The original documents are located in Box 3, folder "Antitrust" of the James M. Cannon Files at the Gerald R. Ford Presidential Library.

Robinson-Patman

DECISION

(Antitrust)

THE WHITE HOUSE

WASHINGTON

October 28, 1975

MEMORANDUM FOR: JIM CANNON

FROM: PAUL LEACH Paul

SUBJECT: Conference on Robinson-Patman Act Reform

Over the past several months (starting before creation of the Regulatory Reform Review Group), the Robinson-Patman Act has been subjected to continuous discussion and analysis within the Administration. The President has indicated in a number of speeches that he will have proposals to reform this Act.

Because the Robinson-Patman Act is thought to be a protection for some small businesses, it is generally thought (by EPB members and participants in the Regulatory Reform Review Group) that we should move cautiously before unveiling any Robinson-Patman Act change proposal. As a step in this careful program, a conference (i.e., hearings) on the problems posed by Robinson-Patman has been proposed for early December in Washington.

The attached memo from Tom Kauper at Justice discusses this conference. The conference will be organized (and financed) by Justice. However, since Justice is known to have a strong bias against the Robinson-Patman Act, we have concluded that it would be better if the conference were nominally sponsored by the Domestic Council Review Group on Regulatory Reform -- which is identified as being more "neutral" on the subject.

Aside from some preliminary planning for the conference, nothing has been done to move the organizing into high gear. However, this should start within the next few days.

If this proposal is agreeable to you, the Review Group (and I) will monitor this to assure that the conference is a success. Since Justice has to move forward with its planning for this conference, I would appreciate your expeditious review and approval of this matter.

Approve _____

Disapprove _____

See Me _____

ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

Department of Justice
Washington, D.C. 20530

OCT 22 1975

MEMORANDUM FOR: James M. Cannon
Assistant to the President
for Domestic Affairs

FROM: Thomas E. Kauper
Assistant Attorney General
Antitrust Division

SUBJECT: Robinson-Patman Hearings

It is my understanding that, pursuant to discussions between Paul MacAvoy, Paul Leach and us, the Antitrust Division is to prepare a one or two day Washington conference to be held under the sponsorship of the Domestic Council (and its Review Group on Regulatory Reform) on problems created by the Robinson-Patman Act and on possible options for dealing with them.

The President has repeatedly expressed his commitment to reform the Act and the Economic Policy Board has discussed the issue in several meetings. A general consensus has apparently developed that public hearings by the Executive Branch would be the best way to start the slow process toward reform or repeal.

The Antitrust Division has developed a background paper on the Act and, in consultation with other Executive Branch agencies, has prepared three options for dealing with the Act: Outright repeal; replacement of the Act with a Predatory Practices Act; and replacement of it with a reformed Robinson-Patman statute designed to meet some of the objections to the current law.

Since the Administration has already developed substantive analyses of the current Robinson-Patman difficulties, the primary purpose of the hearings would be to develop a public record prior to any Administration legislative proposal. I therefore suggest that in order that the hearings be conducted as soon as possible, prospective witnesses not be expected to conduct new research into the effects of the Act, but rather to give summaries of their views based on their current knowledge of it. The hearing might be composed of four groups of

witnesses: academics, consumer representatives, pro-Robinson-Patman Act businessmen, and anti-Robinson-Patman Act businessmen. The latter two groups might be composed solely of trade association staff or might also contain businessmen who wished to relate specific incidents.

If this proposal is agreeable to you, the Antitrust Division will prepare a more formal outline of the content of the hearings, establish a time and place, prepare the appropriate invitations and handle the organizational arrangements for the conference.

Economy

THE WHITE HOUSE

WASHINGTON

February 24, 1976

MEMORANDUM FOR: JIM CANNON ✓
ALAN GREENSPAN
ED LEVI
JIM LYNN
JOHN MARSH
BILL SEIDMAN
BILL SIMON

FROM: PHIL BUCHEN P.W.B

SUBJECT: Administration Antitrust Policy

ISSUE

There has been growing popular and Congressional interest in increasing market competition and improving antitrust procedures and enforcement. The Administration has a good record in this area, but it appears to be that we are being much too reactive to Congressional actions. Instead of having a clearly articulated, positive antitrust policy that aids in shaping the growing public debate, we appear passive and damage-limiting. I think we should give serious consideration to clarifying and effectively communicating the Administration's policy in this important area.

BACKGROUND

The President has taken a strong and aggressive stance in the area of antitrust enforcement. In his first major economic address of October 8, 1974, he called for legislation to increase the penalties and improve the procedures for antitrust enforcement. His program of regulatory reform has called for an elimination of the anti-competitive practices of the transportation rate bureaus, elimination of price-fixing sanctioned by Fair Trade laws, and greater competition between banks and savings and loans. Resources for the FTC's Bureau of Competition and the Antitrust Division have been increased by over 50% in the two Ford Administration budgets. In addition, the Justice Department has been

working with the Congress to improve a range of legislative proposals such as Parens Patriae, pre-merger notifications, and the Hart-Kennedy Competition Test legislation. The President also has an excellent record on Free Trade which is one of the best stimuli for market competition. Despite this considerable record, many view the Administration as having no coherent antitrust policy. Oil company divestiture proposals appear to be gaining momentum, and the Democratic Presidential Candidates are competing with one another over their support for this legislation and their enthusiasm for more aggressive antitrust enforcement. I believe the President's record deserves a better articulation than it has received to date.

The President has put a major emphasis on a more fundamental view of antitrust, which goes back to its original purpose -- keeping the economy open and free -- particularly in his August 25, 1975, address.

Unfortunately, this Presidential address did not receive the press attention that it deserved. One reason was that this antitrust view followed a lengthy treatment of capital formation issues and proposals. Excerpts from this address and other statements the President has made on this subject are attached.

I would like your views on whether we should raise to the President the need for better articulating our antitrust policy in a major Presidential address. If we decide this makes sense, there might also be new areas that the Attorney General would recommend for inclusion.

May I please have your comments by March 15th.

Attachment

Presidential Statements on Antitrust

Listed below are the President's remarks on the importance of antitrust enforcement activities from his earlier speeches.

> To increase productivity and contain prices, we must end restrictive and costly practices whether instituted by Government, industry, labor, or others. And I am determined to return to the vigorous enforcement of antitrust laws.
>
> The President's Address delivered before a joint session of the Congress. October 8, 1974.

> All of the initiatives toward regulation should be accompanied by vigorous enforcements of antitrust laws. Vigorous antitrust action must be part of the effort to promote competition.
>
> Remarks of the President at the White House Conference on Domestic and Economic Affairs. Highway Hotel. April 18, 1975.

> Agencies engaged in regulatory activities can expect that the Antitrust Division of the Department of Justice will continue to argue for competition and lower consumer prices as a participant in your agency's proceedings. Furthermore, the Attorney General will continue to insure vigorous antitrust prosecution to remove private sector barriers to competition.
>
> President Ford, Vice-President Rockefeller, with Members of the Cabinet, and Independent Regulatory Commissioners. July 10, 1975.

