The original documents are located in Box 58, folder "1976/09/30 HR8532 Hart-Scott-Rodino Antitrust Amendments Act of 1976 (5)" of the White House Records Office: Legislation Case Files at the Gerald R. Ford Presidential Library.

Calendar No. 763

94TH CONGRESS
2d Session

SENATE

REPORT
No. 94-803

THE ANTITRUST IMPROVEMENTS ACT OF 1976

REPORT

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

together with

ADDITIONAL AND MINORITY VIEWS

TO ACCOMPANY

S. 1284

PART I

MAY 6, 1976.—Ordered to be printed

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REPT. 94–
803 Part II

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OF THE

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94TH CONGRESS } HOUSE OF REPRESENTATIVES { REPT. 94–
1st Session } { 499 Part 2

ANTITRUST PARENS PATRIAE ACT

NOVEMBER 4, 1975.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

MR. RODINO, from the Committee on the Judiciary, submitted the following

SUPPLEMENTAL REPORT

[To accompany H.R. 8532]

Pursuant to clause 7 of rule XIII, the Judiciary Committee estimates that no substantial costs, if any at all, will be incurred in the implementation of H.R. 8532.

○

57-006

94TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 94-499

ANTITRUST PARENS PATRIAE ACT

SEPTEMBER 22, 1975.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. RODINO, from the Committee on the Judiciary, submitted the following

REPORT

together with

MINORITY AND SEPARATE VIEWS

[To accompany H.R. 8532]

The Committee on the Judiciary, to whom was referred the bill (H.R. 8532), to amend the Clayton Act to permit State attorneys general to bring certain antitrust actions, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

That this Act may be cited as the "Antitrust Parens Patriae Act".

SEC. 2. The Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 12 et seq.), is amended by inserting immediately after section 4B the following new sections:

"ACTIONS BY STATE ATTORNEYS GENERAL

"SEC. 4C. (a) Any State attorney general may bring a civil action, in the name of the State, in the district courts of the United States under section 4 of this Act, and such State shall be entitled to recover threefold the damages and the cost of suit, including a reasonable attorney's fee, as parens patriae on behalf of natural persons residing in such State injured by any violation of the antitrust laws.

"(b) In any action under subsection (a), the court may in its discretion, on motion of any party or on its own motion, order that the State attorney general proceed as a representative of any class or classes of persons alleged to have been injured by any violation of the antitrust laws, notwithstanding the fact that such State attorney general may not be a member of such class or classes.

"(c) In any action under subsection (a), the State attorney general shall, at such time as the court may direct prior to trial, cause notice thereof to be given by publication in accordance with applicable State law or in such manner as the

court may direct; except that such notice shall be the best notice practicable under the circumstances.

"(d) Any person on whose behalf an action is brought under subsection (a) may elect to exclude his claim from adjudication in such action by filing notice of his intent to do so with the court within sixty days after the date on which notice is given under subsection (c). The final judgment in such action shall be res judicata as to any claim arising from the alleged violation of the antitrust laws of any potential claimant in such action who fails to give such notice of intent within such sixty-day period, unless he shows good cause for his failure to file such notice.

"(e) An action under subsection (a) shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given in such manner as the court directs.

"MEASUREMENT OF DAMAGES

"SEC. 4D. In any action under section 4C (a) or (b) or in any other action under section 4 of this Act which is maintained as a class suit, damages may be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit, without the necessity of separately proving the individual claim of, or amount of damage to, each person on whose behalf the suit was brought.

"DISTRIBUTION OF DAMAGES

"SEC. 4E. Damages recovered under section 4C(a) shall be distributed in such manner as the district court in its discretion may authorize, subject to the requirement that any distribution procedure adopted afford each person a reasonable opportunity to secure his appropriate portion of the damages awarded less unrecovered costs of litigation and administration.

"ACTIONS BY ATTORNEY GENERAL OF THE UNITED STATES

"SEC. 4F. (a) Whenever the Attorney General of the United States has brought an action under section 4A of this Act, and he has reason to believe that any State attorney general would be entitled to bring an action under section 4C(a) based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification to such State attorney general with respect to such action.

"(b) To assist a State attorney general in evaluating the notice and in bringing any action under section 4C of this Act, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under section 4C.

"DEFINITIONS

"SEC. 4G. For purposes of this section and sections 4C, 4D, 4E, and 4F:

"(1) The term 'State attorney general' means the chief legal officer of a State, or any other person authorized by State law to bring actions under this Act; except that such term does not include any person employed or retained on a contingency fee basis,

"(2) The term 'State' means a State, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

"(3) The term 'antitrust laws' does not include sections 2 and 7 of this Act.".

"(4) The term 'natural persons' does not include proprietorships or partnerships.".

SEC. 3. The Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 12 et seq.), is amended—

(1) in section 4B (15 U.S.C. 15b), by striking out "4 or 4A" and inserting in lieu thereof "4, 4A, or 4C";

(2) in section 5(b) (15 U.S.C. 16(b)), by striking out "private right of action" and inserting in lieu thereof "private or State right of action"; and

by striking out "section 4" and inserting in lieu thereof "section 4 or 4C"; and

(3) by adding at the end of section 16 (15 U.S.C. 26) the following: "In any action under this section, the court shall award reasonable attorneys' fees to a prevailing plaintiff.".

I. PURPOSE

The purpose of H.R. 8532 is to provide a new federal antitrust remedy which will permit State attorneys general to recover monetary damages on behalf of State residents injured by violations of the antitrust laws. The bill is intended to compensate the victims of antitrust offenses, to prevent antitrust violators from being unjustly enriched, and to deter future antitrust violations.

II. SUMMARY OF REPORTED BILL

The first section establishes the bill's short title.

Section 2 contains the parens patriae provisions to be added as new sections of the Clayton Act (15 U.S.C. 12 et seq.). Proposed section 4C(a) authorizes State attorneys general to sue for damages on behalf of natural persons who have been injured by antitrust violations. Section 4C(b) authorizes the conversion of 4C(a) actions into class suits under certain circumstances. Section 4C(c) requires that individuals on whose behalf parens patriae suits are brought be notified. Section 4C(d) provides an opportunity for individuals to exclude their claims from parens patriae suits. Section 4C(e) requires court approval of settlements of parens patriae cases. Section 4D provides that, in parens patriae cases and other antitrust class suits, damages may be proved and assessed in the aggregate by reasonable methods of estimation. Section 4E requires the opportunity for individuals to secure their appropriate share of the damages recovered, with any amount remaining to be distributed as the court directs. Section 4F(a) requires the U.S. Attorney General to notify appropriate State attorneys general of their entitlement to bring parens patriae cases. Section 4F(b) requires the U.S. Attorney General to make investigative materials available to State attorneys general in parens patriae cases.

Sections 3(1) and 3(2) amend existing sections of the Clayton Act to include parens patriae actions in that Act's statute of limitations and provision for tolling the statute of limitations, respectively. Section 3(3) amends the Clayton Act to require that plaintiffs who prevail in antitrust injunction cases be awarded reasonable attorney's fees.

III. BACKGROUND

The economic burden of many antitrust violations is borne in large measure by the consumer in the form of higher prices for his goods and services. This is especially true of such common and widespread practices as price-fixing, which usually result in higher prices for the consumer, regardless of the level in the chain of distribution at which the violation occurs. It is also true of other antitrust violations such as monopolization, attempts to monopolize, group boycotts, division of markets, exclusive dealings, tie-in arrangements, and conspiracies to limit production. All of these violations are likely to cause injuries to

consumers, whether by higher prices, by illegal limitation of consumer choices, or by illegal withholding of goods and services. Moreover, antitrust violations almost always contribute to inflation. They introduce illegal and artificial forces into the market place, thus undermining our economic system of free enterprise.

Frequently, antitrust violations injure thousands or even millions of consumers, each in relatively small amounts. Indeed, many of the Justice Department's recent prosecutions have involved price-fixing of consumer goods on a local or regional basis. In the food industries alone, the Justice Department's cases have included price-fixing prosecutions involving bread and bakery products in the Philadelphia area, milk in Wyoming, dairy products in Colorado, Utah and Idaho, bread and bakery products in Baltimore and the Eastern Shore area of Maryland, milk in Washington and Alaska, soft drinks in Tulsa, bread in New York and Chicago, baking companies in San Diego and Louisiana, and sugar refiners nationally.

Although the antitrust laws have the immediate goals of protecting and promoting competition, it is the consuming public that ultimately benefits from the enforcement of the antitrust laws. Nonetheless, Federal antitrust statutes do not presently provide effective redress for the injury inflicted upon consumers. This lack of an effective consumer remedy sometimes results in the unjust enrichment of antitrust violators and undermines the deterrent effect of the treble damage action. H.R. 8532 fills this gap by providing the consumer an advocate in the enforcement process—his State attorney general.

During the Subcommittee's hearings in the 93d Congress, Assistant Attorney General for Antitrust, Thomas Kauper outlined the problem in this way:

> There can be no doubt that the treble damage remedy provides a strong deterrent, especially against price-fixing and other hard-core per se offenses. This damage remedy has been particularly effective in cases involving large purchasers, for these plaintiffs are likely to have detailed evidence, a sufficiently large economic stake to bear the inevitable risks of a lawsuit, and the resources to meet the apparently inevitable costs of protracted and complex litigation. However, the remedy has been less effective in circumstances involving multiple transactions of relatively small size, particularly purchases by ultimate consumers of products that may cost as little as 25 or 30 cents. There, records are not likely to be available, individual claims will be small, and the claimant less likely to have either the sophistication or resources necessary to prosecute their individual claims.
>
> I believe that there is a need for the availability of a method by which damages can be recovered where antitrust violations have caused small individual damages to large numbers of citizen-consumers. Without such a procedure, those antitrust violations which have the broadest scope and, often, the most direct impact on consumers would be most likely to escape the penalty of the loss of illegally-obtained profits. Those whose injuries were too small to bear the burden of complex litigation would have no effective access to the courts. As a result, the goal of deterrence sought by the Clayton Act would be frustrated in those situations where damages fell directly on small consumers or purchasers.[1]

Under the well established doctrine of parens patriae, States have successfully sued to halt continuing wrongs which injure or threaten to injure their citizens. The Clayton Act has been interpreted by the Supreme Court as authorizing States to maintain parens patriae lawsuits to enjoin violations of the antitrust laws when those violations are injuring the State's citizens. In *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 451 (1945), the Court said that the State "as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected."

However, when the State of California recently tried to sue to recover monetary damages on behalf of persons who had allegedly been injured by the price-fixing of snack foods, the Ninth Circuit Court of Appeals held that parens patriae damage actions were not authorized by the Clayton Act. In large part, H.R. 8532 is a response to that case and a recognition that the consuming public currently has no effective means of obtaining compensation for its injuries.

An extremely important benefit which would flow from H.R. 8532 is the promotion of cooperation in antitrust enforcement between the States and the federal government. As Federal Trade Commission Bureau of Competition Director James Halverson put it during the Subcommitee's hearings this year:

> There are certain violations of the federal antitrust laws which would be handled more efficiently by a parens patriae suit for damages than by a federal criminal proceeding or action for injunctive relief. An example of such a situation might be where a regional seller of consumer goods has recently discontinued anticompetitive practices that directly injured his customers. The best deterrent to a resumption of the illegal conduct might be a suit by the state which deprives the violator of the profits gained from his bad conduct and provides relief which compensates the injured consumers.[2]

A State attorney general is an effective and ideal spokesman for the public in antitrust cases, because a primary duty of the State is to protect the health and welfare of its citizens. He is normally an elected and accountable and responsible public officer whose duty is to promote the public interest.

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[1] Hearings on H.R. 12528 and H.R. 12921 Before the Monopolies and Commercial Law Subcomm. of the House Comm. on the Judiciary, 93d Cong., 2d Sess., ser. 43, at 27 (1974) (emphasis added) (hereinafter cited as *1974 Hearings*).

[2] Hearings on H.R. 38 and H.R. 2850 Before the Monopolies and Commercial Law Subcom. of the House Comm. on the Judiciary, 94th Cong., 1st Sess., ser. 3, at 16 (1975) (hereinafter cited as 1975 Hearings).

VI. The Consumer Presently Has No Practical Means of Redress

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides a private cause of action for treble damages, costs and attorneys' fees for "any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws."

Under this section, a State may sue to recover damages it has sustained in its capacity as a propietor or purchaser of goods and services.[3] Likewise, under § 4A of the Clayton Act, 15 U.S.C. § 15a, the United States may sue whenever it is injured in "its business or property." Neither the United States nor any State, however, may presently use for damages in a representative capacity on behalf of injured citizens unless it has been injured in the same manner.

The impact of this legislative omission on effective antitrust enforcement has become clear in recent years as a result of developing judicial decisions. Under § 4 of the Clayton Act, any person, including any consumer, who can prove he was injured by price-fixing or any other antitrust violation, has a cause of action.[4] In most instances, however, an individual law suit by an injured consumer is, as a practical matter, out of the question. If, for example, a price-fixing conspiracy results in an overcharge of a dollar on a relatively low priced consumer item, and 50 million such items are sold, the aggregate impact of the conspiracy upon consumers and the illegal profits of the price-fixers are not insignificant—at least $50 million.[5] Yet no single consumer could practically be expected to bring suit. He would have no investigative resources—or incentive—to discover the conspiracy; should he become aware of the overcharge, he will almost certainly have no proof that he purchased the item at a particular time, place and price; he will quite obviously have neither the incentive nor the resources to engage in protracted and extremely costly litigation to recover his tiny individual stake.

Attempts to use the revised class action provisions of the 1966 amendments to Rule 23 of the Federal Rules of Civil Procedure to fashion a mechanism for consumer redress in this situation have been disappointing. Many courts have found that large consumer classes predicated upon small individual claims present insurmountable problems of "manageability" in the conduct of the litigation.[6] These manageability problems include proper notice, the complexity of evi-

[3] State and local governmental units have been recognized as "persons" under § 4 and its predecessor for the purpose of bringing proprietarial damage actions since at least 1906. See, *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390 (1906).

[4] Some courts initially interpreted the Supreme Court's decision in *Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 392 U.S. 481 (1968), to limit standing to sue to the first purchaser of a price-fixed product. In *Hanover Shoe* the Court refused to allow a defendant to escape liability by asserting that his purchaser had passed on any illegal overcharge to the ultimate consumer. A major concern of the Court was to prevent the violator from retailing the ill-gotten gains of his illegal behavior. The Court noted that if the first purchaser was denied standing the ultimate consumers would have neither the incentive nor the ability to bring effective actions for return of the overcharges. 392 U.S. at 494.

More recently lower courts have recognized the pro-enforcement thrust of *Hanover Shoe* and have held that plaintiffs at lower levels of the chain of distribution may attempt to prove that illegal overcharges were in fact passed on to them. See, e.g., *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973).

[5] The amount of the overcharge, of course, may not represent either the total social cost of the violation or the total of recoverable damages flowing therefrom. See, e.g., *Flintkote Co.* v. *Lysfjord*, 246 F.2d 368, 389–90 (9th Cir.), cert. denied, 355 U.S. 835 (1957).

[6] See, e.g., *Donson Stores, Inc.* v. *American Bakeries Co.*, 1973–1 Trade Cases, ¶ 74,387 (S.D.N.Y. 1973) (all purchasers of bread in the New York metropolitan area); *United Egg Producers* v. *Bauer Int'l Corp.*, 312 F. Supp. 319 (S.D.N.Y. 1970) (all purchasers of eggs in the United States).

dentiary issues, and distribution of any recoveries. In *Eisen* v. *Carlisle & Jacquelin*, the Supreme Court interpreted Rule 23 to require class action plaintiffs to provide individual prelitigation notice to all identifiable members of the class regardless of the cost of providing such notice. In the 1975 hearings, the Director of the FTC's Bureau of Competition, James Halverson, explained that:

> The practical effect of *Eisen* is to eliminate the Rule 23 class action as a feasible means for recovery by a large class of individuals each of whom has sustained relatively minor damages. In situations where the costs of giving notice to the class are much greater than any individual class member's stake in the outcome of the action, it is unlikely that any suit will be brought. The person who deals in certain types of consumer goods, where each transaction may involve only a few dollars, can now fix prices, relatively free from the fear of substantial treble damage actions.
>
> A description of the facts in *Eisen* will indicate where the Supreme Court's decision has left the consumer class action. The plaintiff, in *Eisen*, who claimed personal damages of only $70, sought to represent a class of as many as 6 million persons who allegedly were injured as a result of violations of the antitrust and securities laws. It was calculated that that the cost of giving individual notice to all identifiable members of the class would be about $315,000. The Court, in ruling that the plaintiff must give such notice, explicitly recognized that its decision sounded the death knell for Eisen's class action because the plaintiff was unlikely to expend $315,000 to proceed with a suit in which he had a stake of only $70. The immediate result was that the defendants retained the profits from their allegedly illegal activities.[7]

At a minimum, the new emphasis on the intricacies of class actions has simply added another round of expensive and delaying litigation on the very propriety of the validity, and therefore certification, of the class.

Individual suits and class actions have worked far better for business entities than for consumers injured by antitrust violations. Wholesalers and retailers purchasing from price-fixing manufacturers will frequently buy in sufficient volume to give them a substantial incentive to sue. They maintain accurate purchase records which may be used as proof of purchase, and they will usually have access to attorneys and other resources for investigating the facts and prosecuting the litigation. Their numbers will be smaller, and ordinary business records and the records of trade associations will frequently ease the problem of identifying claimants, so that they will not face many of the obstacles encountered by consumers in class action litigation.

The result has been relatively effective antitrust enforcement where the violation has occurred high up in the chain of distribution, and where the impact has been upon other business entities. Where, however, wholesalers and retailers have passed on all or most of the cost of a violation to the consumer, or where the violation itself occurred at

[7] *1975 hearings*, 16.

the retail level (thus subjecting the consumer to the major impact of the violation),[8] adequate enforcement mechanisms simply do not exist. The consumer, who benefits from the proper functioning of our free enterprise system with appropriate antitrust enforcement, has been without an effective method of redress of his grievances.

Frustrated by this gap, the State of California brought an action on behalf of its 20 million purchasers of snack foods, claiming they had been the victims of a price-fixing conspiracy and seeking to represent their interests in court. The Ninth Circuit Court of Appeals held in *California* v. *Frito-Lay*, 474 F.2d 774 (9th Cir.), cert. denied, 412 U.S. 908 (1973), that California could not maintain such a "parens patriae" action for its injured and legally helpless citizens. The court applauded the State's imaginative approach to an obviously important problem, but held that, under the law, California could not recover damages on behalf of its citizens under the Clayton Act. Legislative action was needed, the court said, to enable the State to represent its injured citizens:

> The State most persuasively argues that it is essential that this sort of proceeding be made available if antitrust violations of the sort here alleged are to be rendered unprofitable and deterred. It would indeed appear that the State is on the track of a suitable answer (perhaps the most suitable yet proposed) to problems bearing on antitrust deterrence and the class action as a means of consumer protection. We disclaim any intent to discourage the State in its search for a solution.
>
> However, if the State is to be empowered to act in the fashion here sought we feel that authority must come not through judicial improvisation but by legislation and rule making, where careful consideration can be given to the conditions and procedures that will suffice to meet the many problems posed by one's assertion of power to deal with another's property and to commit him to actions taken in his behalf.[9]

H.R. 8532 is a response to the judicial invitation extended in *Frito-Lay*. The thrust of the bill is to overturn *Frito-Lay* by allowing State attorneys general to act as consumer advocates in the enforcement process, while at the same time avoiding the problems of manageability which some courts have found under Rule 23.

