same time
calling for new legislation to eliminate
treble damages and use of the private
bar by States attorneys.

Would use Schmults statement.

LWS

Per handwritten note.

SEP 25 REC'D

THE WHITE HOUSE

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
Ed Schmults
Bill Seidman

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

For Your Comments

Draft Remarks

REMARKS:

please return to judy johnston, ground floor west wing

*I would sign and
while at the same time
calling for new legislation
to eliminate trouble
damages and use
of the private
bar by states*

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

*Attorney
would file
Schultz
Adams
JD*

THE WHITE HOUSE

ON 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
 Ed Schmults
 Bill Seidman

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 For Your Comments Draft Remarks

REMARKS:

please return to judy johnston, ground floor west wing

*Recommend veto - max F.*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

THE WHITE HOUSE

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
Ed Schmults
Bill Seidman

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

For Your Comments

Draft Remarks

REMARKS:

Approve with DMB statement.

please return to judy johnston, ground floor west wing

RP

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

THE WHITE HOUSE


WASHINGTON

September 27, 1976

MEMORANDUM FOR:

JIM CANNON

FROM:

PHILIP BUCHEN 

SUBJECT:

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

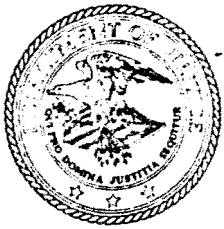
This memorandum is in response to your action memorandum of September 25, Tab I.

The draft Memorandum for the President, which was attached to the action memorandum, refers to the fact that the Attorney General planned to convey his views on the matter personally to the President. His views to the President are set forth in the memorandum signed by him which is attached at Tab II.

The draft memorandum on page 5 (last paragraph) is somewhat misleading. Although it is true that H.R. 8532 is not limited to price fixing but covers all violations of the Sherman Act, the Attorney General in his memorandum shows that the aggregation of damage section only applies where there has been a determination that a defendant agreed to fix prices. Thus, as a practical matter, the *parens patriae* provisions will probably be used only in cases of alleged price fixing.

Edward Schmults and I recommend a veto by the President solely because of the *parens patriae* provisions. But we agree with the Attorney General that the decision is a close one and that if the President does veto the bill, a statement should be issued substantially along the lines set forth in the memorandum from Edward Schmults dated September 25, a copy of which is attached at Tab III.

Attachments



Office of the Attorney General

Washington, D. C. 20530

September 27, 1976

MEMORANDUM FOR THE PRESIDENT

My recommendation is that you veto the antitrust bill. But I believe the decision is a close one and there is a substantial argument the other way.

The argument for signing the bill is that the civil investigative demand and premerger sections have been revised to meet the Administration's wishes. If this is accepted, then the remaining problem is with the *parens patriae* section. This also has been modified to bring it somewhat closer to the views you have expressed, although your objections, with which I agree, were more sweeping.

I assume the Administration is committed to the civil investigative demand and premerger notification provisions. I personally question the importance of the premerger notification provision, although I suppose it has some symbolic value. The Antitrust Division believes it is necessary because of the difficulty otherwise of obtaining sufficient evidence to sustain a preliminary injunction. I dislike the civil investigative demand which can require oral testimony. The argument that this power has been given to other Federal agencies does not seem to me to be a reason for a further extension of Federal intrusive power. But my dislike for the extension of the civil investigative demand to oral questioning may be based more on a general view about government than the likelihood of abuse in this instance. And it is the civil investigative demand provision which the Antitrust Division particularly wants, arguing that it is frequently better to use this form of investigatory power than to use a grand jury. I agree this is true in some cases.

The changes in the *parens patriae* section in the bill which may make it more palatable are as follows: While it is not limited to price fixing agreements or section one of the Sherman Act violations, but applies to any violation of the Sherman Act, the aggregation of damage section only applies where there has been a determination that a defendant agreed to fix prices. The likelihood of nuisance

actions brought by State Attorneys General is slightly diminished by the provision that the court may award a reasonable attorney's fee to a prevailing defendant upon a finding that the State Attorney General has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. The contingent fee section, also, has been substantially altered, and the court must approve the fee.

The harassment of separate suits in district courts in many States is somewhat mitigated by the provision that the judicial panel on multi-district litigation may consolidate and transfer without the consent of the parties, for both pretrial purposes and for trial, any action brought.