> This Administration...will strictly enforce the Federal antitrust laws...
>
> President's State of the Union Address. January 19, 1976.

We will establish as national policy this basic fact of economic life, that Government regulation is not an effective substitute for vigorous American competition in the marketplace...

If we reduce Government regulation of business, we must make certain and positive that our antitrust laws are vigorously enforced...

In short, this Administration will look at the whole range of Government sanctioned monopoly--from the small franchises protected by Federal regulations, which rule out competition, all the way to Government-endorsed cartels involving entire industries.

We must recognize this: Over the years, Government has done as much to create and perpetuate monopoly as it has done to control or eliminate it. As a result, this Nation has become accustomed to certain forms of monopoly. Some are regarded as beneficial, some not.

If an industry combines to raise prices, it violates our antitrust laws, but no laws are violated if an industry can get the Federal government to build trade barriers, to increase support prices for the goods or services that it produces, or to police against potential competitors or price cutters.

It is sad but true--too often the Government walks with the industry along the road to monopoly.

The end result of such special treatment provides special benefits for a few, but powerful, groups in the economy at the expense of the taxpayer and the consumer.

Let me emphasize this is not--and never will be-- an Administration of special interests. This is an Administration of public interest, and always will be just that.

Therefore, we will not permit the continuation of monopoly privilege, which is not in the public interest. It is my job and your job to open the American marketplace to all comers.

Ultimately, the vital reforms will be viewed--as they should be--as a pocketbook issue. Government regulation and restrictions now cost consumers billions and billions of dollars each year. We must be concerned about the cost of monopoly however it is imposed and for what reasons.

Remarks of the President to the American Hardware Manufacturer's Association. August 25, 1975.

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

March 26, 1976

MEMORANDUM FOR: THE ECONOMIC POLICY BOARD

FROM: JAMES T. LYNN

SUBJECT: Administration Position on Omnibus Antitrust Legislation

Congress is moving toward enactment this spring of omnibus antitrust legislation. The Senate Judiciary Committee is in the process of marking up S.1284, "the Hart-Scott Omnibus Antitrust Act," and a final vote is expected on April 6. In the House, the various titles incorporated in S.1284 are being considered separately. H.R. 8532, the parens patriae bill, passed the House last week with amendments that reflected some of the concerns raised in the President's March 17 letter to Congressman Rhodes. The House Judiciary Subcommittee is scheduled to mark up on April 1 the Administration's proposal for amendments to the Antitrust Civil Process Act (H.R.39), which would allow the Department of Justice to take testimony in pre-complaint antitrust investigations.

This legislation has come under heavy attack from the business community. The modifications of the Administration's position on the injunctive relief provisions for mergers in S.1284 and the House parens patriae bill have been interpreted as resulting from business pressure. Consequently, Senator Scott has requested that he and Senator Hart meet with the President to discuss his position on the Senate bill.

The timing of legislative action requires that the Administration position on the House and Senate legislation be communicated quickly.

This memorandum contains a description of H.R.39, the Civil Process Act amendments, and the most significant objections raised by the opponents of the legislation. It also sets forth a brief summary of S.1284 and the positions previously taken by the Administration on its various provisions.

A brief discussion of the House and Senate legislation follows:

The Civil Process Act Amendments (H.R.39)

These amendments, together with legislation to increase antitrust penalties, were endorsed in the President's Economic Address of October 8, 1974. The increase in penalties was enacted and signed into law in December 1974, but the Civil Process Act amendments died in the 93rd Congress. The legislation was reintroduced in the 94th Congress and hearings have been held in both Houses.

The present Civil Process Act was enacted in 1962 to assist the Department of Justice investigate possible antitrust violations. The Act helps the Department determine, in advance of filing a suit, whether in fact a violation has occurred. It was enacted because pre-complaint discovery was preferable to having the government file complaints based upon sketchy or inaccurate information. It was designed to make possible more informed decisions by Justice prior to having the government incur the burden, expense, and adverse publicity of a full government lawsuit.

The 1962 Act, however, was a limited, tentative effort. The Antitrust Division may only serve the Civil Investigative Demand (CID)--a pre-complaint subpoena--on suspected violators, the so-called "targets". The CID may only be served on businesses for the purpose of obtaining documents relevant to the investigation.

Even with this limitation, the 1962 experiment has proven itself helpful to the Antitrust Division, fair to business, and reduced, to some extent, the burden on the courts. Since enactment, the Antitrust Division has issued some 1650 CID's. Only about 20 have been challenged in court. In over 80 percent of the investigations in which CID's are issued, the Department has not filed suit. This filtering system has thus reduced the need for court adjudication of cases based on sketchy or inaccurate information.

In April 1974, the Justice Department submitted legislation to broaden their CID authority. The legislation would permit CID's to be issued not only to "targets" of the investigation, but also to third parties--customers, suppliers, competitors--who may have information relevant to the investigation even though they themselves are not suspected violators. CID's could thus be served not only on a business entity, but also on individuals (e.g., a witness to a meeting). Also, a CID recipient could be compelled not only to produce documents, but also to give oral testimony and answer written questions.

The rationale for the CID bill is set forth in the attached transmittal letter from the Attorney General to the Speaker of the House (Attachment A). The highlights are as follows:

--Enactment of the legislation is viewed as a vital step designed to close a gap in the Justice Department's enforcement authority and to assure that increased funds appropriated to the antitrust enforcement effort, more than a 50 percent increase during the last two Ford budgets, will be utilized in the most efficient and effective manner.

--The bill will accord the Department of Justice essentially the same investigatory powers possessed by the FTC and numerous other Federal agencies (e.g., SEC, Treasury).

--Careful safeguards have been incorporated in the bill to protect against even the appearance of governmental overreaching.

Despite these safeguards, opponents of expanded investigative authority have charged that it represents an excessive grant of authority to the Justice Department.

After analysis of objections raised by the ABA and the business community, the Justice Department suggested additional changes in testimony last summer. With one exception--use of the CID in regulatory agency proceedings--these changes narrowed and clarified the bill and provided additional safeguards. However, opposition to the legislation from the business community continues.

The Department has analyzed their objections, both the broad civil libertarion and more specific ones, in depth and has responded to them in a series of letters to Chairman Rodino. House Judiciary staff have also recently completed a detailed (130 page) analysis and rebuttal of all major objections that have been raised. The analysis strongly supports the present version of the bill with the exception of regulatory CID's, which they regard as a close call. This is the Justice Department's position as well.

An analysis by the Justice Department of the provisions of the bill and the main points of controversy are set forth at Attachment B.

In order to communicate clearly the President's support for this bill, the Justice Department recommends that a letter from the President be transmitted to the Chairmen of the

House and Senate Judiciary Committees, prior to the final Senate markup on the Title II of S.1284 (the Civil Process Act amendments) and the House Judiciary Subcommittee markup on April 1. This will assure the President's continued strong support for the Administration's bill and would counter the view that the Administration lacks a strong posture on antitrust legislation.