Support for these legislative goals was expressed in hearings by every witness before the subcommittee, including some who opposed substantial portions of earlier versions of the bill. The bill as reported by the committee is supported by the Department of Justice and the Acting Director of the Bureau of Competition of the Federal Trade Commission, and, generally, by the National Association of Attorneys General.

V. The Provisions of H.R. 8532

H.R. 8532 employs an ancient concept of our basic English common law—the power of the sovereign to sue as parens patriae on behalf of

[8] A single antitrust violation, it must be noted, may cause multiple injuries, and each individual or business which is injured in its business or property has a right to recover damages. A violation occurring at the retail level may, in addition to raisng consumer prices, injure other retailers who compete with the violators.

[9] 474 F.2d at 777.

the weak and helpless of the realm—to solve a very modern problem in antitrust enforcement. This doctrine is also firmly embedded in American jurisprudence. Since 1900 the Federal courts have expanded the power of a State to sue "in her capacity as a quasi-sovereign or as agent and protector of her people against a continuing wrong done to them." [10] The parens patriae doctrine already applies to antitrust injunction cases. H.R. 8532 extends the doctrine to permit States to protect their citizens by suing for damages when they are injured by antitrust violations. The following is a discussion of individual sections of the Bill.

SUBSECTION 4C(a)

This is the heart of H.R. 8532. It permits a State attorney general to bring parens patriae actions for treble damages "on behalf of natural persons residing in such State injured by any violation of the antitrust laws."

The subsection creates no new substantive liability. Each person on whose behalf the State attorney general is empowered to sue already has his own cause of action under section 4 of the Clayton Act, even if, for practical reasons, the right to sue is not likely to be exercised. Subsection 4C(a) thus provides an alternative means to make practically available Federal remedies at law, previously denied, for the vindication of existing substantive claims. It authorizes State attorneys general to sue for damages on behalf of injured persons, subject to the other provisions of the bill, namely, (1) the right of individuals to opt out under section 4C(d), (2) the extinction of the individual's right to maintain his own suit if he does not opt out, and (3) the right of the individual to receive his appropriate share of any recovery.

The establishment of an alternative remedy does not increase any defendant's liability. To the extent an antitrust violator was liable to an individual, H.R. 8532 would make the violator liable to either the individual or the State. The likelihood of a financial recovery against an antitrust violator, however, is significantly increased because H.R. 8532 creates an effective remedy where none existed before.

The subcommittee and the full committee gave extended consideration to the proper scope of the remedy. The original bill before the subcommittee, H.R. 38, would have permitted actions on behalf of "citizens" injured by antitrust violations. The subcommittee also considered using the terms "persons" and "consumers"; it concluded that "persons" was too broad a term as it might be construed to include business entities, which are able, in general, to fend for themselves. On the other hand, the term "consumers" was considered potentially too narrow and too prone to definitional problems.

The committee chose "natural persons" as the best expression of the goals of the legislation. The term is intended to exclude business entities such as corporations, partnerships and sole proprietorships. While some "natural persons" might be in a position to bring their own actions and some business entities might not, the committee concluded that these instances will be rare and that use of the phrase "natural persons" will permit actions on behalf of those most in need

[10] *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 443 (1945). For an historical discussion of the parens patriae doctrine in American law, see *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 257–260 (1972).

of representation but presently unrepresented. Moreover, the "opt-out" provision of subsection 4C(d) will preserve the separate law suit of any "natural person" who does not want the State attorney general to pursue his claim.

Under H.R. 8532, parens patriae actions may be maintained to recover damages for any antitrust injuries, except those resulting from violations of section 2 (price discrimination) and section 7 (anticompetitive mergers) of the Clayton Act. The Assistant Attorney General recommended that these sections not be included, and the committee agreed that they are not appropriate for parens patriae actions.

State attorneys general may retain outside private counsel to assist in the prosecution of parens patriae cases. Private counsel may be especially necessary and useful when there is multistate litigation since private counsel may be better able to coordinate such litigation than any individual State attorney general. Private counsel may not, however, be retained or employed on a contingency fee basis under the committee's bill, because the committee felt that States should be encouraged to develop their own in-house antitrust capability.

SUBSECTION 4C(b)

Subsection 4C(b) provides the courts with a flexible alternative to the parens patriae action in those rare instances where a different approach is necessary to the efficient conduct of litigation. Under this section the court is empowered, on its own motion or that of any party, to order that an action originally filed as a parens patriae action be maintained as a class action. The attorney general may then represent an appropriate class or classes, regardless of whether he himself is a member of that class or of those classes.

Under the existing class action enforcement scheme, the courts have been reluctant to permit State attorneys general to act as representatives of classes of injured consumers, unless their States, or subdivisions thereof, have been injured in the same way as the other members of the class.[11] At one level, § 4C(b) reflects the committee's disapproval of this unnecessarily narrow approach to the issue of adequate representation in antitrust class actions.[12]

The Judiciary Committee recognized that there may be occasions when extensive investigations and pretrial proceedings and the interests of all parties involved convince the court that, in the interests of justice, an action which was brought as a 4C(a) parens patriae lawsuit should be transformed to and maintained as a class action. It might, for instance, be fairer to all parties for the court to order that a parens patriae action become a 4C(b) action when both businesses and natural persons have been injured in exactly the same manner. Conversion to a 4C(b) action would be inappropriate except where the interests of justice would be served thereby. And it would clearly be inappropriate for a court to convert a 4C(a) action into a Rule 23 class action and, then, dismiss the case on grounds of unmanageability under Rule 23.

[11] See, e.g., *California* v. *Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973).

[12] As one court put it, "it is difficult to imagine a better representative of the retail consumers within a State than "State's attorney general." In re Antibiotic Antitrust Actions, 333 F. Supp. 278, 280 (S.D.N.Y. 1971).

If a case is converted to a § 4C(b) class action, the provisions of §§ 4C(c), 4C(d), 4C(e), 4D, 4E, 4F(b), and 4G apply, even though they may be inconsistent with the provisions of Rule 23. "Adequacy of representation" may be an issue in Rule 23 actions because of the possibility that the representative may have a conflict of interest or otherwise be inadequate. No such issue should arise in parens patriae cases under section 4C(a) or 4C(b), however, absent extraordinary circumstances involving a particular State attorney general.

Subsection 4C(b) is designed to give the courts maximum flexibility to structure individual and consolidated actions to achieve the goal of full and fair adjudication of claims under the antitrust laws.[13] It will permit the courts to utilize the services of the attorney general in a broad representative capacity in those few cases where the parens patriae action would be clearly inappropriate.

The committee is clear in its preference for parens patriae actions under section 4C(a). One of the subsidiary purposes of H.R. 8532 is to avoid, in consumer actions, the cumbersome litigation of peripheral issues which under Rule 23 has sometimes become more time-consuming and costly than litigating the merits of the case. Only where some positive impediment to the maintenance of a parens patriae action exists should a court have to resort to the alternative provided by section 4C(b).

SUBSECTIONS 4C(c) AND 4C(d)

Subsections 4C(c) and 4C(d) must be read together; they are designed to protect the constitutional due process rights of each individual potential claimant and defendant.

The constitutional concept of due process in a civil case embodies at a minimum two components: notice that a court is about to take action which may affect a person's interests, and an opportunity to be heard in defense (or prosecution) of that interest.[14] At the same time, a defendant who litigates a case against a case against a person who purports to represent a particular class has a strong interest in being able to enforce the result against and avoid relitigation with any person who was supposedly represented in the action. That interest is given effective recognition in the legal doctrines of res judicata and collateral estoppel.

Subsections 4C(c) and 4C(d) serve these constitutional interests by providing all potential claimants in the parens patriae action with adequate notice that their interests are to be adjudicated and an opportunity to be heard in vindication of those interests. Simultaneously, they allow a defendant to plead the result as res judicata against all those represented by the State attorney general.

Under § 4C(c), the attorney general in a parens patriae action is required to cause "notice thereof to be given by publication in accord-

[13] Once a parens patriae action has been converted to a class action under subsection 4C(b), it is not intended to limit in any fashion the existing discretion of the court to define classes and subclasses and to designate appropriate parties to provide adequate representation. To the contrary, the intent is to make clear the breadth of that discretion. Thus the attorney general could, under subsection 4C(b), be designated to act as a representative of a class including business entities, notwithstanding the fact that he could not initially have brought a subsection 4C(a) action on behalf of such entities. Likewise, even though subsection 4C(b) makes it clear that the attorney general or the State need not actually be a member of the class he acts to represent, such membership would not be a disqualification. Thus where the State itself is a purchaser, the attorney general could represent its proprietarial interests and the interests of those of its citizens included in the class designated by the court.

[14] See, e.g., *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314–15 (1950).

ance with applicable State law or in such manner as the court may direct; except that such notice shall be the best notice practicable under the circumstances."

The subsection reflects a committee preference for notice by publication in all cases where such notice would adequately serve the constitutional and other interests at stake. "Publication" should, of course, be taken in modern context to include employment of media such as radio and television, as well as traditional newspaper advertisement.[15] When there is no applicable State law, or where the manner of publication provided by State law would, in the court's judgment, be insufficient, the court should determine the method of publication.

The statutory preference for publication is qualified by the proviso that whatever form of notice adopted should be "the best notice practicable under the circumstances." This language is taken from Rule 23 and from major Supreme Court decisions under the due process clause. These decisions require the court to engage in a delicate balancing process to determine what is the "best notice practicable under the circumstances." This balancing test cannot be reduced to any specific written formula, but a few of the underlying principles are worth mentioning. Where the number of potentially affected parties is large and individual interests are small or remote, or where names and addresses are difficult or impossible to obtain, the due process clause does not rigidly require individual written notice of the litigation to be sent to each.[16] Moreover, where the requirement of individual written notice would frustrate a major legislative or judicial policy, that countervailing policy is entitled to considerable weight in the determination whether publication notice will suffice.[17]

In light of these factors and the historically fluid nature of due process requirements, the committee believes that the imaginative use of publication notice will suffice in the vast bulk of parens patriae antitrust suits. The numbers of potential claimants will frequently be very large, the absence of documented proof of purchase will make identification of individual claimants in many instances difficult or impossible, and publication through newspapers, radio and television will frequently quite literally be "the best notice practicable." At the same time, the strong public interest in enforcement of the antitrust laws against those who have injured large numbers of consumers would be frustrated by a rejection of publication notice in favor of something economically or otherwise impracticable. Only in extraordinary circumstances where publication notice would be manifestly unfair should courts require more.

Subsection 4C(d) provides that any person may exclude his claim from the parens patriae action by filing notice of intent to do so within 60 days after notice has been given. Failure to file such a notice of intent to exclude himself within the given time will result in a potential

[15] See *Nolop* v. *Volpe*, 333 F.Supp. 1364 (D.S.D. 1971).

[16] *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, (1950); *Hansberry* v. *Lee*, 311 U.S. 32 (1940); *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356 (1921); *Gonzales* v. *Cassidy*, 474 F.2d 67 (5th Cir. 1973); *Berland* v. *Mack*, 48 F.R.D. 121 (S.D.N.Y. 1969); Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 314–15 (1972); Comment, 62 Geo. L. J. 1123, 1169, and n. 256 (1974); Note, 87 Harv. L. Rev. 589, 590 (1974).

[17] *Boddie* v. *Connecticut*, 401 U.S. 371, 377–78 (1971); *Armstrong* v. *Manzo*, 380 U.S. 545, 550 (1965); *Schroeder* v. *City of New York*, 371 U.S. 208, 212–13 (1962); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 339 (Harlan, J. Concurring).

claimant being bound by the result in the parens patriae case, absent a showing of good cause for his failure. If an individual opts out, he may bring his own action under existing law.

Thus subsection 4C(d) provides protection for the potential claimant's interest in prosecuting his own action. At the same time it safeguards the res judicata rights of defendants against claimants who fail to come forward and exclude themselves from the representational action. In this regard it protects the right of a defendant to avoid duplicative liability.

SUBSECTION 4C(e)

Under Rule 41 of the Federal Rules of Civil Procedure, parties to litigation are ordinarily allowed to dismiss or compromise the action without court approval. In Rule 23 class actions, however, settlements require court approval, which is intended to offer protection to the class members. Under § 4C(e) of the bill, dismissal or compromise of a parens patriae action without the approval of the court is likewise prohibited. Moreover, where an action is dismissed or compromised, notice must be given "in such manner as the court directs," thus allowing dissatisfied claimants to object to the proposed settlement.

The committee views this section as an important safeguard for consumers in the event an attorney general seeks to terminate a parens patriae action by settlement.

Subsection 4C(e) serves a special prophylactic function, to protect members of the class from unjust or unfair settlements should their champion become fainthearted or inadequate in his representation. This section is intended to promote public confidence in the settlements of parens patriae cases by requiring court approval. As under Rule 23, it will be incumbent on the courts to consider carefully any proposed settlement and to approve that settlement only if it is fair and reasonable and in the interests of justice.

SECTIONS 4D AND 4E

These two sections deal with the measurement and distribution of damages once liability has been established. They must also be viewed and understood as a unit. Section 4D provides that a State attorney general may prove the damages suffered by a given class in the aggregate by statistical or other reasonable methods of estimation. Section 4E provides that any amounts left over after the satisfaction of individual claims shall be distributed as the court may direct. These sections address another major difficulty in the emerging Rule 23 case law. The potential difficulties of computing and distributing damages for large classes of persons have led a number of courts to refuse to certify actions under Rule 23 on the grounds that they would be unreasonable.[18]

The fundamental premise of sections 4D and 4E with regard to the measurement, assessment and distribution of damages is that the antitrust laws should, at a minimum, provide an effective means whereby a plaintiff or plaintiff class can force a guilty defendant to part with

[18] See, e.g., *Boshes* v. *General Motors Corp.*, 59 F.R.D. 589 (N.D. Ill. 1973); *City of Philadelphia* v. *American Oil Co.*, 53 F.R.D. 45 (D.N.J. 1971).

all measurable fruits of his illegal activity as it relates to the plaintiff, multiplied threefold to reflect the factor Congress has determined is necessary as a punishment, as a deterrent, and as an incentive. This premise is in full accord with established concepts of damages under the antitrust laws. The cases reiterate that defendants must disgorge ill-gotten gains; [19] and the standard rules for measuring damages allow a reasonable estimate thereof once the fact of injury has been established.[20]

Section 4D draws upon this established body of law by permitting a reasonable estimation of the amount of damage to the class as a whole in a parens patriae or Rule 23 antitrust class action. After the violation and the fact of some injury to the class have been proved, § 4D permits the aggregation of the claims and amounts of injury to the members of the injured class without the requirement of separate proof of the fact and amount of injury to each individual member of the class. Questions relating to causation and the fact of injury to a class may require the court to address such questions separately with respect to different groups within the class of natural persons. For example, in a price-fixing case, the illegal overcharge may have allegedly been passed on to some consumers indirectly through several layers in the chain of distribution and to others directly. These two groups may pose separate questions of causation and fact of injury which must be separately addressed.

Section 4D acknowledges the obvious reality that "it is far simpler to prove the amount of damages to the members of the class by establishing their total damages than by collecting and aggregating individual claims as a sum to be assessed against the defendants." [21] In a price-fixing case, for example, frequently the only method of determining the total impact of the conspiracy will be to measure total illegal overcharges in defendants' total sales during the relevant period at the artificially high price to members of the injured class. Once this figure has been computed and assessed against the defendants, their real interests in the case is at an end. The question of how the sum assessed a damages should be distributed and employed is one in which the defendants have no interest. Their only proper remaining interest—their res judicata rights—are fully protected by § 4C(d).

Aggregation of damages, as provided by § 4D, is necessary because the proof of individual claims and amounts would be impracticable and virtually impossible. Parens patriae actions will normally be

[19] As the Supreme Court put it in a pivotal case:
"Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be a recovery.
"The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."
Bigelow v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264–65 (1946). See also *Continental Ore Co.* v. *Union Carbide & Carbon Co.*, 370 U.S. 690, 697 (1962); *Bordonaro Bros. Theatres, Inc.* v. *Paramount Pictures, Inc.*, 176 F.2d 594, 597 (2d Cir. 1949); *Banana Distributors, Inc.* v. *United Fruit Co.*, 162 F. Supp. 32, 46 (S.D.N.Y. 1958), rev'd on other grounds, 269 F.2d 790 (2d Cir. 1959).

[20] See e.g., *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123–24 (1969); *Bigelow* v. *RKO Radio Pictures, Inc.*, *supra* note 19; *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927).

[21] *In re Antibiotics Antitrust Actions*, 33 F. Supp. 278, 281 (S.D.N.Y. 1971); see e.g., *West Virginia* v. *Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 1971; *Hartford Hospital* v. *Chas. Pfizer & Co.*, 1971 Trade Cases ¶ 73,561 (S.D.N.Y. 1971).

brought in instances where thousands or millions of consumers have been injured. Few consumers keep receipts for all the goods and services they purchase or use. In fact, individual receipts or records are not available on a great many consumer goods and services. Snack food machines, for instance, do not issue receipts. Without the aggregation provisions of § 4D, antitrust violators would be able to injure most consumers with impunity, even if § 4C(a) parens patriae actions were permitted. Section 4D is also necessary to avoid endless trials in which thousands or millions of individuals would have to appear to prove their individual claims and the amounts of their individual injuries. The section is needed to make parens patriae cases manageable and effective. It will reduce significantly the time and expense of the parties and it will simplify the job of the court. Section 4D also permits aggregation and estimation of damages in class actions brought by private parties under § 4 of the Clayton Act. In this regard, the section overcomes some problems which have arisen in cases holding that large classes and the difficulties of damage proof render litigation unmanageable.

Section 4D is fair to both plaintiffs and to defendants. It changes the method by which damages are to be measured and assessed, but the defendant is entitled to a jury trial on the same issues as before. As in other antitrust cases, the pertinent issues of fact in a parens patriae case will be whether there was a violation of the antitrust laws, whether that violation caused an injury to the plaintiffs, and what the amount of damage was.

Section 4D does not permit speculative damages, but it does permit—as the courts have done consistently—the damages to be estimated reasonably. There is no injustice in permitting aggregation and estimation after the defendant's liability to the class has been established. The courts have long permitted damages to be proved in antitrust cases by a "just and reasonable estimate of the damages based on relevant data." [22]

As the Supreme Court put it almost 45 years ago in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931):

> Where the tort itself is of such nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts . . . [T]he risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party.

