The original documents are located in Box 29, folder "Regulatory Reform (15)" of the James M. Cannon Files at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE

WASHINGTON

September 9, 1976

MEMORANDUM FOR: ALLEN MOORE

FROM: PAUL LEACH Paul

SUBJECT: Attached Letter

Here are my proposed revisions in this letter, if we want to send it.

Do you know who drafted the letter?

This is a politically sensitive subject and should be treated with care.

Please call me.

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: September 9, 1976 Time:

FOR ACTION:
Jim Cannon
Jim Lynn
Bob Hartmann

cc (for information):
Dave Gergen

FROM THE STAFF SECRETARY

DUE: Date: Friday, Sept. 10 Time: 2 P.M.

SUBJECT:

Proposed Letter to Michael Parkhurst
President of Independent Truckers Association

ACTION REQUESTED:

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

REMARKS:

Am told inquiry was made by telephone.

Changes noted in text.

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.

Jim Connor
For the President

THE WHITE HOUSE

WASHINGTON

September 7, 1976

Dear Mr. Parkhurst:

In response to your inquiry concerning regulatory reform in the trucking industry, I would like to outline my Administration's policy goals and comment on the legislation intended to help achieve these goals.

As you know, there are three bills pending in the Congress which address the issues. These include S.2271, co-sponsored by Senator Buckley; H.R.12386, co-sponsored by Congressman Kemp, and the Motor Carrier Reform Act which was introduced at my request. While the bills differ somewhat in content, ~~I support the concept of permitting more~~ competition in the industry. ~~I believe that a strong and prosperous trucking industry is vital to our Nation.~~ Truckers would be able to offer consumers a wider choice of prices and services, ~~rather than having Washington dictate~~ what transportation services can be offered, what routes can be served and what rates can be charged.

Efforts to increase competition in the trucking industry would include removal of restrictions that would allow the independent trucker, as a small businessman, to compete more effectively with the larger trucking concerns.

At the same time, I am encouraged by efforts ~~by the ICC~~ to allow for more competition in the industry by changing archaic or restrictive rules and regulations which are anticompetitive. As you ~~know~~, there are items pending on the ICC docket which would make the trucking industry more competitive, thereby ~~giving~~ the small, independent trucker a more even footing ~~with~~ which to compete.

I fully support the goal of more competition and less government regulation in the trucking industry and believe that this kind of regulatory reform legislation will help to keep our vital trucking industry strong and prosperous.

I hope this effectively answers the important questions you raised concerning my Administration's regulatory reform policy IN THE TRUCKING INDUSTRY.

Sincerely,

Mr. Michael Parkhurst
President of Independent Truckers Association
Post Office Box 54078
Los Angeles, California 90054

THE WHITE HOUSE

WASHINGTON

September 7, 1976

Dear Mr. Parkhurst:

In response to your inquiry concerning regulatory reform in the trucking industry, I would like to outline my Administration's policy goals and comment on the legislation intended to help achieve these goals.

As you know, there are three bills pending in the Congress which address these issues. These include S.2271, co-sponsored by Senator Buckley; H.R.12386, co-sponsored by Congressman Kemp, and the Motor Carrier Reform Act, which was introduced at my request. While the bills differ somewhat in content, I support the concept of permitting more competition in the industry. I believe that a strong and prosperous trucking industry is vital to our Nation. Truckers should be able to offer consumers a wider choice of prices and services, rather than having Washington dictate what transportation services can be offered, what routes can be served and what rates can be charged.

Efforts to increase competition in the trucking industry would include removal of restrictions that would allow the independent trucker, as a small businessman, to compete more effectively with the larger trucking concerns.

At the same time, I am encouraged by efforts by the ICC to allow for more competition in the industry by changing archaic or restrictive rules and regulations which are anticompetitive. As you know, there are items pending on the ICC docket which would make the trucking industry more competitive, thereby giving the small, independent trucker a more even footing from which to compete.

I hope this effectively answers the important questions you raised concerning my Administration's regulatory reform policy.

Sincerely,

Mr. Michael Parkhurst
President of Independent Truckers Association
Post Office Box 54078
Los Angeles, California 90054

THE WHITE HOUSE

WASHINGTON

September 16, 1976

K –
~~Note~~ –
Talk w/
Ed Schultz

MEMORANDUM TO: PAUL LEACH

FROM: JIM CANNON

SUBJECT: Regulatory Reform

At the 8:00 Staff Meeting this morning, Bill Seidman reported that EPA is objecting to our regulatory reform efforts.

Why was I not informed about this?

Please give me a report on this situation today.

cc: Art Quern

Jim-

Not having heard Bill's comment, I cannot be sure of precisely what objections were raised. However, Paul MacAvoy has been talking with EPA about setting up one of Paul's "Presidential Task Forces" to work on improving the Inflation Impact Statement analysis process at EPA and Train has apparently objected that this is "discriminatory". Bill Seidman and Paul have had some discussions with Train on this matter and these may be continuing. I have had no involvement in this EPA matter.

Paul

81 9 ED 91 dES 916

file

THE WHITE HOUSE

WASHINGTON

September 16, 1976

MEMORANDUM TO: PAUL LEACH

FROM: JIM CANNON

SUBJECT: Regulatory Reform

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Why was I not informed about this?