I understand one objection which has been advanced to the parens patriae section is that it may be too easy to prove price fixing where there is conscious parallelism or very little evidence of intentional price fixing. I find this a difficult argument to make since it is tantamount to urging that the Federal jurisprudence against price fixing is too strict, which I do not believe to be the case. My guess is that the provision will make the courts more careful in determining in governmental cases that there has been an adequate proof of price fixing. But the courts have been going in the direction of greater care in any event.

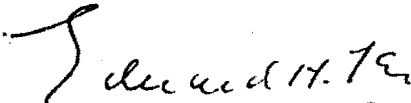
I believe there is a more legitimate argument that the parens patriae provision may catch defendants in the aftermath of change-of-law cases; that is, for example, where professional fees have been arranged according to customary practices which for one reason or another were thought to have been lawful. The effect is conjectural; it may make courts more cautious in the interpretation of the law in government cases.

Presumably parens patriae will be used most frequently where the Federal government has won a final judgment or decree which may be used as prima facie evidence in the parens patriae case. This point is sometimes made as a way of suggesting that parens patriae will not have a deleterious effect. I do not think this follows, although the existence of parens patriae may give added emphasis to consent decrees. The argument does suggest that new initiatives in the interpretation of the antitrust laws through parens patriae may be minimized.

The main argument against parens patriae remains that it adds another element of substantial uncertainty to the cost of doing business. It is not clear that there may not be multiple damage recoveries, with both possible State and Federal court proceedings, and with other actions brought, in addition to the representation of natural persons by the State Attorney General in the parens patriae proceeding, by business entities in the chain of distribution. Aggregation of damage formulas can be unfair; this has added force when the damages are trebled. The law against price fixing, with the increased criminal penalties which the Congress has recently provided, has not been shown to need this reinforcement. The risk of new large damage awards based upon a formula can compel settlements when the enterprise cannot take the larger risk. One can seriously damage the antitrust laws and their continuation with this kind of overkill. The courts have been concerned with the excesses of class actions in other areas. The parens patriae provision seems to ignore this experience.

In my view the provision remains a bad one, and if the bill is viewed in terms of this provision it ought to be vetoed. I do not know whether this can be done in such a way as to show support for the antitrust laws. Since the bill was a compromise it is possible that without the parens patriae provision, a new bill would have the kind of pre-merger notification measure which the Administration might think went much too far.

Overall I think it is important that the Administration show its support of the antitrust laws, since this is an essential part of a dedication to a competitive free enterprise system of individual effort. I believe it has been generally assumed that the Administration (particularly in view of apparent earlier Administration approval) has been on a road toward a compromise. A basic question is whether the Administration can convincingly show support for the antitrust laws if there is a veto of a bill which contains two provisions (and for some persons a third provision) which so many dedicated believers in the antitrust laws regard as important.



Attorney General

THE WHITE HOUSE

WASHINGTON

September 25, 1976

MEMORANDUM FOR: PHILIP BUCHEN
JIM LYNN
JACK MARSH
BILL SEIDMAN

FROM: ED SCHMULTS 

SUBJECT: Consideration of the Hart/Scott/
Rodino Antitrust Improvements Act
of 1976

In connection with consideration of the antitrust legislation, attached for your review is a proposed statement for use by the President in acting on the legislation.

Attachment A is a suggested outline of the antitrust and competition policy of the Ford Administration.

Attachment B would be the last part of the statement if the President decides to sign the antitrust bill.

Attachment C would be used if the President decides to veto the bill.

While I can't find any precedent for a statement in the form I am suggesting, I think there is real benefit, from the President's standpoint, in putting whatever action he takes on the bill in the context of the Administration's overall antitrust policy. The President's antitrust record is a good one and action on the antitrust bill is an event which we can use to call attention to his record. Hopefully, it will be a useful political document in rebutting the attacks Carter and Mondale have made on "weak" Republican antitrust efforts. If the President decides to veto the bill, we could mitigate the down side risk by "forcing" a review of his overall record.

STATEMENT OF THE PRESIDENT

THE ANTITRUST AND COMPETITION
POLICY OF THE FORD ADMINISTRATION

This country has become the economic ideal of the free world because of its dedication to the free enterprise system. Full and vigorous competition has been the watchword of America's economic progress.

My Administration has always considered competition to be the driving force of our economy. Our competitive markets promote efficiency and innovation by rewarding businesses that produce desirable products at low cost. In a competitive industry, inefficient companies are forced to become efficient or be driven out of business. Competition is also a powerful stimulus to the development of new products and manufacturing processes. The free market system rewards the successful innovator.