The Senate Bill (S.1284)

The Senate Bill contains seven titles, but its major provisions are Title II (A CID bill broader than the Administration's bill), Title IV (Parens Patriae - broader than the recently passed House bill) and Title V (pre-merger notification procedures). The Administration, through the Antitrust Division, originally supported, in concept, all three of these provisions, but suggested certain narrowing amendments. Recently, the Administration modified its position on one section of Title V.

The Administration's position on Title IV (Parens Patriae) was set forth in the President's letter of March 17 to Congressman Rhodes. Other provisions of the omnibus bill have either been approved or no objection has been voiced by the Administration.

The Senate markup is now underway. The final vote in the Judiciary Committee is scheduled for April 6.

A brief summary, prepared by the Justice Department, of S.1284 and the positions previously taken by the Administration on its various provisions is set forth at Attachment C. A more detailed analysis of the objections that have been raised concerning the various titles was set forth in an October 21, 1975 report to the EPB.

In addition to a Presidential letter to the House and Senate Judiciary Committees on the Civil Process Act amendments, the Administration should articulate its position on the other provisions of S.1284. A meeting which Senators Scott and Hart requested to discuss the Administration's views on S.1284 should be held shortly. Following such a session, the Justice Department should be directed to work with the Senate staff to attempt to improve the present bill. In the view of Justice, the Senate is willing to make substantial modifications to accomodate the Administration's views. Absent a coordinated effort to work with the Senate, however, there is danger of a bill that might have to be vetoed by the President late in the summer. To try to avoid this, the EPB should review the present status of the bill set forth in this memorandum and give guidance as to possible modifications.

Finally, we are preparing a list of additional sub-issues that have been raised by the ABA, members of the business community and others. We will distribute for discussion this list at the EPB meeting.

Attachment A

IDENTICAL SUBMISSION
TO THE VICE PRESIDENT

ATTACHMENT A

Office of the Attorney General
Washington, D. C. 20530

FEB 13 1975

The Speaker
House of Representatives
Washington, D. C. 20515

Dear Mr. Speaker:

Enclosed for your consideration and appropriate reference is a legislative proposal "To amend the Antitrust Civil Process Act to increase the effectiveness of discovery in civil antitrust investigations." An identical proposal was transmitted to the Congress in the last session of the Ninety-third Congress.

The Antitrust Civil Process Act, 76 Stat. 548, 15 U.S.C. 1311, which presently applies solely to the production of documents by persons (other than natural persons) under investigation, would be extended by this proposal to (1) include persons (including natural persons) in addition to those under investigation, who may have information relevant to a particular antitrust investigation, and to (2) permit the service of written interrogatories and the taking of oral testimony.

The draft bill would also clarify the Act by correcting the adverse effect of a Ninth Circuit Court of Appeals decision, which held that civil investigative demands may issue only to require the production of documents relating to current or past, but not incipient, violations. United States v. Union Oil Company of California, 343 F.2d 29 (9th Cir., 1965). The Act would also be clarified by removing any doubt that it permits the use of evidence in investigations and cases in addition to the specific investigation to which the issued demand relates and any case resulting therefrom. Cf. Upjohn v. Bernstein (D.D.C. Civ. Action No. 1322-66, 1966).

The draft bill specifically authorizes the Department of Justice to extend the period in which persons served may judicially contest a demand, thereby protecting the rights of the latter while facilitating compliance with the demand and lessening the possibility of litigating the question of the legality of the demand. Our proposal would specifically sanction the Government's present practice of extending the time for production, thereby affording opportunity for partial production, possibly obviating the need for full production, and avoiding resort to the court by

either the person served or the Government. The Department's existing practice of requiring certification of compliance would also be specifically sanctioned by the draft bill.

A major objective of the proposed legislation, the production of oral testimony, would be obtained by a somewhat modified Administrative Procedure Act process providing for the presence of the witness' counsel in a limited role with a restricted right to raise objections.

Broadening the Act to cover oral testimony would introduce no novel, untried concepts in antitrust enforcement. Arizona, Connecticut, Florida, Hawaii, Illinois, Kansas, Louisiana, Maine, Missouri, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, South Carolina, Texas, Virginia, Wisconsin, and Puerto Rico have given their Attorneys General (in the case of Puerto Rico, the Secretary of Justice) the power to seek the attendance of witnesses to give oral testimony in antitrust investigations prior to initiation of any suit or proceeding.1/

These jurisdictions also extend the civil investigative subpoena power in antitrust investigations to individuals as well as to artificial persons, and provide for service upon persons capable of providing testimony relevant to the investigation, whether or not they are the actual target of the investigation. The draft bill would utilize the provisions of the federal immunity statute to bring natural persons producing evidence within the reach of a civil investigative demand.

In the area of trade regulation at the federal level, section 9 of the Federal Trade Commission Act confers on the Commission power to compel oral testimony in the course of its investigations.

1/ Ariz. Rev. Stats., Ann., title 44, chap. 10, sec. 44-1406; Conn. Gen. Stats. Ann., title 35, chap. 624, sec. 35-42; Fla. Stats. Ann., title XXXI, chap. 542, sec. 11; Hawaii Rev. Stats., title 26, chap. 480, sec. 480-13; Ill. Ann. Stats., chap. 38, sec. 60-7.2; Kan. Stats. Ann., chap. 50, sec. 50-153; La. Rev. Stats., title 51, secs. 143, 144; Me. Rev. Stats., title 10, chap. 201, sec. 1107 (criminal actions only); Rev. Stats. Mo., chap. 416, sec. 416-310; N.H. Rev. Stats. Ann., title XXXI, chap. 356, sec. 356.10; N.J. Stats. Ann., title 56, chap. 9, sec. 56:9-9; N.Y. Consol. Laws, chap. 20, art. 22, sec. 343; N.C. Gen. Stats., chap. 75, sec. 75-10; Okla. Stats. Ann., title 79, chap. 1, sec. 29; Code of Laws of S.C., title 66, chap. 2, art. 6, sec. 66-111; Texas Codes Ann., Bus. and Commerce Code, title 2, chap. 15, sec. 15.14; Code of Va., title 59.1, chap. 1, sec. 59.1-9.10; Wisc. Stats. Ann., title 14, chap. 133, sec. 133.06; P.R. Laws Ann., title 10, chap. 13, sec. 271.

Among departments and other agencies whose heads, members, or employees have statutory authority to compel attendance and testimony of witnesses in the course of investigations pertinent to laws which they administer are Agriculture, HEW, Labor, Treasury, AEC, CAB, FAA, FCC, FPC, FMC, ICC, NLRB, Railroad Retirement Board, Tariff Commission, and VA.2/

Nor is precedent lacking for extending the investigatory power to incipient violations. The acts of Hawaii, Illinois, Missouri, New Jersey, New York, and Virginia for example, specifically authorize the use of civil investigative subpoenas in investigations of incipient violations.

No field of litigation involves facts more complex and records more extensive than are found in the Government's antitrust cases. The task of amassing the voluminous data essential to successful antitrust enforcement is of considerable magnitude. Insofar as it went, enactment in 1962 of the Antitrust Civil Process Act provided a signal benefit to the Government's civil investigations by authorizing production of relevant documents from corporations, associations, partnerships, or other legal entities not natural persons, under investigation. But the limitations on the scope of the demand have left the Act far from meeting essential investigatory needs of the Department's Antitrust Division.