Please give me a report on this situation today.

cc: Art Quern

[Oct. 1976]

ACTION

DOMESTIC COUNCIL

FROM:

ED SCHMULTS

SUBJECT:

Memo to the President re:
Independent Regulatory Commission
circulated for senior staff comment

Date:

COMMENTS:

Schmults suggests a general letter of acknowledgment be sent to chairmen of Independent Regulatory Commission thanking them for progress reports.

He also suggests a meeting during the budget process to discuss continuing regulatory reform efforts.

The memo includes brief summaries of progress reports of ten Regulatory Commissions. You may be interested in looking them over.

Also, you should indicate a preference on the recommendation at p.2.

Leach recommends "agree."

Paul — Pls call Schmults about the 2 recommendations

ACTION:

Date:

ACTION

file

DOMESTIC COUNCIL

FROM:

ED SCHMULTS

SUBJECT:

Memo to the President re:
Independent Regulatory Commissions
circulated for senior staff comment

Date:

COMMENTS:

Schmults suggests a general letter of acknowledgment be sent to chairmen of Independent Regulatory Commission thanking them for progress reports.

He also suggests a meeting during the budget process to discuss continuing regulatory reform efforts.

The memo includes brief summaries of progress reports of ten Regulatory Commissions. You may be interested in looking them over.

Also, you should indicate a preference on the recommendation at p.2.

Leach recommends "agree."

Paul — Pls call Ed Schmults about this & the reg reform initiatives — Jim

ACTION:

Date:

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: October 29, 1976 Time:

FOR ACTION: cc (for information):

Douglas Bennett
Jim Cannon
Allan Greenspan
Bob Hartman
Jim Lynn
Jack Marsh
Brent Scowcroft
Bill Seidman
FROM THE STAFF SECRETARY

1976 OCT 29 PM 1 30

DUE: Date: Wednesday, November 3, 1976 Time: 10:00 A.M.

SUBJECT:

Edward C. Schmults memo, 10/28/76 re Summary of Progress Reports from Independent Regulatory Commissions.

ACTION REQUESTED:

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

REMARKS:

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.

Jim Connor
For the President

10/29

THE WHITE HOUSE

WASHINGTON

October 28, 1976

MEMORANDUM FOR: THE PRESIDENT

FROM: EDWARD C. SCHMULTS

SUBJECT: Summary of Progress Reports from Independent Regulatory Commissions

Issue

What should be the Administration's next steps in dealing with the ten independent regulatory commissions?

Background

As you recall, on April 8, 1976 you met with the Chairmen of the ten independent commissions to discuss the steps which each agency was taking toward your regulatory reform goals. At the conclusion of that session you asked each of the commissions to prepare a second progress report by September 15, which would concentrate particularly on their accomplishments and identify specific savings to consumers and taxpayers.

We have reviewed the reports of these ten agencies and have prepared brief highlights for each agency, indicating what appear to be their major successes and pointing out the largest persisting problems. (See attachment at Tab A.) The full reports are included at Tab B.

Discussion

The agencies are concentrating primarily on reducing procedural delays and have achieved some progress in eliminating unnecessary paperwork. However, few have reported any major gains in reducing federal regulation and relying more on competition and less on direct federal controls. For example, although the ICC is trying to reduce its backlog of cases, the Commission has opposed most of your fundamental reform proposals. Likewise, the FPC is concentrating on eliminating costly time delays, but it has not proposed any major changes in the legislation which requires the large volume of cases.

In addition, I understand that these agencies have requested major resource increases for the coming year. I believe that much of your commitment to reducing unnecessary government involvement will be measured against changes in the size of the federal bureaucracy, and that concentrated efforts must be made to accelerate reform efforts in regulatory agencies without adding more people. I know that Jim Lynn and his people are looking carefully at all regulatory agencies in light of your concerns, and at some point it may make sense for us to discuss with him his recommendations for the FY '78 budget. It is my view that this budget is an important opportunity for you to emphasize your overall regulatory policies and your commitment to insuring that federal regulations are used only when other options are clearly inadequate.

Recommendation

In the interim, I recommend that you acknowledge the reports from the ten independent commissions without committing these agencies at this time to additional meetings or reports. A draft for your approval is included in this book at Tab C.

Agree _____

Disagree _____

See Me _____

Attachments

THE WHITE HOUSE
WASHINGTON

DATE: 10/29

TO: Paul L.

FROM: ALLEN MOORE

SUBJECT:

ACTION:

FYI: /

for your recommendation

OK - PCL -

TAB A

Summary of Reports from Independent Regulatory Commissions

1. Interstate Commerce Commission

The Railroad Revitalization Act which you proposed (and an amended version of which was signed into law) calls for increased pricing flexibility in the industry and new market opportunities for carriers. Although the ICC indicates some procedural improvements, the Commission's report does not evidence an understanding that fundamental reform may mean less regulation, or new forms of regulation. While the Commission has proposed that some of the procedural improvements enacted in the Rail Bill be extended to other modes, the Chairman has opposed most of the provisions in your program of reforms for the industries under ICC jurisdiction.

2. Civil Aeronautics Board

Chairman Robson has exhibited strong leadership in proposing ways to reduce the CAB's control over domestic airlines. He has supported an air bill similar to yours, has succeeded in getting the Board to substantially liberalize its rules governing charter airlines, and has been sensitive to the need for alternatives to the current system of government subsidies to rural air carriers. The Board's report however, does not clearly identify a desirable timetable for changes. The Board also rejected some innovative ideas that would have helped expedite internal procedures and we continue to believe that the CAB can, with more effort, accomplish significant paperwork reductions.