The committee believes that a defendant who has committed an antitrust violation has no right, constitutional or otherwise, to the retention of one penny of measurable illegal overcharges or other fruits of the violation. This committee emphatically rejects the notion that our constitutional requirements are so rigid that they somehow require that each of millions of potential claimants for individually trivial sums be paraded through the court to prove his personal damages, when the best evidence and often the only appropriate measure of the scope

[22] *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946).

of the violation is found in the records of the defendants themselves. A number of Federal courts have agreed.[23]

While the premise of § 4D is that defendants should be made to disgorge all measurable profits from an antitrust violation, § 4E, which applies only to parens patriae actions, recognizes that rarely, if ever, will all potential claimants actually come forward to secure their share of the recovery. Section 4E requires that all potential claimants be given a reasonable opportunity to claim their "appropriate portion of the damages awarded less unrecovered costs of litigation and administration." Once this claims procedure has run its course, § 4E commits the disbursement of the undistributed portion of the fund, which will often be substantial, to the discretion of the court. The funds remaining should be used for some public purposes benefiting, as closely as possible, the class of injured persons.

Section 4E thus adopts a concept developed in highly imaginative fashion by a number of courts over the years. The judicial antecedents of § 4E include cases in which recoveries for illegal overcharges on bus and taxi fares were applied to reduce those fares in future years.[24] and the innovative application of illegal overcharges in the antibiotic drug industry to a variety of programs beneficial to the drug-consuming public.[25] These include the expansion of State-sponsored health programs, medical research, the training of nurses and paramedical personnel, the staffing of medical and rehabilitation clinics, and other similar programs.[26]

The committee considered and squarely rejected arguments that this method of applying damage recoveries to the general benefit of the injured class is unconstitutional.[27] Once it is acknowledged that the antitrust violator has no constitutional right to retain the profits of his illegal activity, it becomes clear that he has no constitutionally protected interest in how those profits are distributed for the benefit of those whom he has injured. Using the antibiotic litigation example, neither the public nor a person who has been illegally overcharged for his antibiotics receives an unconstitutional "windfall" at the expense of the price-fixer when the fruits of the conspiracy are used to

[23] The Seventh Circuit put the matter succinctly:
"To permit the defendants to contest liability with each claimant in a single, separate suit, would, in many cases give defendants an advantage which would be almost equivalent to closing the door of justice to all small claimants. This is what we think the class suit was to prevent."
Hohmann v. *Packard Instrument Co.*, 399 F.2d 711, 715, (7th Cir. 1968), quoting *Weeks* v. *Bareco Oil Co.*, 125 F.2d 84, 90 (7th Cir. 1941); See *Dickerson* v. *Burnham*, 197 F.2d 973 (2d Cir.), cert. denied, 344 U.S. 875 (1952); *In re Antibiotics Antitrust Actions*, 333 F. Supp. 278, 282, 283, 289 (S.D.N.Y. 1971). See also 1974 Hearings at 29; 1975 Hearings at 17 (testimony of Messers. Kauper and Halverson).
Statistical and sampling methods are, of course, commonly used in evidence in Federal courts in a variety of contexts. See Manual for Complex Litigation § 2.712 (1973). See also *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 339–343 (1962); *United States* v. *United Shoe Mach. Corp.*, 110 F. Supp. 295, 305–07 (D. Mass. 1953); *Rosado* v. *Wyman*, 322 F. Supp. 1173 (E.D.N.Y. 1970), *aff'd* 437 F.2d 631 (2d Cir. 1971) (citing numerous cases and other authorities, 322 F. Supp. at 1180–81); *Zippo Mfg. Co.* v. *Rogers Imports, Inc.*, 217 F. Supp. 670, 680–84 (S.D.N.Y. 1963).

[24] See *Bebchick* v. *Public Utilities Comm'n*, 318 F.2d 187 (D.C. Cir.), cert. denied, 373 U.S. 913 (1963); *Daar* v. *Yellow Cab Co.*, 67 Cal.2d 695, 433 F.2d 732, 63 Cal. Rptr. 224 (1967).

[25] In re Antibiotics Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971).

[26] Hearings on S. 1284 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess., at 343 (1975).

[27] Compare *West Virginia* v. *Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir. 1971), cert. denied, 404 U.S. 871 (1971) (approving antitrust class action settlement embodying fluid class recovery concept), with *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005, 1018 (2d Cir. 1973), vacated and remanded on other grounds, 417 U.S. 156 (1947) (expressing due process doubts concerning what that court termed "fluid class recovery").

establish a medical clinic in his neighborhood. The only alternative—retention of the profits by the adjudicated wrongdoer—is unconscionable and unacceptable.[28]

SECTION 4F

Section 4F promotes parens patriae actions as a major aspect of antitrust enforcement by encouraging Federal-State cooperation. The section provides that whenever the United States has brought suit in its proprietary capacity under § 4A of the Clayton Act, and the U.S. Attorney General believes that the same antitrust violation may have given rise to potential parens patriae claims, he shall notify the appropriate State attorneys general. Whenever a State attorney general so requests, in order to evaluate the notice from the U.S. Attorney General or in order to bring a parens patriae action, section 4F(b) requires the U.S. Attorney General to make the Justice Department's investigative files available to the State attorneys general "to the extent permitted by law." This means that the files are to be made available except where specifically prohibited.

Section 4F(b) reflects the committee's desire that the Federal Government cooperate fully with State antitrust enforcers.

The benefits of increases in Federal-State cooperation and coordination of antitrust enforcement are obvious, and are achieved in H.R. 8532 without the expenditure of additional Federal funds.

SECTION 4G

Section 4G defines the terms used in §§ 4C, 4D, 4E, and 4F.

The term "State attorney general" is defined as the "chief legal officer of a State, or any other person authorized by State law" to bring parens patriae actions. Since "State" is defined to include the District of Columbia, the Commonwealth of Puerto Rico and the territories and possessions of the United States, it thus includes the Corporation Counsel of the District of Columbia, and it includes any legally appointed special prosecutors.

The committee strongly supports the development of "in-house" State antitrust capabilities. At the present time, regrettably, only a few States have the staff and financial ability to prosecute protracted antitrust cases without the assistance of retained private attorneys. Especially in consolidated multistate litigation, retained counsel may well be both necessary and entirely proper for parens patriae cases.

Nonetheless, the Judiciary Committee believes that certain types of fee arrangements between States and private attorneys may inhibit the development of State antitrust capabilities. The definition of State attorney general, therefore, specifically prohibits parens patriae cases

[28] The committee disapproves decisions such as *City of Philadelphia* v. *American Oil Co.*, 53 F.R.D. 45 (D.N.J. 1971); *Illinois Bell Tel. Co.* v. *Slattery*, 102 F.2d 58 (7th Cir. 1939), and In re Hotel Telephone Charges, 500 F.2d 86 (9th Cir. 1975), in which, if allegations were accepted as true, defendants were permitted to retain millions of dollars in ill-gotten gains because of the apparent difficulties involved in manageability or in devising an equitable scheme for distribution of the overcharges to specific individual claimants. For added insight on the facts involved in the *Illinois Bell* outcome, see Newberg, Class Action Legislation, 9 Harv. J. Legis. 217, 231 (1972); Comment, 39 U. Chi. L. Rev. 448, 451, & n. 13 (1972); Note, 31 Md. L. Rev. 354, 361, & n. 50 (1971).

to be brought by "any person employed or retained on a contingency fee basis."

Suits in the name of a State are an exercise of State power. The committee believes that the States should exercise control over the use of State power not only in theory but in fact. If a State attorney general were able to delegate this function to private counsel on a contingency fee basis, the political and financial stake he would experience in otherwise prosecuting the action would be substantially diminished. And thus State power would be exercised without the guarantee of State supervision.

The committee bill excludes the use of fee arrangements whereby a State agrees to pay a private attorney a percentage of the recovery if the attorney wins the parens patriae case for the State. H.R. 8532 also prohibits any contracts which make the outside counsel's fee or the amount thereof contingent on the amount, if any, of the recovery or on whether there is a recovery.

The term "State", as used in proposed §§ 4C, 4D, 4E, and 4F includes the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

As used in the parens patriae sections, especially § 4C, the term "antitrust laws" excludes sections 2 and 7 of the Clayton Act. Section 2 is the Robinson-Patman Act, which concerns price discrimination, and section 7 is the section which prohibits mergers which are anticompetitive. Assistant Attorney General Thomas Kauper recommended that these provisions be excluded from the violations for which State attorneys general could recover damages in parens patriae actions. The committee believes that evolving standards of damage assessment under these sections are in sufficiently embryonic stages that further evaluation is necessary before permitting statewide actions of a parens patriae nature.[29]

Finally, the bill defines the term "natural persons" so as to exclude sole proprietorships and partnerships. This provision is discussed in connection with § 4C(a).

SECTION 3—ADDITIONAL AMENDMENTS TO THE CLAYTON ACT

Section 3 of H.R. 8532 amends the Clayton Act's provisions concerning the statute of limitations, tolling that statute during the pendency of Government actions, and the injunction section.

Section 3(1) amends the statute of limitations provision to include parens patriae actions under section 4C within the 4-year statute of limitations.

Section 3(2) conforms the tolling provision of the Clayton Act so that States' rights of action under section 4C will be treated the same as other rights of action for which the statute of limitations is tolled (stayed) pending the outcome of antitrust civil or criminal cases brought by the United States.

ATTORNEYS' FEES IN INJUNCTION CASES

Section 3(3) of H.R. 8532 provides that in parens patriae injunction cases and in all other private antitrust cases, a prevailing plaintiff shall be awarded reasonable attorneys' fees.

[29] See *Gottesman* v. *General Motors Corp.*, 414 F.2d 956 (2d Cir.), cert. denied, 393 U.S. 1086 (1969) (first holding that damages may be recovered under § 7).

The Clayton Act is intended to provide a sufficient incentive for private parties to sue antitrust violators to redress their grievances effectively. That incentive is primarily achieved by permitting a winning plaintiff to recover treble damages for any injuries he has sustained as a result of the defendant's violation of the antitrust laws.

Another significant incentive provided in § 4 of the Clayton Act is the requirement that a losing defendant in a damage case pay for a "reasonable attorney's fee" for a winning plaintiff. Because antitrust cases are frequently lengthy and complicated, they are normally very expensive for a person to bring and maintain. Attorneys' fees, therefore, comprise by far the largest portion of the legal expenses incurred in maintaining a private antitrust lawsuit. Since the award of attorneys' fees is made in addition to the treble damage award, a prevailing plaintiff is able to pay for the services of his attorney without having to reduce his damage award. The attorneys' fee provision thus preserves the incentive for a private party to file a meritorious lawsuit.

The injunctive provisions of § 16 of the Clayton Act, 15 U.S.C. 26, however, are silent on the subject of awarding attorneys' fees to prevailing plaintiffs. Until recently, the U.S. courts of appeals were split over whether attorneys' fees could be awarded in antitrust injunction cases. Such fees were disapproved in *Decorative Stone Co.* v. *Building Trades Council of Westchester County*, 23 F.2d 426 (2d Cir.), cert. denied, 277 U.S. 594 (1928), but they were approved in *ITT* v. *General Telephone & Elec. Co.*, 43 U.S.L.W. 2466 (9th Cir., April 25, 1975).

The issue of attorneys' fees in § 16 injunction cases was apparently disposed of on May 12, 1975, when the Supreme Court ruled in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 95 S. Ct. 1612 (1975), that, with a few narrow exceptions, the Federal courts have no power to award attorneys' fees in the absence of specific statutory authority. While *Alyeska* was not an antitrust case, the principle apparently applies to cases brought under section 16 of the Clayton Act. The court noted in *Alyeska* that:

> It is true that under some, if not most, of the statutes providing for the allowance of reasonable fees, Congress has opted to rely heavily on private enforcement to implement private litigation. Fee-shifting in connection with treble public policy and to allow counsel fees so as to encourage damage awards under the antitrust laws is a prime example.

95 S. Ct. at 1624.

Alyeska invites Congress to enact specific legislation authorizing the award of attorneys' fees when there is a strong public policy. In the case of § 16 antitrust injunction actions, there is such a compelling public policy to justify the award of attorneys' fees, and § 3(3) of H.R. 8532 provides the specific legislative authority necessary.

The antitrust laws clearly reflect the national policy of encouraging private parties (whether consumers, businesses, or possible competitors) to help enforce the antitrust laws in order to protect competition through compensation of antitrust victims, through punishment of antitrust violators, and through deterrence of antitrust violations. Litigation by "private attorneys general" for monetary relief and for injunctive relief has frequently proved to be an effective enforcement tool. *Alyeska*, however, has apparently eliminated the possibility that prevailing plaintiffs can recover attorneys' fees in meritorious and

successful injunction cases. As such, *Alyeska* creates a significant deterrent to potential plaintiffs bringing and maintaining lawsuits to enjoin antitrust violations. Without the opportunity to recover attorneys' fees in the event of winning their cases, many persons and corporations would be unable to afford or unwilling to bring antitrust injunction cases.

Indeed, the need for the awarding of attorneys' fees in § 16 injunction cases is greater than the need in § 4 treble damage cases. In damage cases, a prevailing plaintiff recovers compensation, at least. In injunction cases, however, without the shifting of attorneys' fees, a plaintiff with a deserving case would personally have to pay the very high price of obtaining judicial enforcement of the law and of the important national policies the antitrust laws reflect. A prevailing plaintiff should not have to bear such an expense. Section 3(3) of H.R. 8532, therefore, is intended to reiterate congressional encouragement for private parties to bring and maintain meritorious antitrust injunction cases. Under this section, a plaintiff who substantially prevails would be entitled to the award of "reasonable attorneys' fees."

In addition to private parties, States would be entitled to recover reasonable attorneys' fees whenever they prevail in § 16 cases.

IV. Committee Action

In March 1974, during the 93d Congress, the Judiciary Subcommittee on Monopolies and Commercial Law conducted 2 days of hearings on H.R. 12528 and H.R. 12921. Identical bills, H.R. 38 and H.R. 2850, were introduced during the 1st session of the 94th Congress, and the subcommittee held an additional 2 days of hearings in February and March 1975. The subcommittee received testimony from Assistant Attorney General for Antitrust Thomas Kauper, the Federal Trade Commission's Director of the Bureau of Competition James Halverson, National Association of Attorneys General Antitrust Committee Chairman Andrew Miller (attorney general of Virginia), representatives of the attorneys general of Connecticut, New York, Ohio, and California, and representatives of the private antitrust bar and of private industry. In addition, the subcommittee received correspondence or prepared statements from several Members of Congress, a total of 38 State attorneys general, the Mayor of Washington, D.C., the American Bar Association's Section on Antitrust Law, the Chamber of Commerce, the National Association of Manufacturers, the Consumers Union, and other persons and organizations.

In public session on May 7, 1975, after 4 days of marking up H.R. 2850, the Subcommittee on Monopolies and Commercial Law ordered 11 to 2 that the amended version, H.R. 6786, be introduced and reported favorably to the full Committee on the Judiciary. On July 10, 1975, in public session, the subcommittee agreed by unanimous consent to reconsider H.R. 6786, which was then amended. By a 9 to 2 vote, the subcommittee ordered the favorable report of a clean bill, H.R. 8532, to the full Committee on the Judiciary. In public session on July 22 and 24, 1975, the committee considered and amended H.R. 8532, and on July 24, the committee by voice vote ordered that H.R. 8532, as amended, be reported favorably to the House.

V. Information Submitted Pursuant to Rules X and XI

A

Clause 2(l)(3) of Rule XI is not applicable. Section 308(a) of the Congressional Budget Act of 1974 will not be implemented this year. See last paragraph of House Rept. No. 94–25, 94th Cong., 1st session (1975).

B

No estimate or comparison from the Director of the Congressional Budget Office was received.

C

No related oversight findings or recommendations have been made by the Committee on Government Operations under 2(b)(2) of Rule X.

D

Pursuant to Clause 2(l)(4) of Rule XI, the committee believes that H.R. 8532 can be a major force in combating the present inflationary spiral, and can have a significant anti-inflationary impact on prices and costs in the operation of the national economy.

In August of 1974, the Assistant Attorney General in charge of the Justice Department's Antitrust Division estimated that ineffective competition in the Nation's economy was adding $80 billion annually to prices paid by consumers. An FTC Commissioner estimated that consumer costs rose as much as $10 billion annually because of price fixing violations alone. The President of the United States, in October, 1974, also recognized and endorsed the anti-inflationary effect of vigorous enforcement of the antitrust laws. In the 93d Congress, the Joint Economic Committee also concluded that it is vitally important to strengthen competition not only to curtail inflation, but also to preserve the free market system itself.

Thus while the precise extent of the inflationary impact of antitrust violations cannot be determined, it is clear that they introduce foreign and artificial forces exerting upward pressure on prices. By providing more effective enforcement of the antitrust laws on a large scale, H.R. 8532 should contribute to a reduction in the level of these forces.

Compensating antitrust victims and preventing violators from being unjustly enriched will not alone reduce consumer prices and combat inflation. But, to the extent that the individual States develop credible antitrust enforcement capabilities, H.R. 8532 will help to convince potential antitrust offenders that violations will not be profitable. The bill gives the States the opportunity to deter future antitrust violations, but the deterrence will depend entirely upon the States' taking advantage of their opportunities to bring parens patriae cases. If States use H.R. 8532 responsibly and are able to deter antitrust violations, then H.R. 8532 will have an anti-inflationary impact locally and regionally, at least, by reducing imperfect competition's contribution to inflation.

MINORITY VIEWS OF MESSRS. HUTCHINSON, RAILSBACK, WIGGINS, MOORHEAD, ASHBROOK, HYDE AND KINDNESS

In the name of providing a legal remedy to those who, as a practical matter, have none, this bill charges far beyond the mark to impose a mandatory irreductible fine on violators of the antitrust laws. Although this remedy is deemed civil, it partakes of both civil and criminal aspects. In doing so, the remedy fails to meet ordinary standards for civil or criminal remedies. As a civil remedy, the damages paid generally will not be paid to compensate victims for their losses. As a criminal remedy, the damages paid will be a mandatory fine, often astronomical, but irreducible, without regard for the interests of justice in the specific case. In our opinion, this legislative remedy presents the worst of both worlds.

We agree that the bill establishes no new substantive liability. No new antitrust violations are created. However, the bill does establish procedural machinery for the calculation and imposition of damage awards that undoubtedly will revolutionize the law of antitrust damages.

It will be said that all this bill does is to allow defendants' current potential liability to become realized, and that to oppose this legislation is, in effect, to oppose the promise of section 4 of the Clayton Act, now over 60 years old. But since the logic of a single idea does not take account of competing ideas, one may by mere logical extensions step over the precipice.

This bill does go too far. It is critical to note that this bill operates in an area where the claimants are often nameless, unidentified, unidentifiable, and ignorant of the trivial injury allegedly suffered and ignorant of who inflicted it. Nevertheless, the bill extracts from defendants three times the damages sustained. Why? Because, it is suggested, that's the way it's done in antitrust law.