The refusal of industry sometimes to cooperate voluntarily in antitrust investigations, which gave rise to the Antitrust Civil Process Act, is the reason today that more effective civil discovery means are needed. The same reasons that supported enactment of the Civil Process Act speak for the Act's expansion. Although the grand jury can be used in investigation of criminal violations under the Sherman Act, the Clayton Act is not a criminal statute, and the grand jury is unavailable where only a civil action is contemplated. Often it is not desirable to bring companion criminal and civil suits; the facts may not warrant criminal sanctions, or the urgency for civil relief may make it unfeasible to risk the delay that very likely would attend the bringing of both types of actions. In other situations it may appear at the outset that the evidence may not meet the test for a criminal case.

2/ There are over three dozen provisions in the United States Code authorizing the taking of compulsory testimony. Among them are: 7 U.S.C. 15, 222, 499m, 610, 855, 2115 (Agriculture); 12 U.S.C. 1820 (banking agencies); 15 U.S.C. 49 (FTC); 15 U.S.C. 77s, 78u, 79r, 80a-41, 80b-9 (SEC); 15 U.S.C. 717m (FPC); 16 U.S.C. 825f(FPC); 18 U.S.C. 835 (ICC); 19 U.S.C. 1333 (Tariff Commission); 26 U.S.C. 7602 (Treasury); 27 U.S.C. 202(c) (Treasury); 29 U.S.C. 161 (NLRB); 29 U.S.C. 209, 308, 521 (Labor); 33 U.S.C. 506 (Transportation); 38 U.S.C. 3311 (VA); 42 U.S.C. 405 (HEW); 42 U.S.C. 2201 (AEC); 45 U.S.C. 362 (R.R. Retirement Board); 46 U.S.C. 826, 1124 (FMC); 47 U.S.C. 409 (FCC); 49 U.S.C. 12, 916, 1017 (ICC); and 49 U.S.C. 1484 (CAB).

The proposed bill would simply make available to the Attorney General the same antitrust investigatory powers in civil investigations that he now has in criminal investigations, and provide him with authority similar to that of the Federal Trade Commission.

For the reasons set forth above, I urge the Congress to give this legislative proposal its early and favorable consideration.

The Office of Management and Budget has advised this Department that enactment of this proposal would be in accord with the program of the President.

Sincerely,

Edward H. Levi

Attorney General

Attachment B

Prepared by the
Justice Department

ATTACHMENT B

Background and Description of
Amendments to Antitrust Civil Process Act

H.R. 39 and Title II of S. 1284 incorporate the Administration's proposal to amend the Antitrust Civil Process Act of 1962, which spells out the authority of the Department of Justice to investigate civil violations of the antitrust laws. This legislation was originally submitted to the Congress by the Nixon Administration and was formally resubmitted by President Ford in February, 1975. The President has repeatedly urged its passage by the Congress, including specific appeals in the Economic Address of October 1974 and the State of the Union Message in 1975. The Senate Judiciary Committee is already considering this legislation in its mark-up of S. 1284; the House Judiciary Subcommittee is scheduled to mark up H.R. 39 on April 1.

These bills are designed to significantly increase the efficiency of antitrust investigations and to bring the investigatory authority of the Department into line with other analagous federal agencies, particularly the Federal Trade Commission. Toward that end, these bills would generally remove limitations upon the Department's pre-complaint authority which have proven to be a significant impediment to effective investigation. Both public and private interests are best served when the Department makes a fully informed decision whether or not to institute civil antitrust proceedings.

Under the original 1962 legislation, the Department may issue a "civil investigative demand" only to "targets" of an antitrust investigation and then only for the production of relevant documentary material. The documentary material may be used by the Department in determining whether or not to bring a civil suit against the person and must be returned when the investigation is completed.

H.R. 39 and Title II of S. 1284 would amend this investigative authority in four respects.

First, the amendments would broaden the coverage of the Act to include natural persons.

Second, the amendments would permit the Department to seek information from persons who are not themselves under investigation but who may nevertheless have important information relevant to an antitrust violation. The Department has found that competitors, customers, and suppliers often have vitally important information but are reluctant to share it with the Department voluntarily because they fear economic retaliation.

Third, the amendments would allow the Department to take depositions or submit written interrogatories in addition to, or instead of, seeking documentary information. The Department has found that requests for documentary material are occasionally unnecessarily burdensome and may also be unsatisfactory for investigative purposes. Questions frequently arise regarding a company policy or product market that could be answered more directly and at less expense if the Department could pose questions directly to involved individuals.

In this context, the amendments contain numerous safeguards to protect persons against governmental over-reaching. Anyone asked to give a deposition by the Department may be accompanied by an attorney who may advise his client to refuse to answer on grounds of self-incrimination or any other lawful grounds. He may clarify or correct any incomplete answers, and the Department has supported a provision to allow a witness to obtain a copy of his statement. Perhaps most importantly, if a disagreement arises about the propriety of any question, he can simply refuse to answer, and the Department can only compel a response by seeking a court order, which can be opposed. In addition, of course, the amendments would not change the existing statutory procedure permitting anyone to move to quash a request for information prior to compliance.

Finally, the amendments would authorize the Department to issue a demand in connection with its participation in administrative agency proceedings. In recent years the Department has become an important advocate for competitive principles in agency decisionmaking. These efforts

are particularly necessary in agency proceedings because of the significant impact that agency decisions may have upon competitive conditions. Because agencies have not been adequately responsive to competitive considerations in the past, their procedures generally do not allow for the development of facts relevant to these issues. Thus it is important that the Department have the opportunity to obtain the information necessary for effective participation in such proceedings.

The primary arguments by opponents of these bills have been: (1) no showing of need; and (2) that amendments would give the Department unprecedented authority infringing on the civil liberties of businessmen. The first is simply judgmental; the second has been effectively rebutted.

General opposition has been expressed to any provision that would authorize the Department to take depositions. Some persons have even charged that enactment of this authority would authorize "inquisitorial proceedings" that would combine the oppressive characteristics of a grand jury investigation without corresponding safeguards. The broad procedural safeguards contained in the amendments belie these charges. The procedural rights, which would be available under these amendments, are almost totally unavailable to a grand jury witness. The grounds for objection and the method for verification and correction of the transcript are patterned upon the Federal Rules of Civil Procedure. Furthermore, the fact that no sanctions may be imposed unless the Department institutes a separate judicial proceeding assures that every person being deposed will have a full opportunity to test the propriety of any inquiry before an impartial judge.

Some have objected to those provisions of the amendments that would allow the Department to seek information from persons who are not themselves under investigation. They apparently feel that innocent persons may thereby be swept into an antitrust violation. Citizens generally have an obligation to cooperate with law enforcement officials, and it is difficult to understand why those with information relevant to antitrust violations should be treated differently. The Department, however, is

sensitive to the possibility that the nature of antitrust demands may be such that some provision for reasonable expenses may be appropriate. S. 1284 has been tentatively amended by the Senate Judiciary Committee to include such a provision, and the Department has indicated a willingness to work on this issue.