3. Federal Maritime Commission

This agency has been involved in a jurisdictional struggle with the ICC over regulation of containerized shipping for more than a dozen years. Little progress has been achieved in working out a sensible system which will promote, rather than restrict, this important technological development which could lead to major savings for shippers. The FMC continues to believe that the way to carry out its mandate is to preserve stability in the merchant shipping industry, at the expense of greater price competition. The Commission does recognize the need for major internal improvements but does not appear to share your view that regulatory reform should include opportunities for a reduced federal role.

4. Federal Power Commission

The Power Commission is faced with a problem of major administrative delays, a point which Chairman Dunham recognizes as a priority for needed improvements. Although his report discusses a number of hoped for remedies, the essential problem still remains--namely that the government established price of natural gas differs significantly from a more realistic market determined price. In large part, the Commission's paperwork problems stem from a flood of applications from those regulated industries seeking to operate profitably in a market which has been artificially controlled. The Commission has adopted a new nationwide ceiling rate for interstate gas sales which is designed to compensate for this problem, but legislative relief remains the only real long term answer. Congressional opposition to de-regulation is still well organized and effective.

5. Nuclear Regulatory Commission

The Commission appears acutely aware of the extreme cost of delays in approving license applications for nuclear generating stations. The Commission is using value-impact analyses extensively to weigh the merits of proposed regulations and has reached your initial goal of a 10 percent reduction in paperwork. It is also trying to implement performance standards for physical security safeguards. There is a very complex tangle of federal, State, and local laws and regulations which govern these projects, but the Chairman has devoted substantial effort to rationalizing this maze. Results will be a long time coming, though, and actual progress to date has been only minimal.

6. Federal Trade Commission

The Commission has put a lot of effort into reducing delays and has achieved some impressive results. It still requires a substantial volume of information from American businesses, much of which is time consuming and expensive to furnish, and the need for which is still quite controversial. The FTC has identified a number of State practices (e.g., restrictions on advertising prices for eyeglasses and prescription drugs) which it believes are anti-competitive. There is a great need for the Commission to cooperate more with other federal and State agencies in defining its appropriate consumer protection responsibilities, but the Commission's report does not identify any ways in which greater reliance can be placed on self-regulation within industries.

7. Securities and Exchange Commission

The Chairman's report is most responsive to your desire to see reduced paperwork burdens. The Commission appears to be working to strengthen the securities industry's self-regulatory bodies and to promote more competition between participants in the capital markets. However, the SEC continues to expand its staff and operations, at obvious increased costs to the taxpayer. It is also important to note that some of its disclosure proposals and requested additional authorities have not been supported by well analyzed and clearly articulated documentation. Several controversial proposals, particularly in the area of accounting practices and reporting requirements, have been withdrawn or modified due to pressure from regulated companies. Objective analyses of these proposals beforehand could have helped weigh their costs and benefits.

8. Federal Communications Commission

The FCC has taken several steps to introduce competition within the telecommunications industry, however, it believes that these changes will require a larger number of personnel and more vigilant enforcement of existing laws. The Chairman is keenly aware of your concerns for reductions in paperwork and administrative backlog, but we continue to believe that the cable television industry, boradcasting, and a number of specialized communications areas (e.g., citizens band radio) could benefit from less, rather than more, federal intervention.

Like many agencies, the FCC is requesting large increases in personnel for purposes of enforcing existing statutes, but it has not identified in its report areas where legislative reforms could accelerate reliance on a different mix of public-private enforcement techniques.

9. Commodity Futures Trading Commission

The CFTC report is largely prospective, but the Chairman appears to be conscious of your desire to see self-regulation used wherever possible. Although it has not yet become an issue, paperwork requirements laid on by this agency represent perhaps the most significant potential problem. The CFTC report indicates that the Chairman hopes to eliminate some 350,000 individual

trader reports every year, but no timetable is cited. Despite the Chairman's stated belief that all federal regulators should be forced to justify themselves every ten years, the CFTC is requesting substantial budget increases and has indicated that previously unregulated areas of the industry require new federal vigilance.

10. Consumer Product Safety Commission

The Commission's report does not identify specific intentions or results in paperwork reduction, or savings to consumers or taxpayers. There is a major question as to how long such a federal agency should exist, particularly in view of the fact that many State and local governments have established their own programs, and your directives to Executive branch agencies have helped to sensitize them to the need for more concern over consumer representation and safety. Individual product liability standards and private damage suits could have substantially more impact on manufacturers' products than any federal standards, but the Commission's report does not indicate what options to the current system of federal preemptive safety standards are being analyzed.

TAB C

THE WHITE HOUSE

WASHINGTON

DRAFT

Dear Mr. Chairman:

Thank you for your recent progress report on steps being taken to improve your commission's regulatory programs.

I was pleased to see that you and the other Chairmen have succeeded in focusing your commissions on the problems of procedural delay. I am hopeful that these first results will be just a beginning toward eliminating unnecessary paperwork and streamlining the agency's operations. I am encouraged by your interest in applying more rigorous economic analysis to existing and proposed regulations, in an effort to determine whether the benefits of federal controls clearly outweigh their costs.