But the purpose of treble-damage awards in antitrust law as we understand it is to compensate victims for their injury and to provide the incentive for bringing the action. But in the typical case envisioned by this bill—for example, one involving price-fixing bread—there is no incentive to bring the case even though treble damages are obtainable and there generally are no provably known victims to compensate. What the treble-damage award really is in this context is punishment.

Although we believe wrongdoers should not be allowed to retain ill-gotten gains, this principle does not compel the imposition of treble damages. It is respectfully suggested that payments exacted from defendants which, as a general matter, will not go to compensate victims for losses and which will put to some noble purpose at the discretion of the court may be more accurately termed "fines" than damage awards.

But the fines imposed by this bill—and this is critical—may not be imposed commensurate with the interests of justice. The committee

rejected an amendment that would have permitted the court to take into consideration the "defendant's degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business and such other matters as justice may require." Although these actions may be filed on behalf of millions of unknown individuals and involve millions of dollars, the resultant award must be arbitrarily calculated and may not be reduced even if the interests of justice so require.

The imposition of minimum mandatory penalties may have its place in the law, but such penalties are established at the low end of the scale so as to be "just" in every application. Not so with these fines, which may run into millions of dollars. Moreover, such penalties envision a range of choices from which the court, in the interests of justice, might fashion an appropriate penalty. But this bill goes far beyond that. Under this bill once the extent of the injury is shown, the imposition of the fine, both in fact and in amount, is automatic.

It is argued that it is of no concern to the defendant to what purpose the award is put after it has paid it. The argument misses the point. It should be of concern to the Congress how necessary it is to inflict possibly astronomical awards, definitionally three times the damage done, when there is no interest among the victims in bringing the case and where there are no provably known victims or only a few able to make claim against the award.

If the purpose is not to compensate in the manner of a civil remedy, it must be to punish and deter in the manner of a criminal penalty. But as a criminal penalty, it is harsh and arbitrary. If the major part of an award is committed to the discretion of the court to be used for some related purpose, it is difficult for us to understand how the purpose, to be fashioned by the court after the case is heard, must be satisfied by an amount which is exactly three times the damage proven to have been done by the defendant.

The purpose fashioned by the court will be a public one. For example, it is suggested that in a case involving the price-fixing of drugs, it is appropriate to commit the award to support a drug clinic. But it is patently clear that the needs of the drug clinic do not define the amount of the award. Nor does the need to compensate, nor does the need to provide incentives for enforcement, as stated before.

We believe that the public interest served by the channeling of the award to some analogous purpose must also admit other factors. For example, if the award is such that it will require the defendant to liquidate assets and lay off employees from work, there may be circumstances where the economic well-being of the community should be a matter for the court to consider in determining whether the defendant should be required to pay the full amount.

The provisions of the bill treating with the aggregation and distribution of damages are the crux of this legislation. We believe they are the wrong answer to the problem. Beyond that we believe that the bill will be subject to much abuse. By calling on the State attorneys to champion these antitrust actions, the bill seeks to provide a political incentive for antitrust enforcement in cases where even treble damage awards provide no economic incentive.

We believe that politics and antitrust will not make a happy marriage. The temptations for the politically ambitious to ride into the

public eye as its champion against "fat cat" antitrust violators by filing lawsuits to the sound of political trumpets may be too great. Since antitrust cases take years to complete, the politically ambitious attorney general need not fear the embarrassment of a string of losses. In any event, many of the cases will have been undoubtedly settled because of their adverse publicity and their nuisance value. This bill underscores how quickly we have forgotten the lesson many thought we learned last year that politics and antitrust should not be mixed.

Finally, in our opinion, the committee report does not correctly describe the notice requirements of the bill. In subcommittee there was substantial debate on the quality of the notice to claimants that should be required. I was recognized that to require only publication notice would certainly streamline the lawsuit, but it was likewise conceded that such a provision without more would be susceptible to constitutional attack on due process grounds in instances where the names and addresses of the claimants were known but where mailed notice—the best notice practicable—was not given. Thus in order to insulate the bill from litigation over its procedure and to eliminate the notice issue as a matter of controversy the subcommittee adopted the proviso that the notice had to be the "best notice practicable," which the committee ratified without further debate. Although the report correctly describes where the phrase is found in the Federal rules of civil procedure and in case law, other language of the report can be fairly read to give this phrase of art a new meaning. The report suggests that the test for adequacy of notice is not whether it is "best" for the claimants to be notified but whether it is "best" for the policy of authorizing parens patriae actions against antitrust violators. Such a suggestion is foreign to the intention expressed in adopting the language explained in the report.

For these reasons we respectfully dissent.

EDWARD HUTCHINSON.
TOM RAILSBACK.
CHARLES E. WIGGINS.
CARLOS J. MOORHEAD.
JOHN M. ASHBROOK.
HENRY J. HYDE.
THOMAS N. KINDNESS.

SEPARATE VIEWS OF MS. JORDAN

I wholeheartedly support this bill. As a sponsor of the original measure I beileve it represents a vital step forward in both general antitrust enforcement and consumer protection.

I am seriously concerned, however, with one amendment adopted by the committee, which may have the effect of undermining a great deal of what the bill is intened to accomplish.

Section 4G, as amended, by its definition of a "State Attorney General," effectively precludes the States from employing knowledgeable private counsel on the basis of any "contingency fee."

The amendment has, I believe, two laudable purposes, namely to encourage States to develop their own antitrust capabilities and to protect them from potential gouging by lawyers who take cases on a flat percentage fee, thus sometimes winding up with unjustifiable windfall fees.

I am in sympathy with both these objectives. Indeed, I would favor an amendment to provide Federal assistance to the States to develop antitrust litigation capabilities. However, I think it is unrealistic to believe that more than a handful of States will be in a position to conduct a significant amount of such litigation on their own in the foreseeable future. And some States will never have the resources or the interest to hire and train the large staffs which antitrust litigation requires.

Thus there will persist for the foreseeable future a critical need to enlist the services of the private bar if the bill is to have any real impact. I am concerned that a flat ban on "contingency fees" will effectively place the services of perfectly ethical and highly knowledgeable attorneys beyond the reach of the States.

Most plaintiff's antitrust litigation, like much plaintiff's litigation in general, is conducted presently on a contingent fee basis. Section 4 of the Clayton Act anticipates this. It provides for the court to award a reasonable attorney's fee to a prevailing plaintiff, in addition to his treble damage recovery. Thus for the most part, lawyers agree to take antitrust cases for plaintiffs in return for whatever fee the court awards them at the successful conclusion or settlement of the action. Without such arrangements, there would be precious little private antitrust enforcement, since few, if any, plaintiffs will be able to pay the normal hourly rate of experienced counsel without regard to the outcome of the case. States, while in a better financial position than ordinary private plaintiffs, will likewise be unable in most instances to commit the required sums to a major case in advance, win or lose.

In some instances, contingency fees can involve overreaching. I do not personally approve of arrangements whereby the lawyer receives both the court-awarded "reasonable fee" and a percentage of the recovery on top of that. However, I fear that the committee, by striking at the overreaching may have seriously undermined the entire scheme of treble damage prosecution.

At the very best, the amendment adopted by the committee regarding "contingency fees" creates dangerous ambiguities with respect to permissible fee arrangements. It does not specify what contingent elements must be present in order to render an arrangement unacceptable, and it is clear that not all uncertainty as to final amount will render a fee "contingent." Even where the lawyer is being paid an hourly charge, he will usually have little idea at the outset what his actual fee will be. The committee amendment could, therefore, be open to an interpretation which would salvage fee contracts department for their ultimate amount on some unknown element, such as the award of the court at the conclusion of the case. The risk is very great, however, that a court would determine that the arrangement was "contingent" if some element of success—either at settlement or at trial—made the difference between a large fee for the lawyer and a low, probably uncompensatory one.

I think that risk is unacceptable, since States are certain to be dependent for many years upon the services of expert private counsel, whom they will be unable to compensate on a hourly basis without regard to the outcome of the case.

There is another vital point at stake. The contingent fee is not merely an honorable means of financing litigation for those who would otherwise be unable to afford it until the award of final judgement. It is also recognized as an important tool for weeding out the frivolous and unmeritorious case on the basis of expert assessment. It is highly unlikely that a lawyer knowledgeable in any field will be prepared to invest large quantities of his own time and effort in a case on the basis that he will be uncompensated unless he obtains a successful result for the client, unless he believes after careful examination that the case has serious merit.

This point is responsive to two concerns which have been expressed by opponents and critics of the bill. Business interests have argued that the enactment of this legislation will bring a plethora of unfounded lawsuits for enormous sums of money, which they will have to defend at great expense. And members of the committee have on several occasions questioned whether the law might not present irresistible temptations to politically ambitious State officials bent on making a reputation without regard to the ultimate disposition of the cases they bring.

Neither of these unfortunate predictions is remotely likely to come true if the economic judgment of the legal experts is invoked in the evaluation of cases through the use of the contingent fee.

Hon. Barbara Jordan.

Changes in Existing Law Made by the Bill, As Reported

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman) :

ACT OF OCTOBER 14, 1914

* * * * * * *

Sec. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Sec. 4A. Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover actual damages by it sustained and the cost of suit.

Sec. 4B. Any action to enforce any cause of action under sections [4 or 4A] *4, 4A, or 4C* shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

ACTIONS BY STATE ATTORNEYS GENERAL

Sec. 4C. (a) Any State attorney general may bring a civil action, in the name of the State, in the district courts of the United States under section 4 of this Act, and such State shall be entitled to recover threefold the damages and the cost of suit, including a reasonable attorney's fee, as parens patriae on behalf of natural persons residing in such State injured by any violation of the antitrust laws.

(b) In any action under subsection (a), the court may in its discretion, on motion of any party or on its own motion, order that the State attorney general proceed as a representative of any class or classes of persons alleged to have been injured by any violation of the antitrust laws, notwithstanding the fact that such State attorney general may not be a member of such class or classes.

(c) In any action under subsection (a), the State attorney general shall, at such time as the court may direct prior to trial, cause notice thereof to be given by publication in accordance with applicable State law or in such manner as the court may direct; except that such notice shall be the best notice practicable under the circumstances.

(d) Any person on whose behalf an action is brought under subsection (a) may elect to exclude his claim from adjudication in such action by filing notice of his intent to do so with the court within sixty days after the date on which notice is given under subsection (c). The final judgment in such action shall be res judicata as to any claim arising from the alleged violation of the antitrust laws of any potential claimant in such action who fails to give such notice of intent within such sixty-day period, unless he shows good cause for his failure to file such notice.

(e) An action under subsection (a) shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given in such manner as the court directs.

MEASUREMENT OF DAMAGES

SEC. 4D. In any action under section 4C (a) or (b) or in any other action under section 4 of this Act which is maintained as a class suit, damages may be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit, without the necessity of separately proving the individual claim of, or amount of damage to, each person on whose behalf the suit was brought.

DISTRIBUTION OF DAMAGES

SEC. 4E. Damages recovered under section 4C(a) shall be distributed in such manner as the district court in its discretion may authorize, subject to the requirement that any distribution procedure adopted afford each person a reasonable opportunity to secure his appropriate portion of the damages awarded less unrecovered costs of litigation and administration.

ACTIONS BY ATTORNEY GENERAL OF THE UNITED STATES

SEC. 4F. (a) Whenever the Attorney General of the United States has brought an action under section 4A of this Act, and he has reason to believe that any State attorney general would be entitled to bring an action under section 4C(a) based substantially on the same alleged violation of the antitrust laws, he shall promptly give writtten notification to such State attorney general with respect to such action.

(b) To assist a State attorney general in evaluating the notice and in bringing any action under section 4C of this Act, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under section 4C.

DEFINITIONS

SEC. 4G. For purposes of this section and sections 4C, 4D, 4E, and 4F:

(1) The term "State attorney general" means the chief legal officer of a State, or any other person authorized by State law to bring actions under this Act, except that such term does not include any person employed or retained on a contingency fee basis.

(2) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

(3) The term "antitrust laws" does not include sections 2 and 7 of this Act.

(4) The term "natural persons" does not include proprietorships or partnerships.

SEC. 5. (a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a

defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 4A.

(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 4A, the running of the statute of limitations in respect of every private *or State* right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 4 *or 4C* is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

* * * * * * *

SEC. 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. *In any action under this section, the court shall award reasonable attorneys' fees to a prevailing plaintiff.*

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94TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 94-1373

ANTITRUST PREMERGER NOTIFICATION ACT

JULY 28, 1976.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. RODINO, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R. 14580]

The Committee on the Judiciary, to whom was referred the bill (H.R. 14580) to amend the Clayton Act to provide for premerger notification and waiting requirements, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert the following:

That this Act may be cited as the "Antitrust Premerger Notification Act."

NOTIFICATION AND WAITING PERIOD

SEC. 2. The Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting immediately after section 7 of such Act the following new section:

"SEC. 7A. (a) Except as exempted pursuant to subsection (c), no corporation shall acquire, directly or indirectly, any voting securities or assets of any other corporation, unless each such corporation (or in the case of a tender offer, the acquiring corporation) files notification pursuant to rules under subsection (d)(1) and the waiting period described in subsection (b)(1) has expired, if—

"(1) the acquiring corporation or the corporation, any voting securities or assets of which are being acquired, is engaged in commerce or in any activity affecting commerce;

"(2)(A) any voting securities or assets of a manufacturing corporation which has annual net sales or total assets of $10,000,000 or more are being acquired by a corporation which has total assets or annual net sales of $100,000,000 or more;

"(B) any voting securities or assets of a nonmanufacturing corporation which has total assets of $10,000,000 or more are being acquired by a corporation which has total assets or annual net sales of $100,000,000 or more; or

"(C) any voting securities or assets of a corporation with annual net sales or total assets of $100,000,000 or more are being acquired by a corporation with total assets or annual net sales of $10.000,000 or more; and

"(3) as a result of such acquisition, the acquiring corporation would hold—

"(A) 25 per centum or more of the voting securities or assets of the acquired corporation, or

"(B) an aggregate total amount of the voting securities and assets of the acquired corporation in excess of $20,000,000.

"(b) The waiting period under subsection (a) shall—

"(A) begin on the date of the receipt by the Federal Trade Commission and the Assistant Attorney General of the completed notification required under subsection (a) and, if such notification is not completed, the reasons therefore; and

"(B) end on the thirtieth day after the date of such receipt or on such later date as may be set under subsection (e) or (g)(2), except that in the case of cash tender offers, such period shall end on the twenty-first day after the date of such receipt, or on such later date as may be set under subsection (e)(2)(B).

"(2) The Federal Trade Commission and the Assistant Attorney General may, in individual cases, terminate the waiting period specified in paragraph (1) and allow any corporation to proceed with any acquisition subject to this section by publishing in the Federal Register a notice that neither intends to take any action within such period with respect to such acquisition.

"(3) As used in this section—

"(A) The term 'Assistant Attorney General' means the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice.

"(B) The term 'voting securities' means any stock or other share capital presently entitling the owner or holder thereof to vote for the election of directors of a corporation.

"(4) The amount or percentage of voting securities or assets of one corporation which are acquired or held by another corporation shall be determined by aggregating the amount of percentage of such voting securities or assets held or acquired by the acquiring coporation and each affiliate thereof. For purposes of this paragraph, the term 'affiliate' means any person who controls, is controlled by, or is under common control with, a corporation.

"(5) The conversion of stock or other share capital which are not voting securities into stock or other share capital which are voting securities shall be deemed an acquisition for purposes of this section.

"(c) The following classes of transactions are exempt from the requirements of this section—

"(1) acquisitions of goods or realty transferred in the ordinary course of business;

"(2) acquisitions of bonds, mortgages, deeds of trust, or other obligations which are not voting securities;

"(3) acquisition of voting securities or assets of a corporation with respect to which the acquiring corporation owns more than 50 per centum of such voting securities or assets prior to such acquisition;

"(4) transfers to or from a Federal agency or a State or political subdivision thereof;

"(5) transactions specifically exempted from the antitrust laws by law or by actions of any Federal agency authorized by law, if copies of any information and documentary material filed with any such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General;

"(6) transactions which require agency approval under section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828(c)), or section 3 of the Bank Holding Company Act of 1956 (12 U.S.C. 1842);

"(7) transactions which require agency approval under section 4 of the Bank Holding Company Act of 1956 (12 U.S.C. 1843), section 403 or 408(e) of the National Housing Act (12 U.S.C. 1726 and 1730a), or section 5 of the Home Owners' Loan Act of 1933 (12 U.S.C. 1464), if copies of any information and documentary material filed with any such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General;

"(8) acquisitions, solely for the purpose of investment, of voting securities if, as a result of such acquisition, the voting securities acquired or do not exceed either 10 per centum of the outstanding voting securities of the

issuing corporation or such greater per centum as may be provided by the Federal Trade Commission under subsection (d)(2)(C);

"(9) acquisitions of voting securities issued by any corporation if, as a result of such acquisition, the voting securities acquired would not increase, directly or indirectly, the acquiring corporation's share of outstanding voting securities of the issuing corporation;

"(10) acquisitions, solely for the purpose of investment, of voting securities pursuant to a plan of reorganization or dissolution, or of assets, by any bank, banking association, trust company, investment company, or insurance company, in the ordinary course of its business;

"(11) acquisitions of voting securities by any bank trust department, trust company, or other entity, if such department, trust company, or entity is acting in the capacity of a trustee, executor, guardian, conservator, or otherwise as a fiduciary, and is voting or investing such voting securties for the benefit of another person or entity, except that any such beneficiary shall not be exempt by virtue of this paragraph from the requirements of this section; and

"(12) such other acquisitions, transfers, or transactions, as may be exempted by the Federal Trade Commission under subsection (d)(2)(B).

"(d) The Federal Trade Commission, with the concurrence of the Assistant Attorney General and by rule in accordance with section 553 of title 5, United States Code—

"(1) shall require that the notification required under subsection (a) be in such form and contain such documentary material relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may violate the antitrust laws; and

"(2) may—

"(A) define the terms used in this section;

"(B) exempt classes of corporations and acquisitions, transfers, or transactions which are not likely to violate section 7 of this Act from the requirements of this section;

"(C) increase the percentage amount specified in subsection (c)(8); and

"(D) prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section.

"(e)(1) The Federal Trade Commission or the Assistant Attorney General may, prior to the expiration of the 30-day waiting period, or in the case of cash tender offers, the 21-day waiting period, specified in subsection (b)(1) of this section, require the submission of additional information or documentary material relevant to an acquisition by any corporation subject to this section, or by any officer, director, agent, or employee of such corporation.

"(2)(A) Except as provided in subparagraph (B) with respect to cash tender offers, the Federal Trade Commission or the Assistant Attorney General may, in its or his discretion, extend the 30-day waiting period specified in subsection (b)(1) of this section for an additional period of not more than 20 days after the date on which the Federal Trade Commission or the Assistant Attorney General, as the case may be, receives (i) all the information or documentary material submitted pursuant to a request under paragraph (1) of this subsection, and (ii) if such request is not fully complied with, a certification of the reasons for such noncompliance. Such additional period may be further extended only by the United States district court, upon an application by the Federal Trade Commission or the Assistant Attorney General pursuant to subsection (g)(2).