Another frequent argument has been that persons under investigation should be given advance notice of all requests under the Act and be permitted to participate in antitrust investigations. Presumably this would allow these persons to review documents submitted by others and to participate in depositions of other persons. This kind of participation by targets in pre-complaint investigations is unprecedented in American jurisprudence, whether one looks to civil or criminal analogies, and in any event would seriously impair antitrust investigations by compromising confidentiality and complicating the investigative process. Furthermore, it seems unnecessary to meet any constitutional or fairness objectives, since, if a complaint is later filed, the defendant will have the opportunity to cross-examine all witnesses at the trial and to discover relevant materials pursuant to the Federal Rules of Civil Procedure.

Put simply, the amendments, to the extent they merely broaden the scope of who may be asked for what information, merely give the Department investigative authority similar to that now possessed by a large number of other regulatory and executive agencies, and a significant number of state antitrust enforcement agencies. These include such diverse agencies as the Federal Trade Commission and the Veterans Administration. The safeguards included in the amendments exceed those contained in any similar statutory provision. Thus, the arguments about lack of safeguards and precedent are difficult to maintain.

Objections have also been raised to provisions of the amendments that would authorize the seeking of information in connection with Department participation in agency proceedings. These objections are apparently based upon either of two arguments: (1) the Department of Justice is an intermeddler in agency proceedings seeking to frustrate agency decisionmaking, or (2) it is "unfair" for the Department to have investigatory powers that are unavailable to other parties.

The first argument, of course, goes flatly against the Administration's fundamental commitment to regulatory reform and competitive policy. Participation in agency proceedings is necessary precisely because insufficient attention has been given in the past to competitive principles. Furthermore, since interested parties in agency proceedings are advancing private interests, the Department stands as an advocate of public policies different in kind from other participants. For this reason, supplemental information gathering techniques are appropriate.

Attachment C

Prepared by the
Justice Department

ATTACHMENT C

Short Summary of Hart-Scott
Omnibus Antitrust Bill, S. 1284

S. 1284 is a wide-ranging antitrust bill co-sponsored by Senators Hart and Scott. It contains seven titles, including provisions comparable to the Civil Process Act amendments now pending in the House, and the parens patriae legislation passed last week.

Title I (Declaration of Policy)

This title contains a collection of assertions and conclusions about the commitment of this country to a free enterprise system, the decline of competition as a result of oligopoly and monopoly, and the positive impact of vigorous antitrust enforcement. It has been heavily criticized by business groups as not being based on economic consensus nor logically connected to the procedural matters dealt with in the body of S. 1284. The Administration has taken no position on Title I, and it is irrelevant to the substantive effect of the omnibus bill. This is an area where it seems likely that significant modification or complete elimination would be possible.

Title II (Antitrust Civil Process Act Amendments)

Title II is the Senate equivalent to H.R. 39, Amendments to the Antitrust Civil Process Act. It is in all major respects identical to the House bill and the Administration's original proposal, as modified by suggestions from the Administration.

Title III (FTC Amendments)

Title III would amend the FTC Act to provide increased penalties for not obeying FTC subpoena or orders. Essentially similar provisions have already passed the Senate in S. 642, and it seems likely that Title III will or could be eliminated from S. 1284. The Administration has generally supported Title III.

Title IV (Parens Patriae)

Title IV is the Senate equivalent to the parens patriae bill recently passed by the House. It is, as it presently stands, a significantly broader bill, allowing, for example, recovery of damages to the general economy of a state. In addition, the bill as it now stands is subject to the same criticisms directed at the House bill in the President's letter to Congressman Rhodes. It seems quite likely, after the House floor action on parens patriae, that substantial amendments in Title IV would be accepted by the Senate. In fact, the Administration has explicitly opposed several provisions of existing Title IV (especially the general economy language) and Judiciary staff has indicated that those provisions would likely be deleted.

Title V (Premerger Notification and Stay Amendments)

Title V establishes a pre-merger notification procedure, and creates an automatic injunction against mergers challenged by federal enforcement agencies. The Administration originally supported the basic concepts of Title V, including the automatic injunction, although suggesting some major modifications in language and scope of coverage. Although those suggested modifications were largely adopted, the Administration recently withdrew its support for the automatic injunction portion of Title V, and stated its opposition to any similar provision, while reaffirming its support for a properly modified pre-merger notification procedure. Senators Scott and Hart have announced their intention to modify the notification procedures in a way consistent with Administration suggestions and to seek to amend the automatic injunction procedure to provide a limited automatic stay, not to exceed 60 days, when a merger is challenged in order to permit a preliminary injunction hearing to be held prior to consummation. There is obviously some room for negotiation here, although there is strong support for some automatic stay provision.

Title VI (Nolo Contendere Amendments)

Title VI would grant prima facie effect in private damage actions to pleas of nolo contendere in the government's criminal antitrust actions. Title VI would also

provide more access to evidence produced in a grand jury proceeding on the part of private treble damage plaintiffs. The Administration has opposed Title VI and there seems to be a substantial possibility that Title VI could be bargained away during a period of negotiation.

Title VII (Miscellaneous Amendments)

Title VII contains a variety of miscellaneous provisions. The Administration has supported only one of these miscellaneous matters, which would amend Section 7 of the Clayton Act to expand its jurisdictional reach to the full scope of Congressional commerce power. This change is necessary because of the Supreme Court's recent decision in the American Building Maintenance case limiting the scope of Section 7 of the Clayton Act. The Administration has either opposed or taken no position on the other features of Title VII. The most significant of these is Section 704, which would amend Section 2 of the Sherman Act to lessen the burden of proof in an attempt to monopolize case. This provision has drawn considerable opposition and, while the Administration has taken no formal position on this provision, we have indicated informally our opposition. There is every reason to believe that most, if not all, of Title VII is negotiable.

THE WHITE HOUSE

WASHINGTON

April 3, 1976

MEMORANDUM FOR: PHIL BUCHEN
JIM CANNON
DICK CHENEY
JIM LYNN
JACK MARSH
BILL SEIDMAN

FROM: ED SCHMULTS

SUBJECT: Robinson-Patman Report

Attached at Tab A is a brief summary of a 314-page Report on the Robinson-Patman Act prepared by the Antitrust Division of the Department of Justice for the Domestic Council Review Group on Regulatory Reform ("DCRG"). This Report will be transmitted to the DCRG. The question before us is whether it should be made public on April 8, 1976, in conjunction with an American Bar Association Committee Meeting on Robinson-Patman.

This Report results from three days of hearings on the Robinson-Patman Act held by the DCRG on December 8-10, 1975. Included in the summary of the Report is background information on the Administration's announced intention to study and probably change the Robinson-Patman Act and a chronology of Administration actions to date.

Needless to say, the small business community views any change in -- or even an investigation of -- Robinson-Patman as anathema, since the law is seen by some as the "Magna Carta of Small Business." Since the President announced his intention to propose changes in the Robinson-Patman Act last spring, there has been an outcry from many small business groups.