However, I ask that you develop and implement imaginative and effective alternatives to existing federal regulations. Procedural improvements, while very important, should be augmented with changes which place a greater reliance on the private sector or state and local governments to solve important problems.

Your report raises a number of important issues and problems, and I hope that you will devote increasing efforts to finding ways to accomplish a better regulatory program with a minimum of federal resources. I look forward to continuing our discussions and wish you great success in your current program of reforms.

Sincerely,

Gerald R. Ford

Copies to Chairmen of:

ICC	FTC
CAB	SEC
FMC	FCC
FPC	CFTC
NRC	CPSC

Reg Reform

THE WHITE HOUSE

WASHINGTON

November 12, 1976

MEMORANDUM FOR THE PRESIDENT

THROUGH: JAMES CANNON

FROM: EDWARD SCHMULTS

SUBJECT: Request for Guidance on Regulatory Reform Program

We would like your guidance on steps that should be taken in the next two months concerning your regulatory reform program. Based on your guidance we will develop specific proposals for your consideration in the near future.

Regulatory reform has been a major initiative of your Administration and I believe we need to consider ways to assure the continuity of this effort. Your guidance is needed on:

I) Whether to resubmit current or modified legislative proposals when Congress reconvenes;

II) What actions are to be taken on studies and evaluations already underway;

III) Whether to publish what we have learned about other regulatory areas; and

IV) Whether to make public a report currently being written on the regulatory reform program and, if so, how?

Your decisions on certain of these issues would be reflected in your State of the Union address.

I. LEGISLATION

A. Agenda for Government Reform

The Agenda for Government Reform Act was submitted to the Congress on May 13, 1976. This legislation has been the center piece of your regulatory reform program and it has received widespread press and public attention. The bill was introduced in the Senate by Senator Scott and in the House by Congressman Rhodes. Hearings on the Agenda and

a similar bill introduced by Senator Percy and Senator Byrd were held in the Senate. Fourteen members of the House Government Operations Committee wrote to Chairman Brooks urging him to hold hearings on these bills. However, none were held. With Senator Byrd's and Congressman Rhodes' support of the concept of the bill, consideration in the 95th Congress is quite probable. We believe that the sector approach embodied in the Agenda is still the best way to achieve comprehensive reform. Our efforts during the last session to reach a compromise with the agency-by-agency approach taken by the Percy-Byrd supporters were not successful. However, in the process, we developed improvements to the Agenda which would increase citizen participation in identifying problems and allow a "sunset" provision on those laws to which the Congress and the President agreed. Should we:

1. submit the revised version of the Agenda which was developed following discussions with Senator Percy; or

2. provide background materials for the new Administration?

Recommendation:

We recommend option 1. This legislation would be ready when Congress convenes.

Agree _____ Disagree _____

B. Aviation Act of 1975

On October 8, 1975 the Aviation Act of 1975 was submitted to the Congress. Extensive hearings have been held in both the House and the Senate. Senator Kennedy, Senator Cannon, and Representatives Anderson and Snyder have all submitted their own reform bills. Senator Pearson has also indicated he will be submitting a bill in the 95th Congress. Early consideration by the Congress is considered a certainty. In your speech

at Kennedy Airport you said that the aviation regulatory reform legislation would be sent to Congress when they convene. On the Aviation Act, should we:

1. resubmit the Aviation Act as it is currently written when the Congress reconvenes, or

2. modify the Act in light of the other airline reform proposals and the hearing record and resubmit to the 95th Congress; or

3. provide background materials for the new Administration?

Recommendation:

We recommend option 2. This legislation would be ready when Congress convenes.

Agree _____ Disagree _____

C. Motor Carrier Reform Act

The Motor Carrier Reform Act was sent to the Congress on November 13, 1975. The House held hearings on the bill in September 1976 and the Senate has asked for written comments on the bill in lieu of hearings. In addition, a pamphlet was developed, but not printed, which explains the rationale for the legislation and outlines and rebuts many of the major objections to the legislation. One of the major opponents of the bill, Senator Hartke, was defeated but congressional interest in the bill will require considerable executive attention. At the recent convention of the American Trucking Association, a group which has been particularly vocal in its opposition to the bill, Secretary Coleman indicated that the Administration was willing to consider modifications to the original bill before it would be resubmitted. Should we:

1. resubmit the Motor Carrier Reform Act in its present form; or

2. modify the current provisions to take into consideration arguments that have been raised and resubmit the bill; or

3. publish the pamphlet and provide background materials for the new Administration; or

4. do not publish pamphlet but provide background materials for the new Administration?

Recommendation:

We recommend option 3. The printing and distribution of the pamphlet could be done immediately and it would provide a useful addition to the debate on the future of ICC regulation.

Agree _____ Disagree _____

D. Financial Institutions Act

The Financial Institutions Act passed the Senate 79-14 on December 11, 1975, but the Senate Finance Committee did not consider the tax provisions necessary to carry out the bill. In the House, the bill was divided into three separate bills and the main provisions of the FIA were incorporated into the Financial Reform Act. Due to strong opposition from labor and the smaller state banks, that bill was never passed by the House Committee. Instead, Congress extended interest rate regulation (Regulation Q) until March 1977. During the debate on FIA, the structure of the banking regulatory agencies was the subject of congressional criticism. The EPB asked agencies to develop proposals for possible changes to the present structure of those regulatory agencies. Should we:

1. resubmit the Financial Institutions Act to the 95th Congress in the Senate-passed form; or

2. modify the bill so that it might be more acceptable to the House, and resubmit the bill; or

3. provide background materials on the FIA, the extension of Regulation Q and the structure of the banking regulatory agencies for review by the new Administration?