"(B) With respect to cash tender offers, the United States district court may, upon application of the Federal Trade Commission or the Assistant Attorney General—

"(i) extend the 21-day waiting period specified in subsection (b)(1) of this section until there is substantial compliance with a request under paragraph (1) of this subsection, and

"(ii) grant such other equitable relief as the court in its discretion determines necessary,

"if the court determines that the Federal Trade Commission or the Assistant Attorney General requested the submission of additional information or documentary material pursuant to subsection (e)(1) within 15 days after the date of receipt of the original notification required under subsection (a) and such

request was not substantially complied with within the 21-day waiting period specified in subsection (b)(1).

"(f) If a proceeding is instituted by the Federal Trade Commission alleging that a proposed acquisition violates section 7 of this Act, or an action is filed by the United States, alleging that a proposed acquisition violates such section 7, or section 1 or 2 of the Sherman Act, and the Commission or the Assistant Attorney General files a motion for a preliminary injunction against the consummation of such proposed acquisition, together with a certification that it or he believes that the public interest requires relief pendente lite, in the United States district court for the judicial district in which the respondent resides or does business in the case of the Federal Trade Commission, or in which such action is brought in the case of the Assistant Attorney General—

"(1) upon the filing of such motion, the chief judge of such district court shall immediately notify the chief judge of the United States court of appeals for the circuit in which such court is located, who shall designate a United States district judge to whom such action shall be assigned for all purposes; and

"(2) the motion for a preliminary injunction shall be set down for hearing by the district judge so designated at the earliest practicable time, shall take precedence over all matters except older matters of the same character and trials pursuant to section 3161 of title 18, United States Code, and shall be in every way expedited.

"(g)(1) Any corporation or any officer or director thereof who fails to comply with any provision of this section shall be liable to the United States for a civil penalty of not more than $10,000 for each day during which such corporation, directly or indirectly, holds any voting securities or assets, in violation of this section. Such penalty may be recovered in a civil action brought by the United States.

"(2) If any corporation or officer, director, agent, or employee thereof fails to substantially comply with the notification requirement of subsection (a) or any request for the submission of additional information or documentary material under subsection (e)(1) of this section within the waiting period specified in subsection (b)(1) and as may be extended under subsection (e), the United States district court shall have jurisdiction to—

"(A) order compliance;

"(B) extend the 30-day waiting period specified in subsection (b)(1) and as may have been extended under subsection (e) until there has been substantial compliance; and

"(C) grant such other equitable relief as the court in its discretion determines necessary,

upon application of the Federal Trade Commission or the Assistant Attorney General.

"(h) Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of title 5, United States Code, and no such information or documentary material may be made public, except as may be required in any administrative or judicial action or proceeding.

"(i)(1) Failure of the Federal Trade Commission or the Assistant Attorney General to take any action under this section shall not bar the institution of any proceeding or action with respect to such acquisition at any time under any other section of this Act or any other provision of law.

"(2) Nothing contained in this section shall limit the authority of the Assistant Attorney General or the Federal Trade Commission to secure from any person documentary material, oral testimony, or other information under the Antitrust Civil Process Act, the Federal Trade Commission Act, or any other provision of law.

"(j) Beginning not later than January 1, 1978, the Federal Trade Commission, after consultation with the Assistant Attorney General, shall annually report to the Congress on the operation of this section. Such report shall include an assessment of the effects of this section, recommendations for any desirable revisions of this section, any rules promulgated under this section, any action taken under this section, and, in cases of acquisitions subject to this section against which the Assistant Attorney General or the Federal Trade Commission took no action under this section prior to the expiration of the waiting period specified in this section, a statement of the reasons for such failure to act.".

SHORT TITLES FOR SHERMAN ACT AND CLAYTON ACT

SEC. 3. (a) The Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890 (15 U.S.C. 1 et seq.), is amended by adding immediately after the enacting clause the following: "That this Act may be cited as the 'Sherman Act'.".

(b) The Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 12 et seq.), is amended by—

(1) inserting "(a)" after "That" in the first section; and

(2) adding at the end of the first section the following new subsection:

"(b) This Act may be cited as the 'Clayton Act'.".

EFFECTIVE DATES

SEC. 4. (a) The amendment made by section 2 of this Act shall take effect 180 days after the date of enactment of this Act, except that subsections (d)(1) and (d)(2) of section 7A of the Clayton Act (as added by section 2 of this Act) shall take effect on the date of enactment of this Act.

(b) Section 3 of this Act shall take effect on the date of enactment of this Act.

I. PURPOSE

The purpose of H.R. 14580 is to amend the federal anti-merger law, Section 7 of the Clayton Antitrust Act (15 U.S.C. § 18), by establishing premerger notification and waiting requirements for corporations planning to consummate very large mergers and acquisitions. The bill in no way alters the substantive legal standard of Section 7: That statute's longstanding prohibitions against acquisitions that may substantially lessen competition or tend to create a monopoly, remain unaffected by this measure.

H.R. 14580 will, however, strengthen the enforcement of Section 7 by giving the government antitrust agencies a fair and reasonable opportunity to detect and investigate large mergers of questionable legality before they are consummated. The government will thus have a meaningful chance to win a premerger injunction—which is often the only effective and realistic remedy against large, illegal mergers—before the assets, technology, and management of the merging firms are hopelessly and irreversibly scrambled together, and before competition is substantially and perhaps irremediably lessened, in violation of the Clayton Act.

II. SUMMARY OF REPORTED BILL

The first section establishes the bill's short title.

Section 2 establishes the premerger notification and waiting requirements.

Subsection (a) prohibits corporations from acquiring the voting securities or assets of other corporations, unless both corporations give advance notice of the acquisition to the Federal Trade Commission and the Justice Department, pursuant to subsection (d), and wait until the expiration of the premerger waiting period set forth in subsection (b). But these notification and waiting provisions apply only if three requirements of substantiality are satisfied: (1) either corporation's activities are "in" commerce or "affect" commerce; (2) the acquiring corporation has total assets or annual sales of $100 million or more, and the acquired corporation has total assets or annual sales of $10

million or more; and (3) the acquiring corporation purchases at least 25% of the voting securities or assets of the acquired firm, or at least $20 million of its voting securities and assets.

Subsection (b) provides that the premerger waiting period begins when the government receives the completed notification form, and ends thirty days later. A special, shortened, 21-day waiting period is provided for mergers consummated by cash tender offers, because of the unique time constraints involved in such mergers.

Subsection (c) exempts a variety of acquisitions that either pose no anticompetitive threats under Section 7, or are already subject to advance antitrust review. Included are certain purchases of voting securities and assets "solely for the purpose of investment" or "in the ordinary course of business," and bank mergers, and acquisitions in other regulated industries.

Subsection (d) requires the FTC, with the concurrence of the Assistant Attorney General in charge of the Antitrust Division, to specify by rule the information which must be supplied on the premerger notification form.

Subsection (e) permits the government to request additional information relevant to a planned acquisition, beyond that submitted in the initial notification form, within the 30-day waiting period. If such a request is made, the two agencies may extend the waiting period for up to twenty days after receipt of the additional data, in order to analyze it and prepare a possible case based upon it. However, in the case of a cash tender offer, such additional requests must be made within the first 15 days after notification; and the entire waiting period can in no event extend beyond 21 days.

Subsection (f) provides that if the government files an action challenging a proposed merger, and seeks injunctive relief, the courts shall give expedited consideration to the action.

Subsection (g) authorizes civil penalties of up to $10,000 per day for violations of this bill's requirements. It further provides that if any corporation subject to this section fails to comply substantially with a premerger request for relevant information, the federal district courts may order compliance, and enjoin the pending merger until substantial compliance is achieved.

Subsection (h) provides that premerger information submitted under this section is confidential, and may not be disclosed, except in judicial or administrative proceedings.

Subsection (i), the savings provision, provides that a failure to invoke this section's authority does not prevent the government from taking action under other specified laws.

Subsection (j) requires the FTC and the Justice Department to report annually to the Congress on their activities pursuant to this section.

Section 3(a) provides that the Sherman Act may be so cited, in honor of its principal author, Senator John Sherman.

Section 3(b) provides that the Clayton Act may be so cited, in honor of its chief sponsor, Congressman Henry D. Clayton.

III. History, Background, and Need

At present, mergers and acquisitions violate section 7 of the Clayton Act if they "may substantially lessen competition," or "tend to create a monopoly" in any line of commerce, in any section of the country. Most violations of this legal standard occur when large corporations merge with, buy out, or otherwise acquire their competitors, suppliers, or distributors. These mergers are illegal because they eliminate actual or potential competition by small or medium-sized independent firms, or deprive other companies of needed supplies or outlets, while helping the acquiring corporation achieve uncontested monopoly power in national, regional, or local markets.

In this way, the first great illegal monopoly, the Standard Oil of New Jersey empire, was established: Standard Oil simply bought up most of its competitors through a series of acquisitions, until its dominance in the oil industry was unquestioned.

Though the Supreme Court broke up the Standard Oil monopoly in 1911, Congress remained concerned over the dangerous economic, social, and political effects that result when control of an entire industry is concentrated in fewer and fewer hands. These concerns, and the belief that democracy can be preserved only by dispersing and decentralizing economic and financial power, together with other dismaying records of turn-of-the-century monopolistic excesses that were unchecked by the Sherman Act, directly led to the enactment of section 7 of the Clayton Act in 1914.[1]

Unlike the Sherman Act, Section 7 of the Clayton Act was meant to deal with potential, probable monopolies—not actual, completed ones. Thus, both Congress and the courts have repeatedly emphasized that section 7 is an "incipiency" statute: It is intended to halt monopolies and restraints of trade in their initial stages, before they ripen into full-scale Sherman Act violations. As the preamble to the original Clayton bill proclaimed, its purpose was "to prohibit certain trade practices which . . . singly and in themselves are not covered by the Sherman Act . . . and thus to arrest the creation of trusts, conspiracies and monopolies in their incipiency and before consummation."[2]

At present, both the Antitrust Division and the Federal Trade Commission have the authority, under 15 U.S.C. § 25 and 15 U.S.C. §53(b), to halt impending mergers before their consummation by seeking a temporary restraining order and a preliminary injunction from the federal courts. But the government carries the burden of proof in premerger injunction proceedings, and must demonstrate a "reasonable probability that it will prevail on the merits of its Clayton Act challenge."[3] Focused as it is on probabilities, this standard for injunctive relief is little different from the steep one forced by the government at

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[1] *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 274–76 (1966).

[2] *Cf. Brown Shoe Co.* v. *United States*, 370 U.S. 294, 323 (1962), where the Supreme Court stressed that "Congress used the words '*may* be substantially to lessen competition' to indicate that its concern was with probabilities, not certainties."

[3] *United States* v. *Atlantic Richfield Co.*, 297 F. Supp. 1061 (S.D.N.Y. 1969); *United States* v. *Ingersoll-Rand Co.*, 218 F. Supp. 530 (W.D.Pa. 1963), *aff'd*, 320 F. 2d 509 (C.A.3 1963).

a trial on the merits—where the issue is whether the merger probably lessens competition to a substantial degree, or tends to create a monopoly.

Yet, without advance notice of an impending merger, data relevant to its legality, and at least several weeks to prepare a case, the government often has no meaningful chance to carry its burden of proof, and win a preliminary injunction against a merger that appears to violate section 7.

The weight of this burden cannot be overemphasized. Merger cases, especially large ones, turn on detailed factual data and careful economic analysis and judgments. As the Supreme Court has pointed out:

> The courts have, in the light of Congress' expressed intent, recognized the relevance and importance of economic data that places any given merger under consideraton within an industry framework almost inevitably unique in every case. Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger." [4]

H.R. 14580 does not eliminate this requirement of particularized factual proof in merger cases, nor does it ease in any way the traditional burden of proof that must be borne by the government when it seeks equitable relief.

But the bill is based on two fundamental propositions: First, the weight of this burden of proof, together with the present lack of any premerger notification and waiting requirements, has meant that many large and illegal mergers have been successfully consummated in recent years, before the government had any realistic chance to challenge them.

Second, experience has shown that after consummation occurs, many large mergers become almost unchallengable. The government may well file suit, and ultimately win the subsequent litigation on the merits of its Clayton Act case, by gaining a final judicial declaration of the merger's illegality.

Yet by the time it wins the victory—and the government is successful in the vast majority of its litigated merger cases—it is often too late to enforce effectively the Clayton Act, by gaining meaningful relief. During the course of the post-merger litigation, the acquired firm's assets, technology, marketing systems, and trademarks are replaced, transferred, sold off, or combined with those of the acquiring firm. Similarly, its personnel and management are shifted, retrained, or simply discharged.

In these ways, the acquiring and acquired firms are, in effect, irreversibly "scrambled" together. The independent identity of the acquired firm disappears. "Unscrambling" the merger, and restoring the acquired firm to its former status as an independent competitor is difficult at best, and frequently impossible.

[4] *Brown Shoe, supra,* 370 U.S. 294 (1962).

To illustrate, in 1955, the nation's leading agricultural magazine, Farm Journal, acquired its chief rival, Country Gentleman. Essentially what was acquired—except for several printing presses—was the list of Country Gentleman's subscribers. After consummation, the publication of Country Gentleman was halted by its new owners, who, not surprisingly, quickly and successfully solicited new subscriptions to Farm Journal from most of the former Country Gentleman readers. When the FTC subsequently ruled the merger illegal, nothing was left to divest, for, as the FTC judge frankly acknowledged, "All the juice has now been extracted from the fruit." [5]

The prospects for a successful divestiture are also impaired whenever the acquiring firm makes considerable improvements to the acquired assets, by utilizing the newly-acquired technology and personnel. When the divestiture order is finally entered, the acquiring firm can often retain the improvements, and divest only the originally-acquired facilities—which, by virtue of intervening market changes, have by then become obsolete, if not useless.[6]

In other cases, the acquiring firm may compete in several different markets, which may be distinct or closely related; and the same may be true of the acquired firm. It thus commonly happens that these two companies are direct or potential competitors only in one or a few of their different product lines. Since their merger illegally lessens competition only in these "overlapping" or shared markets, the government can often win only a "partial divestiture" order, limited to the area of overlap. Yet only the established, existing competitors in this narrow product market will generally have the interest, experience, and funds to purchase and successfully operate the narrow class of divested assets. Such a partial divestiture is, from a competitive standpoint, senseless—an illegal acquisition by one large rival is ostensibly redressed by a court-ordered sale of the remnants to another large rival.[7]

In all these cases, the result is the same: The acquired firm is never restored as a vigorous, independent competitor, and the damage to the marketplace is never repaired.

Thus, divestiture cases are rarely successful. Even worse, they are staggeringly expensive and seemingly interminable. The average divestiture case lasts more than five years, and all the while, the acquiring firm retains the illegal profits and other fruits of the acquisition, and its anticompetitive effects pervade the marketplace, injuring competitors and consumers alike.

A prime reason for the tortuous pace of most diverstiture proceedings is that the negotiation and execution of the divestiture sale is largely in the hands of the violator. Rarely will the acquiring firm swiftly attempt to sever its own illegal acquisition—which has generally become an integral part of its operations by the time a divestiture is entered.

[5] *In re Farm Journal,* 53 F.T.C. 26, 50 (1956).
[6] *In re Union Carbide Corp.,* 59 F.T.C. 614 (1961).
[7] *In re Brillo Manufacturing Co.,* FTC Docket No. 6657 (1963).

The most recent unfortunate example is the *Papercraft* litigation.[8] There, the illegal merger was consummated in 1967, with Papercraft's purchase of CPS Industries, Inc. In 1968 the FTC filed a challenge to the merger, won on the merits, and gained a divestiture order in 1971.

Yet more than four years later, Papercraft had still not managed to divest CPS, because it had been unable to find a "suitable buyer." The reason: Papercraft refused to sell CPS for less than $37.5 million—even though CPS was purchased for only $5 million, had a book value of only $7 million, and an appraised value of $14.9 million.

Thus, simply by rejecting repeated offers of $13 million, $15 million, $20 million (in cash), and $25.5 million Papercraft managed to retain CPS Industries for almost a decade after the illegal acquisition. And Papercraft's strategy of delay has been amply rewarded: In the years since 1967, CPS contributed more than $11 million in profits to Papercraft's treasury.

The prospect of such profits, and the strong probability that the government will ultimately win only a partial or "token" divestiture order, unfortunately provide clear incentives for speedily consummating suspect mergers, and then protracting the ensuing litigation. At best, the offending firm will be allowed to keep its acquisition by agreeing to make no further acquisitions; at worst, it will only be required to divest its acquisition to another firm, often at a hefty profit over the original purchase price.

Even in the few cases where full divestiture is successfully achieved, the "victory" is likely to be so costly that it is pyrrhic: Thus, the litigation spawned by the El Paso Natural Gas merger lasted seventeen years, and went to the Supreme Court six times, before the illegally-acquired firm was sucessfully divested. But the costs—to the firms, the courts, and the marketplace—were immense.[9]

To avoid the worst of these protracted exercises in futility is the major purpose of this bill. Merger litigation simply need not always continue for years and even decades—but if it takes place after consummation, it generally will, for the acquiring firm has no incentive to litigate the issues speedily.

In contrast, pre-consummation merger litigation proceeds rapidly and expeditiously, because all parties have a paramount interest in a quick resolution of the case. Thus, in *U.S.* v. *AMAX*,[10] less than two months elapsed between the filing of the government's complaint, and the filing of the court's written opinion. This happened only because the suit was promptly instituted and tried before the merger's consummation; and this in turn was possible only because the defendants voluntarily agreed to postpone consummation until an expedited trial was completed.

In sum, the chief virtue of this bill is that its provisions will help to eliminate endless post-merger proceedings like the *El Paso* and *Papercraft* cases, and replace them with far more expeditious and effective premerger proceedings. It can be done, and the savings will be considerable, as the *AMAX* case indicates.

[8] *U.S.* v. *Papercraft Corp.*, 1975 CCH Trade Cases, ¶ 60,314 (W.D.Pa.).
[9] The expense of preparing new debt instruments for the divested firm in *El Paso* exceeded $500,000—for printing costs alone.
[10] 402 F. Supp. 956 (D.C. Conn. 1975).

H.R. 14580 achieves this goal by requiring advance notice, together with specific economic data on the merger, and a short, 30-day waiting period for the very largest corporate mergers—about the 150 largest out of the thousands that take place every year. If the initial notification form reveals "problem areas," the government can request additional data during the 30-day period, and thereby extend the waiting period until the government receives the response, and for up to 20 days thereafter so that the response may be analyzed.

Requests made after the expiration of this 30-day period cannot operate to extend the waiting period. Thus, if no request for additional information has been made by the time the period ends, the merger cannot be halted unless the government goes into court, carries its burden of proof, and wins an injunction.