The Report is styled as the product of Antitrust Division staff acting under the auspices of the DCRG. The Report will be transmitted to the DCRG for consideration of the findings, conclusions and recommendations. No suggestion will be made that the Report represents the views of the Administration, but rather it will be clear that the Report is a statement of the views of the Antitrust Division only. See draft transmittal letter and response at Tab B.

Upon receipt of this Report, we anticipate that the DCRG and the Administration will withhold substantive comment on the Report pending a final review of the findings, conclusions and recommendations. The Press Office will be briefed regarding this Administration stance. Because the subject matter is complex and the prospects for careful substantive review by Congress in this election year are slight, there seems to be little point in taking quick action on Robinson-Patman.

Unless there is substantial opposition to the plan outlined above, the Justice Department would like to send advance copies of this Report to the concerned members of the American Bar Association Committee early this week. Thus, I would appreciate your reactions to this proposed plan by c.o.b. Tuesday, April 6.

Thank you.

Attachments

ANTITRUST DIVISION REPORT ON THE ROBINSON-PATMAN ACT

Introduction and Summary

Background

Last year the President indicated in several speeches his strong desire for consideration of reform or repeal of the Robinson-Patman Act.

Following those Presidential statements, the Department of Justice and other concerned agencies (including Commerce, COWPS, SBA and OMB) under the direction of the Domestic Council Review Group (DCRG) considered various approaches to reform of the Robinson-Patman Act. An initial analytic paper was produced by the Antitrust Division on the Act, together with two draft proposals for statutory reform. These were circulated within the Administration in July, 1975. These materials were then made available to the House and Senate Judiciary Committees looking toward possible congressional consideration of Robinson-Patman Act reform.

In addition, in August of 1975, a meeting of DCRG members with representatives of various small business interests was held at the White House to discuss possible reform proposals.

Discussions with the staffs of the Judiciary Committees indicated that, because of the crowded legislative agenda of both committees, hearings on any Administration proposals for repeal or reform of the Robinson-Patman Act were unlikely during the Second Session of the 94th Congress. It was further suggested that additional public education as to the economic impact of the Act would be helpful prior to congressional consideration of any reform legislation.

In the interim, an ad hoc committee of the House Committee on Small Business held a series of hearings on the Robinson-Patman Act. At these hearings a number of congressional and small business supporters of the Act testified and opposed any change in the Act. In addition, the FTC at the hearings was urged to undertake more vigorous enforcement of the Act and to devote increased resources to this effort. In this setting, the DCRG decided that the wisest course was for it to hold a series of public hearings on the economic impact of the Robinson-Patman Act.

These hearings were held on December 8, 9 and 10. Testimony was taken from over twenty witnesses including members of the academic community, representatives of small business associations and other businessmen, as well as practicing attorneys. Testimony was also taken from the Assistant Attorney General for Antitrust, Thomas E. Kauper, and former Assistant Attorney General, Donald F. Turner.

Following the conclusion of these hearings, the Antitrust Division was asked to prepare a report on the Robinson-Patman Act based on the record of the hearings and other available evidence. The Report summarized here represents the culmination of those efforts. It should be noted that the Report represents the views solely of the Antitrust Division and does not express the position of the Administration.

Summary of the Report

The Report arrives at several important conclusions about the impact of the Robinson-Patman Act. First, the Act creates serious anticompetitive effects by deterring price flexibility, and indeed fostering price rigidity if not price fixing; second, the Act fosters major inefficiencies in distribution at great cost to consumers; third, the Act fails to achieve any significant antitrust or procompetitive objectives; finally, the Act represents a false and illusory hope for small businesses because in the long run it fails to achieve the protectionist advantages which it promises.

On the basis of these conclusions, the Antitrust Division recommends that the Robinson-Patman Act be repealed. In our view, the costs of the Act far outweigh any discernible benefits. However, it is recognized that others believe that some price discrimination statute is needed. Therefore, an alternative reform recommendation has been advanced which in our judgment would produce less adverse impact on the economy than the present Act.

The reform proposal has basically four elements. First, it is proposed that enforcement of the new price discrimination statute be left solely to the FTC rather than private plaintiffs. The FTC as a public agency would of course be concerned about a proper application of the Act. The elimination of private plaintiffs would remove the current ability of private business firms to use the threat of suit and treble damage exposure to

blackmail competitors into withdrawing price reductions. A less far reaching alternative would be to eliminate the present treble damage provisions for private plaintiffs. The punitive effects of these treble damage provisions clearly deter legitimate price competition.

Second, the Report recommends that the offense of price discrimination be narrowed to avoid the present wholesale interference in legitimate price competition. This narrowing would be accomplished first by placing the burden of proof on the plaintiff to show that a price discrimination was not cost justified, and second, by limiting those circumstances in which adverse competitive injury may be inferred to instances of systematic discrimination, or the charging of prices below marginal costs. The current standard, which permits a finding of liability for sporadic discrimination or the charging of prices below fully-allocated costs, inherently inhibits a significant number of procompetitive price reductions.

Third, the report recommends that the defenses to a charge of price discrimination reflect business realities. Thus, businessmen should be able to justify discrimination on the basis of reasonably anticipated future costs according to flexible groupings of customers. Similarly, businessmen should not be required to go through unrealistic and potentially anticompetitive verification procedures to qualify for the meeting competition defense.

Finally, the report recommends that the Act's present flat prohibition against discounts in lieu of brokerage and "nonproportional" promotional allowances be eliminated. Since, at worst these practices can only be disguised price discriminations, it is recommended that they be evaluated under the Act's more general provisions, requiring a showing of competitive injury and permitting the interposition of basic defenses.

Of course, the basic proposal is for repeal of the Act, reflecting the report's finding that the implementation of a price discrimination statute based on faulty economic assumptions necessarily impedes the competitive process to the great economic detriment of consumers.

Robinson-Patman Creates Serious Anticompetitive Effects

The Robinson-Patman Act is a statute of broad applicability, governing the prices which can be charged for most commodities and sales among businesses, including nearly all products which are to be resold by merchants. While the statute is intended to prevent the abuse of purchasing power by large buyers, the actual effect of the statute is to discourage many procompetitive price reductions.

Under Robinson-Patman, the Federal Trade Commission in an enforcement action, or a competing business firm in a treble damage action, can quite easily establish a prima facie case of violation. In most instances, the complainant need only show that one of his competitors was able to obtain a lower price for a product, and that such a discount was sufficient to affect the resale price for that item. Once such a showing is made, the firm granting the discount must prove that the lower price is justified by some cost saving in supplying the product to the favored customer, or that the lower price is necessary to meet a lower price of a competing supplier. These defenses are difficult to use. The cost-justification defense requires detailed accounting studies, utilizing procedures which are not part of normal accounting practice, and excluding certain cost savings which a prudent businessman would take into consideration. Consequently, a businessman can never know until his case is finally adjudicated whether his cost-justification defense will be successful. Similarly, in order to defend a price cut on the grounds of meeting competition, the businessman cannot simply rely on a statement from his customer that a lower price has been offered. Rather, he must undertake affirmative action, such as checking invoices or price quotes, or actually calling his competitor to verify the bid, before a "matching" discount can be given. Other provisions of the Act are even more restrictive, prohibiting certain payments in lieu of brokerage and promotional allowances regardless of their effects on competition or cost justification.