Recommendation:

We recommend option 3. Several provisions of the bill and the tax changes needed to carry out the bill should receive further study.

Agree _____ Disagree _____

E. Patent Reform Bill

An Administration bill to modernize and reform the patent system was submitted to the Senate in March 1975. A compromise bill was passed by the Senate on February 25, 1976. Hearings on patent reform were not held in the House and there was continuing disagreement among executive branch agencies as to the best strategy to pursue patent reform. Should we:

1. resubmit the Administration bill to the 95th Congress; or

2. provide background materials on patent reform for consideration by the new Administration?

Recommendation:

We recommend option 2. There probably is not sufficient time to accommodate the varying positions in a compromise bill.

Agree _____ Disagree _____

F. Deregulation of New Natural Gas

Administration legislation proposing deregulation of new natural gas was sent to the Congress as a part of the Energy Independence Act in January 1975. In October 1975 the Senate passed a five-year phase-out of controls on new natural gas. In February 1976, the House passed a bill which would remove price controls from smaller producers of natural gas, continue price controls on large producers, and extend controls to the intrastate as well as the interstate market. The congressional impasse was

never resolved during the 94th Congress. In the meantime, the Federal Power Commission announced that it would allow the price of new natural gas to increase to more than double its current price and the courts have given preliminary approval of the increase. The controversy will likely continue into the 95th Congress. Should we:

1. resubmit a new natural gas deregulation bill to the 95th Congress; or

2. provide background materials for the new Administration?

Recommendation:

We recommend option 1. The legislation would be available when the Congress convenes.

Agree _____ Disagree _____

II. STUDIES AND EVALUATIONS

A. Inflation Impact Statements

The Executive Order 11821, which requires executive branch agencies to prepare Inflation Impact Statements analyzing the economic effects of their major regulatory and legislative proposals, expires December 13, 1976. OMB and the Council on Wage and Price Stability have underway an evaluation of the IIS program. The evaluation will be completed later in the fall in preparation for a decision on future directions in this area (i.e., to permit the executive order to expire, modify it to ensure that agencies consider the economic impacts of their decisionmaking, or expand it to include other administrative reforms). During the 94th Congress various congressional bills, including the proposal creating a consumer protection agency, have included provisions requiring an economic impact statement. Although none of the bills became law, legislation mandating an economic impact statement is very likely in the 95th Congress. OMB and CWPS will complete the evaluation by December 15, 1976. Should we:

1. modify and issue the executive order based on the evaluation; or

2. issue a three month extension of the current executive order and present evaluation and options to the new Administration; or

3. take no action and present evaluation to the new Administration?

Recommendation:

We recommend option 2.

Agree _____ Disagree _____

B. Progress Reports from the Independent Regulatory Agencies
The second progress reports from the ten independent regulatory commissions have been received and analyzed. A separate memorandum is being forwarded to you. complete

C. Short-Term Task Forces
On May 13, 1976 short-term task forces were set up to streamline and simplify the regulations of the Federal Energy Administration, the Occupational Safety and Health Administration in the Department of Labor, and the Export Control Administration in the Commerce Department. Reports from these task forces are being developed and will be completed by early December. Should we:

1. issue the reports, as they are finished, with a Presidential statement on the benefits of regulatory reform to the American people; or

2. hold the reports for inclusion in the State of the Union with distribution to follow immediately after the SOTU; or

3. hold the reports for the new Administration to decide whether or not to issue them?

Recommendation:

We recommend option 1. The reports will be completed in the next several weeks and will demonstrate the potential for reform in the Executive Branch agencies.

Agree _____ Disagree _____

III. PUBLICATION OF REPORTS

Over the first two years, several areas of possible reform have been carefully studied and preliminary reports prepared on the anti-competitive effects of much government regulation. Final reports could be issued in the next two months on the Robinson-Patman Act and on studies completed in conjunction with an Antitrust Immunities Task Force.

A. Report on the Robinson-Patman Act

The Department of Justice, under the aegis of the Domestic Council, has held hearings on the Robinson-Patman Act and written a preliminary report on its anti-competitive effects. The final report could summarize the present findings and present options for the repeal or modification of the present Act. Should we:

1. authorize the Department of Justice to complete the final report for review by the White House before release; or

2. publish no report but present report recommendations to the new Administration?

Recommendation:

Recommend Option 1.

Agree _____ Disagree _____

B. Antitrust Immunities Task Force

The Antitrust Immunities Task Force which was chaired by the Assistant Attorney General for Antitrust was established in February, 1975. The Task Force has completed extensive analysis on the anti-competitive effects of maritime shipping conferences, the insurance industry, and communications. A final report by the Task Force could present the considerable information and analysis that have been accumulated and outline what further analysis is required. Should we:

1. authorize the Department of Justice to prepare a final report for review by the White House before release; or

2. publish no report; prepare only a summary of the work of the Antitrust Immunities Task Force for the new Administration?

Recommendation:

Recommend Option 1.