It is expected that a corporation to which a request for additional information is made will be co-operative so as to expedite the passing of the waiting period. However, if a corporation is requested to provide information which it believes is burdensome, irrelevant, or privileged, it may forward to the government, together with all the information that it is submitting, a certification of the reasons why it is not fully complying with the request. When the government receives both the submission and certification, the 20-day period for analyzing the submission starts to run. On the expiration of the 20-day period, the waiting period ends and the merger may be consummated, unless prior to that time the government secures injunctive relief because the corporation has failed substantially to comply with the government's request.

If these premerger reporting requirements were imposed on every merger, the resulting added reporting burdens might more than offset the decrease in burdensome divestiture trials. That is why H.R. 14580 applies only to approximately the largest 150 mergers annually: These are the most likely to "substantially lessen competition"—the legal standard of the Clayton Act. They are by far the most difficult to unscramble. They inflict the greatest damage to the marketplace. And they generally require many months and even years of advance planning, so the impact of this bill on them will be minimal.

Hence, smaller, illegal mergers may still be consummated, despite passage of this bill, and there may still be lengthy divestiture trials in future years—but surely this bill represents a reasonable step in the right direction. It will help prevent the consummation of so-called "midnight" mergers, which are designed to deny the government any opportunity to secure preliminary injunctions. It will ease burdens on the courts by forestalling interminable post-consummation divestiture trials. And it will advance the legitimate interests of the business community in planning and predictability, by making it more likely that Clayton Act cases will be resolved in a timely and effective fashion.

CASH TENDER OFFERS

H.R. 14580 provides a special, shortened 21-day waiting period for mergers consummated by means of cash tender offers.

Unlike most mergers, which are amicably negotiated by the management of the two firms, cash tenders enable the acquiring or "raid-

ing" company to "bypass" the management of the acquired, "target" company, and purchase that company directly from its shareholders. If the offering price is well above current market value, the shareholders of the target company will generally sell in order to gain sizable profits; and the target company's management will then be ousted by the raiding company.

Thus, the very possibility of a successful cash tender offer may exert a pro-competitive influence in the marketplace by keeping incumbent management "on their toes," and by forcing them to keep their firm efficient and successful. If they fail to utilize their firm's full potential and keep its earnings as high as possible, a raiding company—believing that more efficient and innovative policies might increase the target firm's future profits—may try to take it over by means of a cash tender offer.

But cash tenders depend on speed and surprise. If months go by, the target company's incumbent management can often frustrate a cash tender offer, by establishing "lifetime" employment contracts for themselves, or by arranging a more favorable "defensive" merger, or by other means.

That is why Congress, in 1968 and 1970, after fully considering the nature and purpose of cash tenders, passed the Williams Act, which imposes only a ten-day pre-consummation waiting period on cash tenders.[11] Concededly, the purpose of this ten-day waiting period was not to permit the antitrust enforcement agencies to assess the antitrust implications of a cash tender acquisition. Instead, it was intended to give investors protection against fraud, by providing them at least ten days to weigh the merits of the offer before accepting it.

Nevertheless, it is clear that this short waiting period was founded on congressional concern that a longer delay might unduly favor the target firm's incumbent management, and permit them to frustrate many pro-competitive cash tenders. This ten-day waiting period thus underscores the basic purpose of the Williams Act—to maintain a neutral policy towards cash tender offers, by avoiding lengthly delays that might discourage their chances for success.

However, the purposes of this bill would be frustrated by limiting the waiting period to only ten days, for it is simply impossible to analyze the antitrust implications of a cash tender offer in this short time. In addition, some of the largest stock acquisitions in recent years have been accomplished through cash tender offers. Indeed, cash tenders almost always involve exceptionally large corporations, and may thus present serious anticompetitive problems. Accordingly, the antitrust enforcement agencies have a proper and legitimate interest in assessing the legality of proposed cash tenders under the antitrust laws.

H.R. 14580 therefore attempts to strike a balance between the ten-day Williams Act waiting period, and the thirty-day premerger waiting period established by this bill for all other kinds of mergers and acquisitions. This "compromise" 21-day waiting period for cash tenders should not unduly inhibit them, since more than three-fourths of all cash tenders offers require more than 217 days for consummation.

At the same time, this 21-day period provides the antitrust enforcement agencies with a realistic opportunity to review the antitrust implications of a cash tender, before it is consummated. In fact, since cash tender offers are almost always made in a hostile setting, where the target company opposes the raiding company's offer, it is quite probable that the target company will eagerly come forward with whatever relevant information it has that would be helpful to antitrust authorities. This increased cooperation should help to ease any difficulties the FTC and the Justice Department will necessarily meet in completing their evaluation within this shortened time period.

[11] Or, in the event the offer is for "any and all shares," a seven-day waiting period.

CONCLUSION

Finally, the Committee emphasizes that H.R. 14580 is not new or hastily-drawn legislation. In fact, similar premerger notification and waiting bills were sponsored by this Committee's former Chairman Emanuel Celler, and passed by a unanimous vote in the House of Representatives during the 84th Congress. Similar bills were also passed by the Senate Judiciary Committee during the 84th Congress; by the House Judiciary Committee during the 85th Congress; and by the Senate Antitrust and Monopoly Subcommittee on three prior occasions. In five successive messages to Congress, President Eisenhower urged adoption of such legislation. Chairman Rodino himself filed the Committee's Report on the 1961 premerger notification and waiting bill, which was strongly backed by Attorney General Robert F. Kennedy.

H.R. 14580 was introduced by Committee Chairman Rodino, and is co-sponsored by eleven of the thirteen members of the Monopolies Subcommittee.

In its present form, it is supported by President Ford, Attorney General Levi, Antitrust Division Chief Thomas E. Kauper, the Federal Trade Commission's Paul Rand Dixon, the American Bar Association, and many others. It parallels in many respects the premerger notification and waiting provisions of H.R. 8532, as passed by the Senate on June 10 by a vote of 67 to 12.

IV. Committee Action

On March 10, 1976, the Committee's Monopolies and Commercial Law Subcommittee held merger oversight hearings, which examined current problems in merger enforcement, and favored testimony by Thomas E. Kauper, Assistant Attorney General in charge of the Justice Department's Antitrust Division, and Paul Rand Dixon, the Acting Chairman of the Federal Trade Commission.

On April 8, 1976, Committee Chairman Rodino introduced H.R. 13131, a bill to establish premerger notification, waiting, and stay requirements. The Monopolies Subcommittee held hearings on this measure on May 6 and May 13. Testimony was presented by seven witnesses, including attorneys in private practice, professors of economics, and representatives of the American Bar Association and the U.S. Chamber of Commerce. Other witnesses included the FTC's former Chief Economist, and Emanuel Celler, the Committee's former Chairman. In addition, further written statements on the measure were received

from the U.S. Chamber of Commerce, the American Bankers Association, the Federal Trade Commission, and the Justice Department.

In public session on June 25, the Monopolies Subcommittee marked up H.R. 13131, and by voice vote ordered that, as amended, the bill be reintroduced and reported favorably to the full Committee on the Judiciary. Reintroduced as H.R. 14580, the bill was considered and amended in public session on July 27, 1976, by the full Committee, which by a roll call vote of 29 to 0, with one Member voting "present," ordered that H.R. 14580, as amended, be reported favorably to the House.

V. Information Submitted Pursuant to Rules X and XI

A

The Committee, in considering H.R. 14580, made no specific oversight findings pursuant to clause 2(b)(1) of Rule X. However, both the Monopolies Subcommittee and the full Committee gave extensive consideration to testimony and other materials presented during the Subcommittee's merger oversight hearing on March 10, 1976, and its hearings on H.R. 13131 held in May 1976.

B

No new budget authority is provided.

C

No estimate or comparison was received from the Director of the Congressional Budget Office, and none is necessary, as no budget authority is provided.

D

No related oversight findings and recommendations have been made by the Committee on Government Operations under clause 2(l)(3)(D) of Rule XI.

E

Inflationary Impact Statement.

Pursuant to clause 2(l)(4) of Rule XI, the Committee concluded that there will be no inflationary impact on the national economy. In fact, because the bill will help to prevent large, illegal mergers, and will thereby eliminate the long-enduring and often irreparable anticompetitive damage they inflict on the nation's markets, H.R. 14580 will help to make the American economy more competitive and efficient, with resulting lower prices and costs. Moreover, by replacing costly and interminable post-merger divestiture proceedings with expeditious premerger litigation, this bill will ease burdens on the courts, and reduce the costs of government merger enforcement actions.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

THE ACT OF OCTOBER 15, 1914

AN ACT To supplement existing laws against unlawful restraints and monopolies, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (*a*) "antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this Act.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided*, That nothing in this Act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

(*b*) *This Act may be cited as the "Clayton Act".*

* * * * * * *

Sec. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such

acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof of the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

SEC. 7A. (a) Except as exempted pursuant to subsection (c), no corporation shall acquire, directly or indirectly, any voting securities or assets of any other corporation, unless each such corporation (or in the case of a tender offer, the acquiring corporation) files notification pursuant to rules under subsection (d) (1) and the waiting period described in subsection (b) (1) has expired, if—

(1) the acquiring corporation or the corporation, any voting securities or assets of which are being acquired, is engaged in commerce or in any activity affecting commerce;

(2) (A) any voting securities or assets of a manufacturing corporation which has annual net sales or total assets of $10,000,000 or more are being acquired by a corporation which has total assets or annual net sales of $100,000,000 or more;

(B) any voting securities or assets of a nonmanufacturing corporation which has total assets of $10,000,000 or more are being acquired by a corporation which has total assets or annual net sales of $100,000,000 or more; or

(C) any voting securities or assets of a corporation with annual net sales or total assets of $100,000,000 or more are being acquired by a corporation with total assets or annual net sales of $10,000,000 or more; and

(3) as a result of such acquisition, the acquiring corporation would hold—

(A) 25 per centum or more of the voting securities or assets of the acquired corporation, or

(B) an aggregate total amount of the voting securities and assets of the acquired corporation in excess of $20,000,000.

(b) (1) The waiting period under subsection (a) shall—

(A) begin on the date of the receipt by the Federal Trade Commission and the Assistant Attorney General of the completed notification required under subsection (a) and, if such notification is not completed, the reasons therefor; and

(B) end on the thirtieth day after the date of such receipt or on such later date as may be set under subsection (e) or (g) (2), except that in the case of cash tender offers, such period shall end on the twenty-first day after the date of such receipt, or on such later date as may be set under subsection (e) (2) (B).

(2) The Federal Trade Commission and the Assistant Attorney General may, in individual cases, terminate the waiting period specified in paragraph (1) and allow any corporation to proceed with any acquisition subject to this section by publishing in the Federal Register a notice that neither intends to take any action within such period with respect to such acquisition.

(3) As used in this section—

(A) The term "Assistant Attorney General" means the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice.

(B) The term "voting securities" means any stock or other share capital presently entitling the owner or holder thereof to vote for the election of directors of a corporation.

(4) The amount or percentage of voting securities or assets of one corporation which are acquired or held by another corporation shall be determined by aggregating the amount or percentage of such voting securities or assets held or acquired by the acquiring corporation and each affiliate thereof. For purposes of this paragraph, the term 'affiliate' means any person who controls, is controlled by, or is under common control with a corporation.

(5) The conversion of stock or other share capital which are not voting securities into stock or other share capital which are voting securities shall be deemed an acquisition for purposes of this section.

(c) The following classes of transactions are exempt from the requirements of this section—

(1) acquisitions of goods or realty transferred in the ordinary course of business;

(2) acquisitions of bonds, mortgages, deeds of trust, or other obligations which are not voting securities;

(3) acquisitions of voting securities or assets of a corporation with respect to which the acquiring corporation owns more than 50 per centum of such voting securities or assets prior to such acquisition;

(4) transfers to or from a Federal agency or a State or political subdivision thereof;

(5) transactions specifically exempted from the antitrust laws by law or by actions of any Federal agency authorized by law, if copies of any information and documentary material filed with any such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General;

(6) transactions which require agency approval under section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828(c)), or section 3 of the Bank Holding Company Act of 1956 (12 U.S.C. 1842);

(7) transactions which require agency approval under section 4 of the Bank Holding Company Act of 1956 (12 U.S.C. 1843), section 403 or 408(e) of the National Housing Act (12 U.S.C. 1726 and 1730a), or section 5 of the Home Owner's Loan Act of 1933 (12 U.S.C. 1464), if copies of any information and documentary material filed with any such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General;

(8) acquisitions, solely for the purpose of investment, of voting securities if, as a result of such acquisition, the voting securities acquired or held do not exceed either 10 per centum of the outstanding voting securities of the issuing corporation or such greater per centum as may be provided by the Federal Trade Commission under subsection (d)(2)(C);

(9) acquisitions of voting securities issued by any corporation if, as a result of such acquisition, the voting securities acquired would not increase, directly or indirectly, the acquiring corporation's share of outstanding voting securities of the issuing corporation;

(10) acquisition, solely for the purpose of investment, of voting securities pursuant to a plan of reorganization or dissolution, or

of assets, by any bank, banking association, trust company, investment company, or insurance company, in the ordinary course of its business;

(11) acquisitions of voting securities by any bank trust department, trust company, or other entity, if such department, trust company, or entity is acting in the capacity of a trustee, executor, guardian, conservator, or otherwise as a fiduciary, and is voting or investing such voting securities for the benefit of another person or entity, except that any such beneficiary shall not be exempt by virtue of this paragraph from the requirements of this section; and

(12) such other acquisitions, transfers, or transactions, as may be exempted by the Federal Trade Commission under subsection (d)(2)(B).

(d) The Federal Trade Commission, with the concurrence of the Assistant Attorney General and by rule in accordance with section 553 of title 5, United States Code—

(1) shall require that the notification required under subsection (a) be in such form and contain such documentary material relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may violate the antitrust laws; and

(2) may—

(A) define the terms used in this section;

(B) exempt classes of corporations and acquisitions, transfers, or transactions which are not likely to violate section 7 of this Act from the requirements of this section;

(C) increase the percentage amount specified in subsection (c)(8); and

(D) prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section.

(e)(1) The Federal Trade Commission or the Assistant Attorney General may, prior to the expiration of the 30-day waiting period, or in the case of cash tenders offers, the 21-day waiting period, specified in subsection (b)(1) of this section, require the submission of additional information or documentary material relevant to an acquisition by any corporation subject to this section, or by any officer, director, agent, or employee of such corporation.

(2)(A) Except as provided in subparagraph (B) with respect to cash tender offers, the Federal Trade Commission or the Assistant Attorney General may, in its or his discretion, extend the 30-day waiting period specified in subsection (b)(1) of this section for an additional period of not more than 20 days after the date on which the Federal Trade Commission or the Assistant Attorney General, as the case may be, receives (i) all the information or documentary material submitted pursuant to a request under paragraph (1) of this subsection, and (ii) if such request is not fully complied with, a certification of the reasons for such noncompliance. Such additional period may be further extended only by the United States district court, upon an application by the Federal Trade Commission or the Assistant Attorney General pursuant to subsection (g)(2).

(B) With respect to cash tender offers, the United States district court may, upon application of the Federal Trade Commission or the Assistant Attorney General—

(i) extend the 21-day waiting period specified in subsection (b)(1) of this section until there is substantial compliance with a request under paragraph (1) of this subsection, and

(ii) grant such other equitable relief as the court in its discretion determines necessary,

if the court determines that the Federal Trade Commission or the Assistant Attorney General requested the submission of additional information or documentary material pursuant to subsection (e)(1) within 15 days after the date of receipt of the original notification required under subsection (a) and such request was not substantially complied with within the 21-day waiting period specified in subsection (b)(1).

(f) If a proceeding is instituted by the Federal Trade Commission alleging that a proposed acquisition violates section 7 of this Act, or an action is filed by the United States, alleging that a proposed acquisition violates such section 7, or section 1 or 2 of the Sherman Act, and the Commission or the Assistant Attorney General files a motion for a preliminary injunction against the consummation of such proposed acquisition, together with a certification that it or he believes that the public interest requires relief pendente lite, in the United States district court for the judicial district in which the respondent resides or does business in the case of the Federal Trade Commission, or in which such action is brought in the case of the Assistant Attorney General—

(1) upon the filing of such motion, the chief judge of such district court shall immediately notify the chief judge of the United States court of appeals for the circuit in which such court is located, who shall designate a United States district judge to whom such action shall be assigned for all purposes; and

(2) the motion for a preliminary injunction shall be set down for hearing by the district judge so designated at the earliest practicable time, shall take precedence over all matters except older matters of the same character and trials pursuant to section 3161 of title 18, United States Code, and shall be in every way expedited.

(g)(1) Any corporation or any officer or director thereof who fails to comply with any provision of this section shall be liable to the United States for a civil penalty of not more than $10,000 for each day during which such corporation, directly or indirectly, holds any voting securities or assets, in violation of this section. Such penalty may be recovered in a civil action brought by the United States.

(2) If any corporation or officer, director, agent, or employee thereof fails to substantially comply with the notification requirement of subsection (a) or any request for the submission of additional information or documentary material under subsection (e)(1) of this section within the waiting period specified in subsection (b)(1) and as may be extended under subsection (e), the United States district court shall have jurisdiction to—

(A) order compliance;

(B) extend the 30-day waiting period specified in subsection (b)(1) and as may have been extended under subsection (e) until there has been substantial compliance; and

(C) grant such other equitable relief as the court in its discretion determines necessary,

upon aplication of the Federal Trade Commission or the Assistant Attorney General.

(h) Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of title 5, United States Code, and no such information or documentary material may be made public, except as may be required in any administrative or judicial action or proceeding.

(i)(1) Failure of the Federal Trade Commission or the Assistant Attorney General to take any action under this section shall not bar the institution of any proceeding or action with respect to such acquisition at any time under any other section of this Act or any other provision of law.

(2) Nothing contained in this section shall limit the authority of the Assistant Attorney General or the Federal Trade Commission to secure from any person documentary material, oral testimony, or other information under the Antitrust Civil Process Act, the Federal Trade Commission Act, or any other provision of law.

(j) Beginning not later than January 1, 1978, the Federal Trade Commission, after consultation with the Assistant Attorney General, shall annually report to the Congress on the operation of this section. Such report shall include an assessment of the effects of this section, recommendations for any desirable revisions of this section, any rules promulgated under this section, any action taken under this section, and, in cases of acquisitions subject to this section against which the Assistant Attorney General or the Federal Trade Commission took no action under this section prior to the expiration of the waiting period specified in this section, a statement of the reasons for such failure to act.

* * * * * * *

ACT OF JULY 2, 1890

AN ACT To protect trade and commerce against unlawful restraints and monopolies

Be it enacted by the Senate and House of Representatives of the United States of American in Congress assembled, That this Act may be cited as the "Sherman Act".

* * * * * * *

ADDITIONAL VIEWS OF HON. JOHN F. SEIBERLING

With two small exceptions, I fully support H.R. 14580 as amended by the Committee. I think that the legislation will be very beneficial to the Federal agencies responsible for the enforcement of the antitrust laws, specifically of section 7 of the Clayton Act (which prohibits certain anticompetitive mergers and acquisitions) and section 5(a) of the FTC Act (which prohibits unfair methods of competition and unfair or deceptive acts or practices in commerce).