As a consequence of this overreach of the Robinson-Patman Act, the prudent businessman wishing to lower a price to a particular customer must assume that a competitor or the Federal Trade Commission will be able to successfully

challenge that price cut and that his ability to defend such a cut is highly uncertain. Rather than undergo the expense of litigation, pre-trial discovery of a firm's proprietary cost and price data, and the possibility of costly damages or injunctive relief, the cautious businessman will simply decide not to cut prices.

Robinson-Patman thus promotes pricing inflexibility. Unfortunately, such a result serves to reinforce high prices in oligopolistic manufacturing industries. In industries where there are few sellers, list prices tend to remain sticky and the only way high prices will come down is through the granting of selective discounts. These discounts over time erode the industry's high price structure leading to the establishment of list prices at a lower level. By requiring that price cuts be an all or nothing affair, Robinson-Patman serves to ensure that prices will remain high: oligopolists know it is not in their best interests to cut list prices across-the-board, except in times of very weak demand.

The anticompetitive effect of Robinson-Patman is compounded by the fact that the meeting competition defense serves to encourage discussions about prices among competitors, and even price fixing agreements. While the defense does not require that a firm check directly with a competitor before meeting his price, courts have stated that if a businessman does discuss prices for the purpose of satisfying Robinson-Patman, he can be exonerated of what would otherwise be a violation of the Sherman Act. Once such discussions begin, actual price fixing arrangements may result.

Finally, restrictions on price cuts to particular customers or geographic areas serve to inhibit businesses from engaging in promotional pricing practices to gain new customers. To the extent that such promotional prices are necessary to enter a market, the Act serves to insulate the entrenched business firms from new competition.

In addition to Robinson-Patman's protection of high prices, the Act also leads to higher costs for doing business. Various provisions of the Act serve to protect the existence of brokers and middlemen because the Act makes it difficult for businessmen to restructure their distribution systems to meet the needs of their various customers on an

individual basis. Other restrictions on promotional allowances also may require businesses to engage in valueless promotional programs, again because of the inability to tailor such efforts to the realities of the marketplace. Lastly, Robinson-Patman leads to added costs when businessmen engage in product differentiation strategies to lawfully avoid the restrictions of the Act.

In light of the legislative history of Robinson-Patman, Congressional passage of a statute having such effects becomes understandable. The Robinson-Patman Act was a product of two historical occurrences. The first was the Depression. During the early 1930s, the severe deflation, high unemployment, and increased volume of business bankruptcies led to the general belief that competition was not necessarily in the public interest because it led to prices which were destructively low. Through the NRA Codes of Fair Competition, the minimum rate provisions of the Motor Carrier and Civil Aeronautics Acts, and through Robinson-Patman, Congress sought to stabilize or actually enhance, price levels. At about the same time, a revolution was occurring in the distribution sector. The growth of chain stores in the 1920s led to much concern among wholesalers that absorption of the wholesaling function by chains would force them out of business. Similarly, it was feared that the growth of chains would also mean a decline in the number of independent retailers with whom they did business, a fear which the retailers soon adopted. Responding to pressures from these businessmen, state legislatures passed chain store taxes and fair trade laws, and the Congress passed the fair trade enabling amendment to the Sherman Act--and in 1936 passed Robinson-Patman.

Because of the understandable congressional desire to do something about the adverse economic effects of the Depression, and to do something to allay the fears of independent wholesalers and retailers, it passed the Robinson-Patman Act without thoroughly understanding the economic assumptions and long-run economic consequences implicit in such a statute. Thus, we find upon examination that Robinson-Patman's basic assumptions are invalid. Today, prices should be lower, not higher. The granting of discounts is not inherently unfair; it is a necessary part of the dynamics of bringing down high oligopoly prices. Price differences do not normally reflect only differences in costs; they result from the interaction of both supply (cost) and demand. Lower prices to some do not mean higher prices to others; high prices to certain

customers indicate the presence of market power on the seller's side and lower prices may represent a transfer of oligopoly profits from manufacturers to consumers.

The Robinson-Patman Act Fails to Achieve Any Significant Antitrust Goals

Robinson-Patman is claimed to be an appropriate supplement to the other antitrust laws as a means of catching potentially anticompetitive situations in their "incipiency" by preventing the use of a market advantage gained through price discrimination to lessen the number of competitors and decrease competition. Unlike Section 7 of the Clayton Act which covers structural changes caused by mergers, the conclusion that price discrimination will have anticompetitive effects relies upon a series speculative and untested inferences. It must be assumed that if one manufacturer is permitted to discriminate in price to a retailer, the effect will necessarily be to force a disfavored businessman from the marketplace; that such a situation would affect many other similarly situated businessmen; and that the number of businessmen so eliminated would be sufficient to seriously reduce competition in the market. The evidence shows, however, that such a chain of events just is not likely in the case of most price discriminations. Yet, these inferences are permitted in order that the statute may be efficiently applied to the billions of pricing transactions in the economy. Thus, the Act virtually presumes that any price discrimination will have an anticompetitive effect when the more likely truth is that the discrimination is procompetitive.

Robinson-Patman is, in fact, a regulatory statute, not an antitrust law. Those administering it seek to protect businesses regardless of their relative efficiencies, and regardless of varying demand characteristics of the markets they serve. As such, the effect of the Act is strikingly similar to that of the other regulatory statutes which empower agencies to set minimum prices. Also, the Act compels businessmen to seek legal advice before making pricing decisions, and may require businessmen to seek advice from the Federal Trade Commission before changing a marketing practice.

For all of this, Robinson-Patman provides no demonstrable antitrust benefits. Proponents argue that without Robinson-Patman, any immediate increase in competition and lowering

of prices would be outweighed by the likelihood that markets would become increasingly concentrated and prices would rise. In order for that eventuality to occur, though, it would be necessary that a discrimination be so substantial as to force a large number of businesses out of a market, that prices thereafter would rise to a level higher than that charged before and that these higher prices would be maintained for a long enough time to outweigh the benefit of the initial price reductions. No evidence of any such instance has been demonstrated, while testimony to the contrary was heard by the Review Group. Likewise, studies conducted by the Federal Trade Commission of its own enforcement orders have not demonstrated that its actions had any appreciable effect in improving competition. Rather, one study found such orders to have no effect, and its authors doubted that price discrimination and increases in concentration were related.

Genuinely predatory practices, like below-marginal cost pricing, can be dealt with under the Sherman Act. Likewise, small businessmen can counteract the buying power of larger firms through the formation of cooperative wholesaling operations. Indeed, testimony was heard from one Review Group witness that his cooperative was so successful in countering the buying power of the chains, that one national food chain joined his group.