In the United States, promotion of competition is consistent with our political and social goals. Any excessive concentration of either economic or political power has traditionally been seen as a threat to individual freedom. Under competitive conditions, economic power is fragmented; no one firm can control prices or supply. Political power is also 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 today's international economy, members of a vigorously competitive economic system enjoy unlimited worldwide opportunities and contribute significantly to the stability of their domestic economies.

But perhaps the most compelling justification for a free market economy is that it best serves the interests of our citizens. In a freely competitive market, consumers enjoy the freedom to choose from a wide range of 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 an important role in protecting and advancing the cause of competition.

Through enforcement of our antitrust laws, the Antitrust Division of the Department of Justice and the Federal Trade Commission must assure that competitors do not engage in anticompetitive practices.

A vigorous antitrust enforcement policy is most important in deterring price-fixing agreements between competitors that result in higher costs to consumers -- and less production. As we come out of an inflationary period and into a period of economic growth and expansion,

my Administration will work to assure that the price mechanism is not artificially manipulated for private gain.

It is important to realize that this Administration has been the first one in forty years to recognize a second way the Federal Government vitally affects the competitive environment in which businesses operate. Not only must the Federal Government seek to restrain private anticompetitive conduct, but the Federal Government must also see to it that the governmental process does 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 vigorously continue this most worthwhile 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, provide or terminate services without the prior approval of a Federal regulatory body. As a consequence, the innovative and creative forces of major industries are suffocated by governmental 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 governmental 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 periods which differed greatly from today's economic conditions. We must repeal or modify those controls that suppress rather than support fair and healthy competition.

My Administration's pro-competitive policy has attempted to make those necessary modifications. We have set in motion a far-reaching regulatory reform program. And this program has been accompanied by a policy of vigorous antitrust enforcement to reinforce our commitment to competition.

In the last two years, the antitrust laws have been vigorously enforced by strengthened 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 represented the first real manpower increases since 1950. I am committed to continuing to provide 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 a competitive market structure by preventing anti-competitive mergers and acquisitions, the Antitrust Division is devoting substantial resources to merger investigations. At the same time, the Division is litigating large and complex anti-monopoly cases in two of our most important industries -- computers and telecommunications. Cases have also been filed involving such anticompetitive business actions as restrictive allocation of customers and markets.

I advanced the cause of vigorous antitrust enforcement with the signing of the Antitrust Procedures and Penalties Act of 1974, which made 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.

Two regulatory reform proposals I have signed -- the Securities Act Amendments of 1975 and the Railroad Revitalization and Regulatory Reform Act, inject strong dosages 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 and elsewhere.

My Administration has also sponsored important legislative initiatives to reduce regulation of other modes of transportation and the regulation of financial institutions. An important element of my regulatory reform proposals has been the narrowing antitrust immunities which Federal legislation currently grants to industry rate bureaus thereby permitting these groups to restrain competition under official government sanction. Although Congress has not yet acted on these proposals, I am hopeful that the elected representatives of our people will take action on these proposals soon, since every day which passes

means millions of dollars of excessive costs and inefficiencies in our economic system.

The Administration also has underway a comprehensive review of many other legislative immunities to the antitrust laws and I intend to eliminate those immunities that are not truly justified -- if the Congress will concur. All industries and groups, however regulated and by whom, should be subject to the interplay of competitive forces to the maximum extent feasible.

A full measure of my commitment to competition is the proposed Agenda for Government Reform Act. This would require a comprehensive, disciplined look at ways of restoring competition in the economy. This 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, which includes regulatory reform and invigorated antitrust enforcement, will protect those businessmen who desire to be competitive from anti-competitive actions both by government regulators and by other business competitors. In turn, the American consumers will enjoy the substantial benefits provided by full and open competition within the business community.

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 the 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 proposal. 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 the 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.

However, 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.

However, Congress has narrowed this title in order to remove the possibility of significant abuses. Earlier, I had urged that the scope of this legislation be narrowed to price-fixing activities 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 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 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.

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 I had hoped that the Congress would submit to me additional legislation to further strengthen competition and anti-trust enforcement. However, Congress passed an omnibus antitrust bill containing 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 the Administration two years ago.

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 proposal. 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 was supported by the Administration.

I believe these two titles would 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.