The first problem I find with H.R. 14580 is the particular threshhold size requirements which must be exceeded before a proposed acquisition has to be reported to the Justice Department and the FTC. Specifically, subsection 7A(a)(3) requires reporting only if—

> "As a result of such acquisition, the acquiring corporation would hold—
>
> "(A) 25 per centum or more of the voting securities or assets of the acquired corporation, or
>
> "(B) an aggregate total amount of the voting securities and assets of the acquired corporation in excess of $20,000,000.

I do not object to establishing some reasonable threshhold size requirements. The proper limits, in my view, are 10 percent and $10 million. I believe that the bill's limits of 25 percent and $20 million are unreasonably high and that they will permit many significant acquisitions to go unreported.

According to the majority report, H.R. 14580 is intended to give the Justice Department and the FTC a "fair and reasonabe opportunity to detect and investigate large mergers of questionable legality before they are consummated." In my view, 10 percent and $10 million limits are more consistent with this stated purpose than are 25 percent and $20 million limits, and they are also more consistent with the 10 percent figure used in proposed subsection 7A(c)(8)'s exemption of acquistions for purposes of investment. As I understand the bill, the purpose of the 10 percent figure in the investment exemption is to screen out certain acquisitions which may reasonably be considered *de minimis* while requiring the reporting of significant transactions, including those which the acquiring corporations claim to be for purposes of investment. The whole purpose of the bill is to enable the Justice Department and the FTC to evaluate the purpose and effects of all proposed significant acquistions.

A stockholder doesn't need 50 percent of the stock in most corporations to gain effective control. Most large publicly-owned corporations can be controlled with far less than 25 percent of the stock, in fact. As a general rule, the larger the value of a corporation (as measured by the total value of its stock), the smaller the percentage of stock required for effective control.

This is precisely why a number of important Federal statutes presume control of a corporation by any holder of 10 percent of the stock. The Federal Deposit Insurance Act (12 U.S.C. 1817(j)), for instance, requires the reporting of any change in control of an FDIC bank, but specifies that a holding of less than 10 percent shall not be considered

control. Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m) requires that the beneficial owner of 5 percent or more of the stock of certain corporations report certain information about acquisitions and holdings to the SEC. And section 16 of the Securities Exchange Act of 1934 (15 U.S.C. 78p) requires that any inside traders of the stock of certain corporations (including officers and directors and owners of 10 percent or more of the stock in a corporation) report certain information about acquisitions and holdings to the SEC.[1]

The 25 percent and $20 million limitations in H.R. 14580, it should be noted, would not require the reporting of any acquisition which would give the acquiring company any of the following holdings:

25 percent of a corporation with stock or assets valued at $80 million.

20 percent of a corporation with stock or assets valued at $100 million.

10 percent of a corporation with stock or assets valued at $200 million.

5 percent of a corporation with stock or assets valued at $400 million.

2 percent of a corporation with stock or assets valued at $1 billion.

These figures may, in fact, represent control of a corporation. In some cases they will, and in some cases they won't. The point is that they may, and the fact that they may is precisely why the 25 percent and $20 million figures are too high.

The figures create an unreasonable loophole when combined with the provisions of proposed subsection 7A(c)(11), which exempts entities acting in a fiduciary capacity from the bill's reporting requirements. Under the bill in its present form, for example, no corporation would have to report an acquisition through a broker acting as a fiduciary for five oil companies of all the stock or assets of another oil company whose stock or assets were valued at $100 million. Such an acquistition might be highly anticompetitive, but the bill does not ensure that the Justice Department or the FTC will learn about it prior to or even after its consummation. Reducing the bill's threshhold size limits to 10 percent and $10 million would reduce the possibility of a similar acquisition going unreported, and would somewhat narrow this potential loophole.

The second problem I have with H.R. 14580 is that it requires the reporting only of acquisitions by corporations. While section 7 of the Clayton Act is concerned only with acquisitions by corporations, section 5(a) of the FTC Act is concerned with acquisitions by any "person, partnership, or corporation." H.R. 14580's limitation to corporations, therefore, does not have the full scope of the FTC Act. I think that it would be generally desirable for the Justice Department and the FTC to have the opportunity to review significant corporate acquisitions by persons (including natural persons, associations, and—very importantly—foreign governments) and by partnerships. While there may not be many such acquisitions annually, they may well have a significant anticompetitive impact. I would hope that, in this respect, the bill's scope would be broadened appropriately before enactment into law.

JOHN F. SEIBERLING.

[1] Not all Federal statutes presume control with 10 percent ownership. The Investment Company Act of 1940 (15 U.S.C. 80a-2(9)), for instance, presumes control with 25 percent ownership.

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94TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 94–1343

ANTITRUST CIVIL PROCESS ACT AMENDMENTS OF 1976

JULY 15, 1976.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. RODINO, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R. 13489]

The Committee on the Judiciary to whom was referred the bill (H.R. 13489) to amend the Antitrust Civil Process Act to increase the effectiveness of discovery in civil antitrust investigations, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

On the first page, immediately after line 4, insert the following:

DEFINITIONS

Page 3, line 8, after "state" insert "in appropriate detail".

Page 8, line 20, strike out "said" and insert "such".

Page 12, line 16, strike out "transcripts or" and insert "transcripts of".

Page 15, line 19, strike out "Antitrut" and insert "Antitrust".

Page 17, line 9, strike out "subject to" and insert "subject of".

The text of the reported bill appears in this report in Appendix I.

I. PURPOSE AND SCOPE

The purpose of H.R. 13489 is to amend the Antitrust Civil Process Act of 1962 (15 U.S.C. 1311 *et seq.*), to provide the Justice Department's Antitrust Division with all the basic investigative tools necessary for effective and expeditious investigations into possible civil violations of the federal antitrust laws.

★57–006

These fact-finding tools include the authority to compel the submission of documents, answers to written interrogatories, and oral testimony from any person having information relevant to a possible civil antitrust violation. Similar investigative powers are exercised by nearly forty important federal law enforcement agencies, including the Federal Trade Commission, which shares with the Division the duty of enforcing the federal antitrust laws, and many other Executive-branch and independent regulatory agencies. Equal powers are also held by the chief antitrust enforcement officers of nineteen states.

All of these three investigative tools are traditional and familiar features of federal civil litigation: Each one is routinely available to any civil litigant, including the Division, to help develop the relevant facts after a civil complaint is filed and post-complaint discovery commences.

Nevertheless, because of restrictions set by the 1962 Antitrust Civil Process Act, the Division's existing civil, pre-complaint investigative authority is limited to a special kind of civil subpoena, known as a civil investigative demand, or CID. These CIDs can compel only:

(1) The submission of documents;

(2) From corporations, partnerships, and other non-natural persons;

(3) That are suspected violators of the antitrust laws, and are thus direct "targets" of a civil investigation;

(4) If a past or present violation is under investigation.

H.R. 13489 broadens these limited, current investigative powers by authorizing the Division to issue CIDs for:

(1) Documents, and answers to written interrogatories, and oral testimony;

(2) From businesses and natural persons;

(3) From "targets" and "non-target" third parties with relevant information, such as the target's competitors, officers, franchisees, distributors, or customers;

(4) During investigations of past or present violations, and during investigations of "incipient" violations, such as proposed mergers that cannot constitute a completed offense until they are consummated at some future date.

Oral testimony, as well as information from third parties, is frequently crucial to an antitrust investigation. Yet, far too often, the Division cannot determine whether or not a civil complaint would be justified because it does not receive voluntary cooperation from persons who know the relevant facts.

In these cases, the Division is left facing two equally unsatisfactory alternatives: Either abandon the inconclusive investigation for lack of solid facts, or else file a "skeleton" complaint, and hope the facts revealed during pre-trial discovery will support the charges, not refute them. This troubling dilemma has long confronted the Division, and has constantly hindered both its investigations and its enforcement efforts. H.R. 13489 will resolve this dilemma, and will permit the Division to make a more informed judgment on whether or not to institute a civil suit.

The power to conduct premerger investigations, in particular, is necessary to implement the Congressional policy established in the federal antimerger law, section 7 of the Clayton Act. As the courts have repeatedly emphasized, that Act is intended to arrest illegal monopolies and restraints of trade "in their incipiency," before they ripen into full-scale Sherman Act violations. Thus, Clayton section 7 prohibits mergers and acquisitions which "may" lessen competition, or "tend" to create a monopoly. Yet the courts will not enjoin the consummation of such illegal mergers, unless the Division makes a persuasive factual showing of their anticompetitive effects. Without recourse to these basic investigative powers, the Division cannot speedily gather these crucial facts and promptly present them to a federal judge in time to halt a suspect merger.

To ensure against any abuse of these basic and long-needed investigative powers, H.R. 13489 also includes expansive and detailed safeguards to protect every recipient of a CID from unwarranted or unreasonable governmental intrusion. These safeguards include a full right to counsel during any CID oral examination, and a right to refuse to answer any question if it violates "any Constitutional or other legal right or privilege." Every CID recipient also may challenge CIDs that are oppressive, unreasonable, irrelevant, or otherwise improper under appropriate civil or criminal standards, and has a right to judicial review by the courts in case of any dispute over the legality of a CID. The bill requires that strict confidentiality be accorded to all CID investigative files in order to protect the reputation and standing of witnesses, as well as their trade secrets and proprietary financial data. It also provides an absolute right for CID witnesses to review, correct, and inspect transcripts of their testimony, and sets forth other appropriate safeguards.

II. Summary of Reported Bill

The first section establishes the bill's short title.

Section 2 broadens the definitions set forth in the 1962 Act in three significant ways: First, the "under investigation," or "target" restriction set by the 1962 Act is eliminated. Thus, federal anirust investigators will be empowered to demand relevant information from "any person," whether that person is a "target" of the investigation, or simply an unimplicated third party. Second, in addition to their current authority to investigate past or present violations, the bill gives antitrust investigators authority to inquire into "any activities in preparation for a merger, acquisition, joint venture, or similar transaction, which, if completed, may violate the antitrust laws." Third, natural persons, as well as corporations and other legal entities, are made subject to civil investigation.

Section 3 re-enacts the Division's existing authority to issue CIDs for documents, and provides it with new authority to issue CIDs for answers to written interrogatories and oral testimony. This section also sets forth the strict standards which must be met by each CID; provides detailed procedures for compliance with CIDs; and establishes careful safeguards for all recipients of CIDs, including comprehensive rights to object to any CID, and the right to counsel during any CID oral examination.

Section 4 establishes detailed controls over the Division's use of CID information, in order to protect the confidentiality of these investigative files.

Section 5 adds a new provision to the 1962 Act, which permits the Division to extend the time within which any CID recipient may file his own petition challenging a CID's legality. This will give the Division and businessmen more time to resolve possible disputes "out of court." This section also protects all CID information from public disclosure under the Freedom of Information Act. Existing provisions of the 1962 Act, governing pre-enforcement judicial review of disputed CIDs, are unchanged.

Section 6 makes the criminal penalties set by the 1962 Act for obstructing compliance with a CID for documents equally applicable to willful obstruction in cases of CIDs for answers to written interrogatories and oral testimony.

Section 7 provides that the authority conferred by H.R. 13489 shall become effective upon enactment.

III. Background

H.R. 13489 has strong bipartisan support. It is co-sponsored by Chairman Rodino and eleven of the thirteen Members of the Committee's Monopolies Subcommittee, and is vigorously endorsed by President Ford, U.S. Attorney General Edward H. Levi, and Antitrust Division Chief Thomas E. Kauper.[1]

In a letter to Chairman Rodino, dated March 31, 1976, President Ford stated:

> During the last year and a half, my Administration has supported effective, vigorous, and responsible antitrust enforcement. . . . Assuring a free and competitive economy is a keystone of my Administration's economic program.
>
> In October 1974, I announced my support of amendments to the Antitrust Civil Process Act which would provide important tools to the Justice Department in enforcing our antitrust laws. My Administration reintroduced this legislation at the beginning of this Congress and I strongly urge its favorable consideration.

This legislation does not establish any novel, untested powers. All the investigative tools provided in H.R. 13489 have long been employed by many Executive-branch law enforcement agencies—including the Departments of Labor, Agriculture, Health, Education and Welfare, Commerce, Transportation, and the Treasury—and by many regulatory and administrative agencies—including the Securities Exchange Commission, the Interstate Commerce Commission, the Federal Power Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Federal Trade Commission, the International Trade Commission, the National Labor Relations Board, the Small Business Administration, the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Federal Maritime Commission, the Veteran's Administration, and the Railroad Retirement Board, among others.

[1] See Executive Communications, *infra*.

Such investigative powers are also held by all House and Senate Committees and Subcommittees; many Presidential and "blue ribbon" investigative commissions;[2] and the chief antitrust enforcement officials of nineteen States. Surely the widespread prevalence of these powers reflects a universal recognition that effective law enforcement in the public interest depends on thorough and complete investigations.

Attorney General Levi persuasively stated the Antitrust Division's need for these new tools in his letter of February 13, 1975, transmitting this measure to the Speaker of the House of Representatives:

> 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.[3]

There are four apparent alternatives to the use of compulsory investigative authority, but all are unsatisfactory and inadequate:

(1) The Division might rely on the voluntary cooperation of the party under investigation. However, as might be expected, investigated parties often refuse to cooperate by providing the Division with the evidence that might seal the case against them. More importantly, as was noted in the 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws, "A government agency should not be in a position of sole dependence upon voluntary cooperation for discharge of its responsibilities."[4]

(2) The Division might try to empanel a grand jury, as it currently does in criminal antitrust investigations, and use the sweeping, compulsory powers of that investigative body to unearth evidence of civil violations. But the U.S. Supreme Court has virtually eliminated the Antitrust Division's power to utilize the grand jury as a civil investigative tool. In *United States* v. *Proctor & Gamble*, 356 U.S. 677 (1958), Justice Douglas concluded that "if the prosecution were using . . . criminal procedures to elicit evidence in a civil case, it would be flouting the policy of the law." That is because such a use of the grand jury would subvert the Division's policy of proceeding criminally only against flagrant, willful offenses, and would debase the law "by tarring respectable citizens with the brush of crime when their deeds involve no criminality."[5]

[2] As recently as June 4, 1976, the Senate agreed by a vote of 73–0 to establish a blue-ribbon "Antitrust Review and Revision Commission," directed to study the Federal antitrust laws and report to the President and Congress any revisions in them it deems advisable. With little rebate, the Senate granted this Commission precisely the same investigative powers provided in this bill; these were characterized by Senator Javits, the sponsor of the Commission, as "the usual routine subpena [powers]." See June 4, 1976, Cong. Rec., S. 8562–3.

[3] See Executive Communications, *infra*.

[4] Report of the Attorney General's National Committee to Study the Antitrust Laws, Report No. 176, p. 343 (1955).

[5] *Ibid*, p. 342.

Undeniably, the great bulk of the Antitrust Division's efforts are consumed in civil litigation, in which there is no realistic prospect of any criminal action whatsoever. Hence, in these many cases, the Division is absolutely barred from using a grand jury as an investigative tool.

(3) The Division might try to "borrow" the Federal Trade Commission's broad civil investigative powers, by requesting the FTC to conduct an investigation under the FTC Act, 15 U.S.C. § 49. However, the Division has no clear statutory authority to "borrow" the FTC's investigative tools, and the Commission itself is not required to "loan" them. In any event, both agencies view such "borrowing" as a wholly unsatisfactory procedure, since it would place new demands on the FTC's limited resources, while simultaneously reducing the power of Antitrust Division attorneys to maintain control over their investigations. Both the courts [6] and the 1962 House Report [7] on the bill that ultimately became the current Antitrust Civil Process Act have pointed out that because of these drawbacks, this "alternative" has rarely, if ever, been utilized.

(4) The Division might file a "skeleton" complaint, and use the broad deposition, interrogatory, and document production powers that then become available under the discovery provisions of the Federal Rules of Civil Procedure. But, the commencement of an action with a "skeleton" complaint, with the aim of resorting to post-complaint discovery under the Federal Rules and thereafter amending and fleshing out the complaint, is obviously a poor practice. It is often wasteful of the time and effort of all concerned. It may be that there is no legal cause of action, and that a full investigation will reveal just that. Thus, because of their speculative approach and unduly prejudicial impact, investigations by means of "skeleton" complaints have been universally condemned as a perversion of the Federal Rules of Civil Procedure.[8]

Testimony that the Division's limited existing powers are inadequate was presented to the Monopolies and Commercial Law Subcommittee by Assistant Attorney General Thomas E. Kauper, in charge of the Antitrust Division. On May 8, 1975, he emphasized that:

> The limited scope of the Act substantially impairs our investigative effectiveness by limiting civil investigative demands to current or past alleged violations, to legal entities not natural persons, to documentary material, and to parties under investigation.

The Subcommittee thereupon requested Mr. Kauper to present a specific and detailed showing of instances in which recent civil antitrust investigations by the Division were hindered or thwarted for want of the investigative powers contained in this bill. On January 22, 1976, Mr. Kauper forwarded to the Subcommittee a representative list of investigations that were substantially impeded by the current restrictions on Division investigations.[9]

[6] *Petition of Gold Bond Stamp Co.*, 221 F. Supp. 391 (1963).
[7] House Report No. 1386, 87th Cong., 2d Sess. (1962).
[8] See Judicial Conference of the United States, Report on Procedure in Antitrust and Other Protracted Cases, 13 F.R.D. 62, 67 (1951); The Report of the Attorney General's National Committee to Study the Antitrust Laws, Report No. 176, pp. 344–345 (1955); and Siegel, "The Antitrust Civil Process Act," 10 Villanova Law Review 413, 416, Spring 965.
[9] See Executive Communications, *infra*.

Throughout these "case studes," the same problems appear and reappear: Thus, in premerger investigations, the Division now has no compulsory powers whatever, and voluntary cooperation is all too often non-existent. In such cases, the Division is left with the choice of abandoning its investigation, or else filing a complaint on incomplete or unreliable market data.

Even if voluntary cooperation in premerger investigations is forthcoming, it may be delayed until it is too late to halt an anticompetitive merger.

And while the Division can compel the submission of documents during investigations of possible Sherman Act violations, documents may be inconclusive by themselves, or non-existent. Corporations have become very sophisticated about not creating or preserving documentary evidence. In such cases, oral testimony and answers to written interrogatories offer the only means of ascertaining the relevant facts.

In other cases, key corporate officials may agree to be interviewed by the Division, but because these officials are not under oath, and there is no formal record of the interview, the usefulness of this approach is limited.

In many cases, information that is crucial to the investigation may only be obtained from third party witnesses, such as the target company's competitors, suppliers, franchisees, patent licensees, and customers. Trade associations, in particular, may be the only repositories of the detailed market data needed by the Division. Yet commonly third parties refuse to cooperate voluntarily with the Division.

The case studies reveal that without oral testimony from natural persons, and evidence in the hands of third parties, antitrust investigators often cannot make an informed judgment on whether or not a civil complaint should be filed. Yet the Division should not be required to guess. It should not be forced to either engage in a "fishing expedition"—by filing a civil complaint "on a hunch"—or else abandon the investigation, along with its enforcement responsibilities.