Agree _____ Disagree _____

IV. REPORT ON THE REGULATORY REFORM PROGRAM

For more than two years government-wide efforts have been undertaken to achieve both legislative and administrative reforms of government regulations. Special meetings have been held, new studies of the impact of government regulations have been initiated, independent agencies have taken important steps to reform their policies, and the general awareness of the hidden costs of regulations has been significantly increased. With the diversity of the efforts and the wide variety of agencies and departments involved, some documentation of the program as a history of this Administration and as a challenge to the new Administration will be beneficial.

As we have worked on individual proposals and initiatives over the past two years we have learned how little basic information and understanding there is of government regulations and their effect on the economy. We have spent much of our time in recent months developing a common definition of government regulatory activity. We have applied this definition to all the various bureaus and agencies of government to arrive at an inventory of 86 organizations of the government that have regulatory responsibilities. Using this inventory we have been looking at regulatory enforcement techniques and federal pre-emption of state responsibilities. Much of this work has only begun and many of our legislative and administrative reforms are far from complete. I believe that a report on all of our efforts could provide a complete catalog for the new Administration of what we have done, what we have learned, and what needs to be done. I would hope that this report will assure that this bipartisan effort continues to focus on fundamental, substantive issues of government regulation rather than being diverted to short-term, administrative changes that avoid the basic problems. Should we:

1. forward the report to the Congress in tandem with the State of the Union Address; or

2. publish the material in a report to the American people; or

3. present the report to the new Administration?

Recommendation:

We recommend option 1.

Agree _____ Disagree _____

Obviously your guidance on these issues will reflect your views on how best to assist the incoming Administration in the transition and assure some continuity of the program of regulatory reform. I would be happy to discuss this further with you or Dick Cheney, if you wish.

THE WHITE HOUSE

WASHINGTON

November 12, 1976

MEMORANDUM FOR THE PRESIDENT

THROUGH: JAMES CANNON

FROM: EDWARD SCHMULTS

SUBJECT: Request for Guidance on Regulatory Reform Program

We would like your guidance on steps that should be taken in the next two months concerning your regulatory reform program. Based on your guidance we will develop specific proposals for your consideration in the near future.

Regulatory reform has been a major initiative of your Administration and I believe we need to consider ways to assure the continuity of this effort. Your guidance is needed on:

I) Whether to resubmit current or modified legislative proposals when Congress reconvenes;

II) What actions are to be taken on studies and evaluations already underway;

III) Whether to publish what we have learned about other regulatory areas; and

IV) Whether to make public a report currently being written on the regulatory reform program and, if so, how?

Your decisions on certain of these issues would be reflected in your State of the Union address.

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The Agenda for Government Reform Act was submitted to the Congress on May 13, 1976. This legislation has been the center piece of your regulatory reform program and it has received widespread press and public attention. The bill was introduced in the Senate by Senator Scott and in the House by Congressman Rhodes. Hearings on the Agenda and

a similar bill introduced by Senator Percy and Senator Byrd were held in the Senate. Fourteen members of the House Government Operations Committee wrote to Chairman Brooks urging him to hold hearings on these bills. However, none were held. With Senator Byrd's and Congressman Rhodes' support of the concept of the bill, consideration in the 95th Congress is quite probable. We believe that the sector approach embodied in the Agenda is still the best way to achieve comprehensive reform. Our efforts during the last session to reach a compromise with the agency-by-agency approach taken by the Percy-Byrd supporters were not successful. However, in the process, we developed improvements to the Agenda which would increase citizen participation in identifying problems and allow a "sunset" provision on those laws to which the Congress and the President agreed. Should we:

1. submit the revised version of the Agenda which was developed following discussions with Senator Percy; or

2. provide background materials for the new Administration?

Recommendation:

We recommend option 1. This legislation would be ready when Congress convenes.

Agree _____ Disagree _____

B. Aviation Act of 1975

On October 8, 1975 the Aviation Act of 1975 was submitted to the Congress. Extensive hearings have been held in both the House and the Senate. Senator Kennedy, Senator Cannon, and Representatives Anderson and Snyder have all submitted their own reform bills. Senator Pearson has also indicated he will be submitting a bill in the 95th Congress. Early consideration by the Congress is considered a certainty. In your speech

at Kennedy Airport you said that the aviation regulatory reform legislation would be sent to Congress when they convene. On the Aviation Act, should we:

1. resubmit the Aviation Act as it is currently written when the Congress reconvenes, or

2. modify the Act in light of the other airline reform proposals and the hearing record and resubmit to the 95th Congress; or

3. provide background materials for the new Administration?

Recommendation:

We recommend option 2. This legislation would be ready when Congress convenes.

Agree _____ Disagree _____

C. Motor Carrier Reform Act

The Motor Carrier Reform Act was sent to the Congress on November 13, 1975. The House held hearings on the bill in September 1976 and the Senate has asked for written comments on the bill in lieu of hearings. In addition, a pamphlet was developed, but not printed, which explains the rationale for the legislation and outlines and rebuts many of the major objections to the legislation. One of the major opponents of the bill, Senator Hartke, was defeated but congressional interest in the bill will require considerable executive attention. At the recent convention of the American Trucking Association, a group which has been particularly vocal in its opposition to the bill, Secretary Coleman indicated that the Administration was willing to consider modifications to the original bill before it would be resubmitted. Should we:

1. resubmit the Motor Carrier Reform Act in its present form; or

2. modify the current provisions to take into consideration arguments that have been raised and resubmit the bill; or

3. publish the pamphlet and provide background materials for the new Administration; or

4. do not publish pamphlet but provide background materials for the new Administration?