I also urged Congress to provide adequate safeguards that would prevent abuses of *parens patriae*. 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 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 and 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. The Administration has urged a flat ban against any such arrangements. By allowing private attorneys to seek out cases, the bill avoids the state government's 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 can successfully defend.

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

I am vetoing the Hart/Scott/Rodino Antitrust Improvements Act of 1976 with the expectation that Congress will promptly enact the first two 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 titles sent to it by the House earlier this year. This action will better assure the American people of responsible and effective enforcement of the antitrust laws.

—
Toby King

for files
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Mr. J.

This would appear to be
the original of the Statement
that was not returned with

N.L. 8532.

Kate

Office of the White House Press Secretary

THE WHITE HOUSE

STATEMENT BY THE PRESIDENT

After careful reflection, I am signing into law today H.R. 8532 -- the Hart-Scott-Rodino Antitrust Improvements Act of 1976. This bill contains three titles, two of which my Administration has supported and one -- the "parens patriae" title -- which I believe is of dubious merit.

COMPETITION AND ANTITRUST POLICIES

I am proud of my Administration's record of commitment to antitrust enforcement. Antitrust laws provide an important means of achieving fair competition. Our nation has become the economic ideal of the free world because of the vigorous competition permitted by the free enterprise system. Competition rewards the efficient and innovative business and penalizes the inefficient.

Consumers benefit in a freely competitive market by having the opportunity to choose from a wide range of products. Through their decisions in the marketplace, consumers indicate their preferences to businessmen, who translate those preferences into the best products at the lowest prices.

The Federal Government must play two important roles in protecting and advancing the cause of free 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 environment for business 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 Government has itself been a major source of unnecessary restraints on competition.

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. Government regulation is not an effective substitute for vigorous competition in the American marketplace.

In some instances government regulation may well protect and advance the public interest. But 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, 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 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 been the first real manpower increase since 1950. I am committed to 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 aided substantially 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.

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 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. While I continue to have serious reservations about the "parens patriae" title of this bill, on balance, 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. To meet in part my objection, Congress wisely incorporated a proviso which permits a state to prevent the applicability of this title.

In price-fixing cases, this title provides that damages can be proved in the aggregate by using statistical sampling or other measures without the necessity of proving the individual claim of, or the amount of damage to, each person on whose behalf the case was brought. During the hearings on this bill, a variety of questions were raised as to the soundness of this novel and untested concept. Many of the concerns continue to trouble me.

I have also questioned the provision that would allow states to retain private attorneys on a contingent-fee basis. While Congress adopted some limitations which restrict the scope of this provision, the potential for abuse and harassment inherent in this provision still exists.

In partial response to my concerns, Congress has narrowed this title in order to limit the possibility of significant abuses. In its present form, this title, if responsibly enforced, can contribute to deterring price-fixing violations, thereby protecting consumers. I will carefully review the implementation of the powers provided by this title 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 antitrust legislation with the expectation that it will contribute to our competitive economy.

Original of Statement did not come
back with signed bill.

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 included in this bill.

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 contingent fee arrangements.
- Small businesses would be unable to cope with this law. Local manufacturers and service firms could be subjected to large nuisance suits they would not have the resources to defend.

COMPETITION AND ANTITRUST POLICIES

I am proud of my Administration's record of commitment to antitrust enforcement. Antitrust laws provide an important means of achieving fair competition. Our nation has become the economic ideal of the free world because of the vigorous competition permitted by the free enterprise system. Competition rewards the efficient and innovative business and penalizes the inefficient.

Consumers benefit in a freely competitive market by having the opportunity to choose from a wide range of products. Through their decisions in the marketplace consumers indicate their preferences to businessmen, who translate those preferences into the best products at the lowest prices.

The Federal Government must play two important roles in protecting and advancing the cause of free 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 environment for business 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 Government has itself been a major source of unnecessary restraints on competition.

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. Government regulation is not an effective substitute for vigorous competition in the American marketplace.

In some instances government regulation may well protect and advance the public interest. But 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 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 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 been the first real manpower increase since 1950. I am committed to 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 aided substantially 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.

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 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.

In price-fixing cases, this title provides that damages can be proved in the aggregate by using statistical sampling or other measures without the necessity of proving the individual claim of, or the amount of damage to, each person on whose behalf the case was brought. During the hearings on this bill, a variety of questions were raised as to the fairness and constitutionality of this novel and untested concept. Many of the concerns continue to trouble me.

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 contingent 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 in separate legislation. 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,