MEMORANDUM

THE WHITE HOUSE
WASHINGTON
November 20, 1982

FOR: EDWIN L. HARPER

FROM: MICHAEL M. UHLMANN

SUBJECT: New Initiatives in Antitrust

As you are aware, Bill Baxter has initiated a major review of the antitrust laws. The purpose of the exercise is to incorporate into antitrust statutes much of the so-called "new learning" which has emanated from the Chicago School and of which Baxter himself (along with folks like Bob Bork, Dick Posner, Jim Liebeler, and Jim Miller) has been a leading exponent. The core of the new learning is "consumer welfare" economics, which seeks to analyze whether the public is in fact helped or hurt by antitrust and trade regulation enforcement which is undertaken in its name.

To make a long story short, a considerable body of literature over the past 20 years has demonstrated that much antitrust enforcement has adverse rather than beneficial consequences for the public. What Baxter apparently has in mind is a series of statutory changes which will ensure that consumer benefit is in fact the dominant criterion of enforcement.

Although the Antitrust Division is still in the process of deciding what should or should not be in the package, Baxter himself has a particular interest in the following:

- Limiting the number and scope of per se violations to those which are capable of restricting output. Of necessity, this will focus primarily on horizontal activities and steer away from vertical arrangements save where those arrangements will be likely to invite or induce cartel or price-fixing behavior. This will require amending the Sherman Act, but depending on how far Baxter wants to press the principle, the Clayton Act as well.

- There are any number of ways in which this same theme might be carried out, e.g.,

  -- codification of merger guidelines of the sort now in force;

  -- a statutory declaration that no vertical arrangement shall be illegal unless it restricts output;

Antitrust Package for Mid-term Initiative Papers 12/31/1982 OA 09440 Uhlmann, Michael: Files

-- a statutory change to overcome certain theories embraced by the courts on patent-licensing arrangements;

-- a statutory change to enhance the feasibility of R&D consortia.

o Amending Section 8 of the Clayton Act (which deals with interlocking directorates) for the twin purpose of (a) expanding the rule to cover certain officers as well as directors, and (b) narrowing the rule in terms of what kinds of interlocks may be mischievous.

It is too early to tell which of these particular proposals will survive review within DOJ, but I have informed Baxter of the deadline we face over here. I would expect some sort of draft package from them by late next week or early the week after.

Apart from the general thrust, with which I strongly concur, we should pay special attention to the legislative and political risks which will necessarily arise if we send a major antitrust reform package to the Hill. I am, I must confess, something of a pessimist on this point and, despite my enthusiasm and support for what Bill is trying to do, believe we should proceed with caution. I will provide you with greater detail on this point when we meet and suggest a possible alternative.