Recommendation:

We recommend option 3. The printing and distribution of the pamphlet could be done immediately and it would provide a useful addition to the debate on the future of ICC regulation.

Agree _____ Disagree _____

D. Financial Institutions Act

The Financial Institutions Act passed the Senate 79-14 on December 11, 1975, but the Senate Finance Committee did not consider the tax provisions necessary to carry out the bill. In the House, the bill was divided into three separate bills and the main provisions of the FIA were incorporated into the Financial Reform Act. Due to strong opposition from labor and the smaller state banks, that bill was never passed by the House Committee. Instead, Congress extended interest rate regulation (Regulation Q) until March 1977. During the debate on FIA, the structure of the banking regulatory agencies was the subject of congressional criticism. The EPB asked agencies to develop proposals for possible changes to the present structure of those regulatory agencies. Should we:

1. resubmit the Financial Institutions Act to the 95th Congress in the Senate-passed form; or

2. modify the bill so that it might be more acceptable to the House, and resubmit the bill; or

3. provide background materials on the FIA, the extension of Regulation Q and the structure of the banking regulatory agencies for review by the new Administration?

Recommendation:

We recommend option 3. Several provisions of the bill and the tax changes needed to carry out the bill should receive further study.

Agree _____ Disagree _____

E. Patent Reform Bill

An Administration bill to modernize and reform the patent system was submitted to the Senate in March 1975. A compromise bill was passed by the Senate on February 25, 1976. Hearings on patent reform were not held in the House and there was continuing disagreement among executive branch agencies as to the best strategy to pursue patent reform. Should we:

1. resubmit the Administration bill to the 95th Congress; or

2. provide background materials on patent reform for consideration by the new Administration?

Recommendation:

We recommend option 2. There probably is not sufficient time to accommodate the varying positions in a compromise bill.

Agree _____ Disagree _____

F. Deregulation of New Natural Gas

Administration legislation proposing deregulation of new natural gas was sent to the Congress as a part of the Energy Independence Act in January 1975. In October 1975 the Senate passed a five-year phase-out of controls on new natural gas. In February 1976, the House passed a bill which would remove price controls from smaller producers of natural gas, continue price controls on large producers, and extend controls to the intrastate as well as the interstate market. The congressional impasse was

never resolved during the 94th Congress. In the meantime, the Federal Power Commission announced that it would allow the price of new natural gas to increase to more than double its current price and the courts have given preliminary approval of the increase. The controversy will likely continue into the 95th Congress. Should we:

1. resubmit a new natural gas deregulation bill to the 95th Congress; or

2. provide background materials for the new Administration?

Recommendation:

We recommend option 1. The legislation would be available when the Congress convenes.

Agree _____ Disagree _____

II. STUDIES AND EVALUATIONS

A. Inflation Impact Statements

The Executive Order 11821, which requires executive branch agencies to prepare Inflation Impact Statements analyzing the economic effects of their major regulatory and legislative proposals, expires December 13, 1976. OMB and the Council on Wage and Price Stability have underway an evaluation of the IIS program. The evaluation will be completed later in the fall in preparation for a decision on future directions in this area (i.e., to permit the executive order to expire, modify it to ensure that agencies consider the economic impacts of their decisionmaking, or expand it to include other administrative reforms). During the 94th Congress various congressional bills, including the proposal creating a consumer protection agency, have included provisions requiring an economic impact statement. Although none of the bills became law, legislation mandating an economic impact statement is very likely in the 95th Congress. OMB and CWPS will complete the evaluation by December 15, 1976. Should we:

1. modify and issue the executive order based on the evaluation; or

2. issue a three month extension of the current executive order and present evaluation and options to the new Administration; or

3. take no action and present evaluation to the new Administration?

Recommendation:

We recommend option 2.

Agree _____ Disagree _____

B. Progress Reports from the Independent Regulatory Agencies
The second progress reports from the ten independent regulatory commissions have been received and analyzed. A separate memorandum is being forwarded to you.

C. Short-Term Task Forces
On May 13, 1976 short-term task forces were set up to streamline and simplify the regulations of the Federal Energy Administration, the Occupational Safety and Health Administration in the Department of Labor, and the Export Control Administration in the Commerce Department. Reports from these task forces are being developed and will be completed by early December. Should we:

1. issue the reports, as they are finished, with a Presidential statement on the benefits of regulatory reform to the American people; or

2. hold the reports for inclusion in the State of the Union with distribution to follow immediately after the SOTU; or

3. hold the reports for the new Administration to decide whether or not to issue them?

Recommendation:

We recommend option 1. The reports will be completed in the next several weeks and will demonstrate the potential for reform in the Executive Branch agencies.

Agree _____ Disagree _____

III. PUBLICATION OF REPORTS

Over the first two years, several areas of possible reform have been carefully studied and preliminary reports prepared on the anti-competitive effects of much government regulation. Final reports could be issued in the next two months on the Robinson-Patman Act and on studies completed in conjunction with an Antitrust Immunities Task Force.