Robinson-Patman Provides a False Promise to Small Business

Perhaps the greatest irony of Robinson-Patman is that it does not protect small businesses as a class. Distribution is a dynamic sector of the economy. In order to remain successful, businessmen must deal with changing population and income characteristics, changing lifestyles, changing products, changing ways of doing business, and competition from new shopping locations. Moreover, businessmen must contend with competition from those who, though doing business in the same manner and in the same area, nevertheless do so in ways more responsive to the desires of the buying public. In such an environment, it is simply not the case that the ability of one competitor to get a somewhat lower price on merchandise of like grade and quality, which discount is not cost-justified and is not

given to meet competition--plays any significant role in determining the success or failure of small business as a class.

The fact is that large and small businesses frequently do not engage in precisely the same selling function. Small businesses tend to provide higher price and higher service options, while larger businesses often utilize a lower price, lower service, mass marketing approach. The determinant of the success or failure of a given business in such a situation is not the cost of goods purchased, it is consumer preference for the price/quality/service mix of the large or small business. If a business satisfies its customers, it will survive, if it does not, it will exit the market, and no statute can--or should--prevent this.

Not surprisingly, the evidence available to the Review Group does not demonstrate any effect of Robinson-Patman on the viability of small businesses as a group. A comparison between the position of small businesses--retailers having only one location--in the United States with Robinson-Patman, and in Canada without it, shows that the percentage of stores attributable to small business is almost identical in both countries. In Canada, without an effective price discrimination law, small business actually has a higher portion of sales than does the United States.

Fair Trade laws were more protective of small business than is the Robinson-Patman Act. Yet, Congress recently found in repealing the Fair Trade enabling statute that Fair Trade simply did not protect small business.

Thus, for all its cost, Robinson-Patman gives only illusory protection to the small businessman. Most small businessmen work, very hard, to survive, and will support any statute which offers the promise of protection. But Robinson-Patman only offers a false promise, at a great cost to our society as a whole.

B

DRAFT

Mr. Paul C. Leach
Associate Director
Domestic Council
Room 218 Old Executive
Office Building
Washington, D. C. 20500

Dear Mr. Leach:

Enclosed herewith is a Report on the Robinson-Patman Act prepared by staff of the Antitrust Division, Department of Justice. The Report was written after the close of the DCRG hearings on Robinson-Patman in December of 1975, and represents solely the views of the Antitrust Division of the Department of Justice. The Report is intended to assist the DCRG's consideration of what, if any, recommendations to make to the President in connection with this legislation. It is also our hope that the Report will contribute to deeper public understanding of the Robinson-Patman Act and its effects on the economy.

Sincerely yours,

THOMAS E. KAUPER
Assistant Attorney General
Antitrust Division

Enclosure

THE WHITE HOUSE

WASHINGTON

Dear Mr. Kauper:

On behalf of the Domestic Council Review Group on Regulatory Reform, I wish to thank you for the work done by Antitrust Division staff in preparing the Report on the Robinson-Patman Act. Be assured that the findings and recommendations of the Report will be given careful consideration by us in considering what recommendations to make to the President with respect to this legislation. Your efforts and the efforts of your staff are greatly appreciated.

Sincerely,

Paul C. Leach
Associate Director
Domestic Council

The Honorable Thomas E. Kauper
Assistant Attorney General
Antitrust Division
Department of Justice
Washington, D. C. 20530

THE WHITE HOUSE
WASHINGTON

DATE: Sept. 28, 1976

TO: JIM CANNON

FROM: JIM CAVANAUGH

SUBJ: H.R. 8532

FYI x

ACTION

cc: Parsons
Quern
Leach

File

Antitrust

1976 SEP 28 AM 9 23

THE PROPRIETARY ASSOCIATION

1700 Pennsylvania Avenue, N.W. / Washington, D.C. 20006 / Phone (202) 223-5866

September 24, 1976

James H. Cavanaugh, Ph.D.
Deputy to White House Chief of Staff
The White House
Washington, D.C. 20500

Re: Veto of H.R. 8532 ("Parens Patriae Antitrust Bill")

Dear Dr. Cavanaugh:

I am writing to express the hope of the members of The Proprietary Association that the President will veto the "Parens Patriae Antitrust Bill" (H.R. 8532). Our members strongly believe that any public benefits in this bill are strongly outweighed by the dangerous potential of the parens patriae portion. We are particularly concerned about the following aspects of this provision:

-- The legislation does not require lawyers bringing suits against business to prove claims of individual consumers; rather these lawyers can simply use statistical sampling and mere estimates of losses to force businesses to defend these suits; moreover, any money obtained through this procedure would not necessarily be used to compensate consumers;

-- The legislation provides, contrary to the original House-passed version, that state attorneys general can "farm out" cases against business to private lawyers on a contingency fee basis, thereby further permitting a further dilution of the money obtained from business ostensibly on behalf of consumers; and

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-- Whereas the original House-passed version of this bill once contained a reasonable safeguard whereby businesses violating the antitrust laws in good faith would only have to pay actual damages, the legislation now penalizes even these companies by requiring them to pay triple damages.

We believe that this bill is an example of good legislation "gone bad" and hope that the President will veto the parens patriae bill as not being in either the ~~consumer~~'s best interest or in business' best interest.

Sincerely,

James D. Cope
President

JDC:bws

READING

DOMESTIC COUNCIL

file

FROM:

PAUL LEACH

SUBJECT:

Monitoring implementation of "Parens Patriae" Title of the Anti-trust bill

Date: 10/6/76

COMMENTS:

Leach's memo, sent FYI, outlines a rough plan for monitoring implementation of this bill to see whether the results of this title are as bad as we suspect they might be.

A.M.

ACTION:

Date:

bcc: Jim Cannon

Antitrust

THE WHITE HOUSE

WASHINGTON

October 6, 1976

1976 OCT 6 PM 7 01

MEMORANDUM FOR: DON BAKER

FROM: PAUL LEACH Paul

SUBJECT: Monitoring the Implementation of the "Parens Patriae" Title of the Antitrust Bill

In his Signing Statement for H.R. 8532, the President, in noting some reservations about the parens patriae title, said:

> I will carefully review the implementation of the powers provided by this title to assure that they are not abused.

This provides us with a mandate to do something which the Government does all to infrequently --- to establish a system of measuring the actual results of a new regulatory/antitrust law against its predicted consequences. Among other things, we could monitor:

- Parens patriae suit statistics
  - Incidence against "small" business.
  - Judgment/settlement record.
  - Geographical breakdown.
  - Types of industry (e.g., real estate brokerage)sued.
  - Etc.
- Alleged and actual "political" abuses.
- The use of private attorneys and their fee arrangements.

Since this ongoing review is something that the President wants, I would suggest that you have someone in the Antitrust Division work with Stan Morris' group at OMB to develop a simple system for monitoring what happens with parens vs. the

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predicted results over the next couple of years. Once a plan for doing this is developed --- say by November 1, --- then you, Ed Schmults, Stan and/or Dan Kearney and I can review the plan to assure that it will help achieve what the President has requested, without causing any undue burden on the Antitrust Division. Finally, using this monitoring system, we can review the parens patriae situation quarterly or semi-annually and make a simple report to the President, if that seems appropriate.

Once you have given this some thought, let's discuss it and set up a target date when we can get together with Ed and OMB on this.

cc: Ed Schmults
Dan Kearney
Stan Morris