A. Report on the Robinson-Patman Act

The Department of Justice, under the aegis of the Domestic Council, has held hearings on the Robinson-Patman Act and written a preliminary report on its anti-competitive effects. The final report could summarize the present findings and present options for the repeal or modification of the present Act. Should we:

1. authorize the Department of Justice to complete the final report for review by the White House before release; or

2. publish no report but present report recommendations to the new Administration?

Recommendation:

Recommend Option 1.

Agree _____ Disagree _____

B. Antitrust Immunities Task Force

The Antitrust Immunities Task Force which was chaired by the Assistant Attorney General for Antitrust was established in February, 1975. The Task Force has completed extensive analysis on the anti-competitive effects of maritime shipping conferences, the insurance industry, and communications. A final report by the Task Force could present the considerable information and analysis that have been accumulated and outline what further analysis is required. Should we:

1. authorize the Department of Justice to prepare a final report for review by the White House before release; or

2. publish no report; prepare only a summary of the work of the Antitrust Immunities Task Force for the new Administration?

Recommendation:

Recommend Option 1.

Agree _____ Disagree _____

IV. REPORT ON THE REGULATORY REFORM PROGRAM

For more than two years government-wide efforts have been undertaken to achieve both legislative and administrative reforms of government regulations. Special meetings have been held, new studies of the impact of government regulations have been initiated, independent agencies have taken important steps to reform their policies, and the general awareness of the hidden costs of regulations has been significantly increased. With the diversity of the efforts and the wide variety of agencies and departments involved, some documentation of the program as a history of this Administration and as a challenge to the new Administration will be beneficial.

As we have worked on individual proposals and initiatives over the past two years we have learned how little basic information and understanding there is of government regulations and their effect on the economy. We have spent much of our time in recent months developing a common definition of government regulatory activity. We have applied this definition to all the various bureaus and agencies of government to arrive at an inventory of 86 organizations of the government that have regulatory responsibilities. Using this inventory we have been looking at regulatory enforcement techniques and federal pre-emption of state responsibilities. Much of this work has only begun and many of our legislative and administrative reforms are far from complete. I believe that a report on all of our efforts could provide a complete catalog for the new Administration of what we have done, what we have learned, and what needs to be done. I would hope that this report will assure that this bipartisan effort continues to focus on fundamental, substantive issues of government regulation rather than being diverted to short-term, administrative changes that avoid the basic problems. Should we:

1. forward the report to the Congress in tandem with the State of the Union Address; or

2. publish the material in a report to the American people; or

3. present the report to the new Administration?

Recommendation:

We recommend option 1.

Agree _____ Disagree _____

Obviously your guidance on these issues will reflect your views on how best to assist the incoming Administration in the transition and assure some continuity of the program of regulatory reform. I would be happy to discuss this further with you or Dick Cheney, if you wish.

information

DOMESTIC COUNCIL

FROM:

Schmults

SUBJECT:

Justice report on antitrust

Date: 12/7

COMMENTS:

Schmults asks if there is any reason not to let Justice issue this report. It concludes that the Robinson-Patman Act creates anti-competition effects and should be repealed.

Leach says it is a good report and has already been made available outside of government.

There appears to be no reason not to permit its release, but I thought you should be aware of the issue.

No action necessary if you agree on release.

A.

O.K. to release

ACTION:

O.K. 12/10

Date:

THE WHITE HOUSE

WASHINGTON

December 7, 1976

MEMORANDUM FOR: PHILIP BUCHEN
JAMES CANNON
DICK CHENEY
JACK MARSH
BILL SEIDMAN

FROM: ED SCHMULTS

The Department of Justice wishes to release a report on the Robinson-Patman Act prepared by the Antitrust Division. The report reflects the views of the Antitrust Division and would not be expressing a formal position of the Administration.

Attached is an executive summary of the Robinson-Patman Act report. The report concludes that the Act creates serious anti-competitive effects and should, therefore, be repealed. In the alternative, fundamental amendments are suggested. If you wish to see a full copy of the report, which is about two inches thick, please give me a call.

Attached also is a copy of a memorandum from the Deputy Assistant Attorney General in the Antitrust Division outlining the manner of the proposed release of the report.

If you feel strongly that the Department of Justice should not release the report at this time, please give me a call before the close of business on December 10.

Attachments

EXECUTIVE SUMMARY OF DEPARTMENT OF JUSTICE

REPORT ON THE ROBINSON-PATMAN ACT

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.

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

November 30, 1976

MEMORANDUM FOR: EDWARD C. SCHMULTS
DEPUTY COUNSEL TO THE PRESIDENT

STANLEY MORRIS
DEPUTY ASSOCIATE DIRECTOR
FOR MANAGEMENT
OFFICE OF MANAGEMENT AND BUDGET

FROM: JONATHAN C. ROSE
DEPUTY ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

SUBJECT: ROBINSON-PATMAN REPORT

Enclosed for your review is a copy of the Robinson-Patman Report which you have indicated should be released after you have had a chance to look at it. Upon reflection, we are inclined to think that this document should be issued as a Department of Justice Report. The reason for this rests upon our expectation about its ultimate utility: we see the Report having its primary impact on courts and the FTC considering Robinson-Patman issues. In this regard, we think it would have its greatest impact if it were viewed like the 1955 Attorney General's Report on the Antitrust Laws, i.e., as a non-political evaluation of an antitrust law.

You will note the Report contains various typographical errors which we estimate could be cleaned up in a matter of hours.

cc: (memo & Report) -
Stanley Morris (OMB)