Indeed, as many witnesses recognized during the hearings on this measure, H.R. 13489 should be the instrument of more enlightened antitrust enforcement, since the thorough pre-complaint investigations this bill will authorize would in many cases disclose facts that would lead the Government to file no action whatsoever. In fact, this often happens with CID investigations under the present 1962 Act. The Division's figures reveal that approximately 1300 of the 1600 CIDs for documents it has issued since 1962 ultimately resulted in no action, and many of these 1300 investigations conclusively and clearly vindicated potential defendants.

In each of these many cases, the CID process has benefitted everyone—the courts, the Division, and the potential defendants. The more thorough precomplaint investigations that H.R. 13489 will make possible will yield similar benefits in the future.

IV. Safeguards

While it is clear to the Committee that the Antitrust Division needs the expanded investigative powers provided by H.R. 13489, it is equally clear that the need for effective law enforcement must be balanced against the rights of businesses and individuals to be free from

unwarranted and unreasonable government intrusion. The Committee therefore determined to include in H.R. 13489 appropriate safeguards to protect the legitimate rights and interests of every person subjected to investigation.

These protections include a full right to counsel during any CID oral examination; a right to refuse to answer any question if it violates "any Constitutional or other legal right or privilege;" a right to object under either grand jury subpoena standards or appropriate civil discovery standards; a right to judicial review by the courts in case of any dispute; strict confidentiality of all CID investigative files in order to protect witnesses' reputations, trade secrets and proprietary financial data; an absolute right on the part of CID witnesses to review, correct, and inspect the transcripts of their oral testimony; and other safeguards. These are detailed below.

Right to Counsel

CID recipients have an unlimited right to counsel while preparing their responses to CIDs for documents and answers to written interrogatories. It is equally important that this fundamental right be fully available to witnesses subjected to CIDs for oral testimony. Accordingly, section 3(i)(5)(A) provides that:

> Any person compelled to appear under a demand for oral testimony pursuant to this section may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, either upon the request of such person or upon counsel's own initiative, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall state for the record the reason for the objection. An objection may properly be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination.[10]

The right to refuse to answer on grounds of the privilege against self-incrimination is especially crucial, because CID investigations may uncover evidence of criminal violations of the Sherman Act, such as "hard-core" price fixing. In that event, the Division may invoke its present grand jury authority, and undertake a criminal investigation. If it does so, its civil investigative powers cease; but any previously-collected CID evidence may, if relevant, be presented to a grand jury. Section 7 of the 1962 Act so provides, and it remains unchanged by this bill.

In any event, H.R. 13489 entitles all CID witnesses to raise "any Constitutional or other legal right or privilege" in the course of the investigation. Included among these "privileges" are the Fourth

[10] These provisions are intentionally modeled after the "right to counsel" provisions of the Administrative Procedure Act, 5 U.S.C. § 555: "A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel"—and after the FTC Rules, 16 CFR § 2.9, governing the rights of witnesses in FTC investigations: "Counsel for a witness may advise his client, in confidence, and upon the initiative of either himself or the witness, with respect to any question asked of his client. . . ."

Amendment privilege against unreasonable searches and seizures, which is enjoyed by both corporations and natural persons; the Fifth Amendment privilege, which can be claimed only by natural persons; the attorney-client privilege; the "work-product" privilege; and any other lawful privilege. The Committee notes that this bill neither expands nor limits these privileges; their scope and application remain within the province of the judicial branch.

These rights and privileges may be raised against any CID, not just CIDs for oral testimony. This is made clear by section 5(b) of the 1962 Act, which is unchanged by this bill: Section 5(b) extends to all CID recipients the same protections set forth in section 3(i)(5)(A), by authorizing the federal courts to refuse enforcement of any CID that violates "any Constitutional or other legal right or privilege" of the CID recipient.

Grounds for Objections

The nature of the "legal rights" CID recipients may assert is detailed in sction 3(c), which sets forth the additional grounds for objections to CIDs:

> No such demand shall require the production of any document, the submission of any information, or any oral testimony if such document, information, or testimony would be protected from disclosure under—
>
> (1) the standards applicable to subpenas or subpenas duces tecum issued by a court of the United States in aid of a grand jury investigation, or
>
> (2) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this Act.

These twin protections reflect the nature of the Division's investigative function as detailed in *Petition of Gold Bond Stamp Co.*, 221 F. Supp. 391 at 395 (D. Minn 1963), *aff'd*, 325 F.2d 1018 (8th Cir. 1964):

> [In] determining the reasonableness of the [Division's civil investigative] demand, the limitations placed on grand jury and civil discovery cases have to be considered. . . . 'The investigative function, in searching out violations with a view to securing enforcement of the Act, is essentially the same as the grand jury's, or the court's in issuing other pre-trial orders for the discovery of evidence, and is governed by the same limitations.' *Oklahoma Press* v. *Walling*, 327 U.S. at 216."

The 1962 Antitrust Civil Process Act expressly incorporated the "grand jury subpoena" standard of protection for CID recipients. But that Act did not clearly authorize CID objections under the "civil discovery" standard set forth in this bill. Instead, section 5(e) of the 1962 Act merely provided that "the Federal Rules of Civil Procedure shall apply to any petition under this Act." But this language is ambiguous: It is not clear whether it makes the "civil discovery" standards available only if civil discovery is attempted in the course of and ancillary

to court disputes over CIDs, or whether, in addition, it means that CID recipients can raise the same objections to CIDs that civil litigants can raise against civil discovery requests. Legislative history and court decisions under the 1962 Act fail to provide guidance. Thus, in order to resolve this doubt in favor of protecting CID recipients, the Committee adopted the express language of section 3(c).

Consequently, CID recipients will be permitted to premise objections not only on the basis of precedents under the 1962 Act, but also on the basis of precedents under the grand jury subpoena standard and the civil discovery standard as well.

According to these precedents, the demand must not be too broad and sweeping.[11] The information sought must have some materiality to the investigation being conducted.[12] The demand must be limited to a reasonable time period.[13] The documents or information requested must be described with sufficient definiteness so that the person served may know what is wanted.[14] The burden of complying with the demand must not be to great.[15] The demand may not be used to secure privileged communications. Trade secrets may be obtained,[16] but protective orders are available to guard against their prejudicial disclosure in any subsequent proceedings.[17]

Most of these standards have constitutional origins, and stem from the Fourth Amendment prohibition against "unreasonable searches and seizures."[18] But such subpoenas must also conform to Federal Rule of Criminal Procedure 17(c), which provides that a court may quash or modify the subpoena—or, under this bill, a CID—if compliance would be "unreasonable or oppressive."

Moreover, a demand may be quashed if the information sought "is not shown to be necessary in the prosecution of the case;"[19] or if the government is engaged "in an unlimited, exploratory investigation whose purposes and limits can be determined only as it proceeds."[20]

Furthermore, the relevancy of the entire demand may be questioned,[21] as well as particular paragraphs of the CID.[22] Additionally, this standard of relevance is expressly set forth in section 3(a) of

[11] *Brown* v. *United States*, 276 U.S. 134 (1928), and *Application of Harry Alexander, Inc.*, 8 F.R.D. 559 (S.D.N.Y. 1949).

[12] *Hale* v. *Henkel*, 201 U.S. 43 (1906), and *Schwimmer* v. *United States*, 232 F.2d 855 (8th Cir. 1956).

[13] *Brown* v. *United States, supra; In re Eastman Kodak Co.*, 7 F.R.D. 756 (D.Mass. 1947).

[14] *Brown* v. *United States, supra; United States* v. *Medical Society*, 26 F. Supp. 55 (D.D.C. 1938).

[15] *United States* v. *Watson*, 266 Fed. 736 (N.D. Fla. 1920); *In re Grand Jury Investigation*, 33 F. Supp. 367 (M.D.N.C. 1940).

[16] *United States* v. *Medical Society, supra; Petition of Borden Co.*, 75 F. Supp. 857 (N.D. Ill. 1948); *Application of Radio Corp. of America*, 13 F.R.D. 167 (S.D.N.Y. 1952).

[17] *Upjohn Company* v. *Lewis Bernstein*, 1966 CCH Trade Cases, ¶ 71,830 (D.D.C.).

[18] CIDs issued under the 1962 Act have repeatedly survived Fourth Amendment challenges, most notably in *Petition of Gold Bond Stamp Co.*, 221 F.Supp. 391 (D.Minn. 1963), *aff'd.*, 325 F.2d 1018 (8th Cir. 1964). Significantly, the *Gold Bond* court analogized the disputed CID to administrative supoenas issued by the Secretary of Labor and the Federal Trade Commission. The former was upheld in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946), since "the gist of the [Fourth Amendment] protection is in the requirement . . . that the disclosure sought shall not be unreasonable." 327 U.S. 186, 208. The latter was upheld in *U.S.* v. *Morton Salt Company*, 338 U.S. 632 (1957), because "It is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant." 338 U.S. 632, 652. The *Gold Bond* CID was, that court expressly concluded, squarely within these two Supreme Court "guideposts." 221 F.Supp. 391, 396.

[19] *Hale, supra.*

[20] *In re Grand Jury Investigation* (General Motors Corp.) 174 F.Supp. 393 (S.D.N.Y. 1959).

[21] *In re American Medical Association*, 26 F.Supp. 58 (D.D.C. 1938).

[22] *In re United Shoe Machinery Corp.*, 73 F.Supp. 207 (D.Mass. 1947).

H.R. 13489, which limits service of CIDs to persons with documents or information "relevant to a civil antitrust investigation."

CID's, like grand jury subpoenas, may also be quashed if they are not issued "in good faith."[23] Elaborating this important requirement of "good faith," other courts have ruled that objections to CIDs may be sustained if the Justice Department issued the CID "with fraudulent and improper motives;"[24] if the CID "was inspired by and was in aid of an inquiry of a legislative and political nature being pursued by an individual member of Congress, since issuance and service of the CID therefore was an abuse of process and an improper use of the ACPA;"[25] or if the CID was "part of a plan to utilize the full forces of the U.S. Government and the Department of Justice to intimidate and harass" the CID recipients.[26]

Objections may also be proper if the CID "does not sufficiently state the alleged violation;"[27] or if the CID unreasonably seeks information that has already been provided to another Federal agency, such as the FTC.[28]

CID recipients may also refuse to comply with any CID if the Division has no jurisdiction to conduct an investigation—which will be the case if the activities at issue enjoy a clear exemption from the antitrust laws.[29] However, such challenges to jurisdiction are not permitted under the "grand jury subpoena" or "civil discovery" standards of this bill; rather, they stem from the bill's express limitation of CID powers to investigations of civil antitrust violations.[30]

The Committee does recognize that the inflexible application of post-complaint, civil discovery standards to pre-complaint investigations might be inappropriate in certain instances. In particular, the civil discovery standards are tailored to meet the requirements of formal, adversary, adjudicatory proceedings. Unlike investigations, adjudications feature detailed pleadings setting forth specific allegations and responses. The issues will necessarily be more narrowly-drawn and well-defined than they can possibly be during an investigation.

Thus, the grand jury subpoena standard, tailored as it is to reflect the broader scope and less precise nature of investigations, may in this one respect seem to be a more appropriate standard for antitrust investigations than a rigidly-applied, post-complaint civil discovery

[23] "It is recognized that the facts in each individual case are the determining factors. More important than the formal results in these cases are the tests laid down for determining reasonableness, e.g., the type and the extent of the investigation; the materiality of the subject matter to the type of investigation; the particularity with which the documents are described; the *good faith* of the party demanding the broad coverage; a showing of need for such extended coverage. . . ." *Application of Linen Supply Companies*, 15 F.R.D. 115 (S.D.N.Y. 1953) (Emphasis added).

[24] *American Pharmaceutical Association* v. *McLaren*, 344 F. Supp. 9 (E.D. Mich. 1971).

[25] *In re Emprise Corporation*, 344 F. Supp. 319 (S.D.N.Y. 1972); and *Petition of Cleveland Trust Co.*, 1972 CCH Trade Cases, ¶ 73,911 (N.D. Ohio).

[26] *Chattanooga Pharmaceutical Association* v. *U.S. Department of Justice*, 358 F.2d 864 (6th Cir., 1966).

[27] *Hunter Co.* v. *U.S.*, 338 F.2d 183 (9th Cir. 1964).

[28] This objection was unsuccessfully raised in *Petition of CBS*, 235 F. Supp. 684 (S.D.N.Y. 1964).

[29] *Chattanooga Pharmaceutical Association, supra* (the now-defunct "fair trade" exemption); *Amateur Softball Association of America* v. *U.S.* 1972 CCH Trade Cases, ¶ 74,188 (10th Cir.) (the asserted "amateur sports" exemption); *Texas State Board of Public Accountancy* v. *U.S.*, U.S. Sup. Ct., No. 75-531, *cert. denied*, 12/15/75 (the "state action" exemption).

[30] But the Committee stresses that the scope of many antitrust exemptions is not precisely clear; and many others, especially those among the regulated industries and what were formerly termed "the learned professions," are currently being narrowed by statute or judicial rulings. In these amny cases, the applicability of an asserted exemption may well be a central issue in the case. If so, the mere assertion of the exemption should not be allowed to halt the investigation.

standard would be. Yet it seems equally inappropriate to apply only a criminal, grand jury standard to civil investigations, conducted under the Antitrust Civil Process Act.

To resolve this dilemma, and to preserve maximum protections for CID recipients without impeding antitrust investigations, section 3(c)(2) therefore requires that the application of civil discovery standards be "appropriate" and "consistent" with the purpose of this Act, which is to increase the effectiveness of antitrust investigations. As long as this qualification is recognized, the federal judiciary may treat objections to CIDs much like objections to civil discovery requests.

One category of discovery objections permitted under the Federal Rules of Civil Procedure, however, may not be raised against a CID: These are "purely procedural" objections that are based not on the burdensome or irrelevant nature of the CID, but instead on the various procedural requirements of the Civil Rules that conflict and are inconsistent with those specifically set by the Antitrust Civil Process Act.

One obvious example lies in F.R.Civ.P. 30(a), which permits oral depositions only after a complaint has been filed, and an action formally commenced. But this procedural requirement will never be met in the case of a CID, which is by definition a pre-complaint tool. Because it thus conflicts with the authority conferred by this Act, this "procedural" objection may not be raised against a CID.

Another example is F.R.Civ.P. 30(b)(1), which requires that any "party" give prior notice of an oral deposition to all other "parties," who may then attend and participate in the deposition, and cross-examine the witness testifying there. But an objection based on this requirement could not be raised against a CID, because this Act specifically requires that all persons except the antitrust investigator, the stenographer, the witness, and his counsel, be excluded from a CID oral examination.

In addition, non-witnesses are not formal "parties" to an investigation. They have never been entitled to participate in an investigation by receiving prior notice of any witness' oral examination, nor by intervening in the investigation, nor by confronting and cross-examining witnesses during the investigation. These rights of notification, intervention, confrontation, and cross-examination are adversary in nature, and apply as a matter of due process only during adjudicatory proceedings, such as a civil antitrust suit. Indeed, these rights have never been mandated in non-public investigations,[31] whether conducted by Congressional committees,[32] grand juries,[33] independent regulatory agencies,[34] Executive-branch officials,[35] or state law enforcement agencies.[36] If such rights were granted to non-witnesses, the confidentiality of the investigation would be hopelessly compromised; the witness' trade secrets and confidential proprietary data would necessarily

[31] Appendix to *Hannah* v. *Larche*, 363 U.S. 454 (1960).
[32] Rule XI of the U.S. House of Representatives, § 712.
[33] *Hannah, supra*, at 448; Fed. R. Crim. P. 6(e).
[34] Appendix to *Hannah, supra*.
[35] *Peterson* v. *Richardson*, 370 F. Supp. 1259 (N.D. Texas 1973), citing *Hannah*, and upholding HEW investigation of medicare fraud by physician; and *Womer* v. *Hampton*, 496 F.2d 99 (5th Cir. 1974), citing *Hannah*, and upholding Army Corps of Engineers investigation of bribery.
[36] *U.S. ex rel. Catena* v. *Elias*, 465 F. 2d 765 (3rd Cir. 1972), investigation of official corruption by New Jersey State Commission of Investigation, citing *Hannah;* and *Londerholm* v. *American Oil Co.*, 202 Kan. 185, 446 P. 2d 754 (1968), which upholds the Kansas CID statute, and rejects a "target's" claim that it is entitled to participate in the CID investigation.

be disclosed to his chief competitors; and he would be opened to economic retaliation from the targets of the investigation. Even disclosure of the mere fact of a CID investigation—much less disclosure of the substance of the inquiry—would often cast unfair and prejudicial aspersions on the integrity of the CID recipient.

In sum, to permit CID objections based upon conflicting procedural requirements of the Federal Rules would nullify many provisions of this bill, and utterly invalidate the Act. That is why section 3(c)(2) requires that objections against CIDs raised under the discovery provisions of the Federal Rules of Civil Procedure be "appropriate" and "consistent with the provisions" of the Antitrust Civil Process Act.

Right to Pre-Enforcement Judicial Review

Like any other civil administrative subpoena, a CID has no compulsory force unless and until a federal judge upholds its legality, by issuing an order enforcing compliance.

Thus, if a CID recipient objects to all or any part of a CID:

(1) The recipient may refuse to produce the objectionable documents, answer the objectionable interrogatories, or respond to the assertedly improper question, or line of questioning. But the CID recipient must comply with all unobjectionable portions of the CID.

(2) If it chooses, the Antitrust Division may go to a U.S. district court, and seek enforcement of the CID under section 5(a) of the Act. Alternately, the CID recipient may choose to "leapfrog" the Division into court, by himself filing a petition to quash the CID, under section 5(b) of the Act.

(3) After a *de novo* hearing on the nature of the investigation and all the objections to the CID, the district court will apply the "grand jury subpoena" and "civil discovery" standards of protection, and uphold, modify, or entirely set aside the disputed CID.

(4) Under section 5(d) of the Act, this decision by the district court is a "final order" under 28 U.S.C. § 1291. Whoever loses—either the CID recipient or the Division—has an absolute right to appeal this ruling to the appropriate U.S. court of appeals.

(5) Even if the CID recipient loses in the district court, nothing happens if a stay pending appeal is entered; assertedly objectionable documents are not produced, interrogatories are not answered, and no oral testimony can be compelled.

(6) Whoever loses in the court of appeals can ask the U.S. Supreme Court to review that ruling. The Supreme Court, in its discretion, may review the ruling by *certiorari.*

(7) While section 5(d) of the Act authorizes contempt of court sanctions for disobedience to a court order enforcing any CID, this punishment may be imposed only after all appeals that are taken have ended in favor of the CID's legality.[37]

[37] There is one exception: In case a CID witness refuses to answer on the basis of his privilege against self-incrimination, section 3(i)(5)(b) authorizes the Justice Department to apply for a grant of immunity from prosecution on the basis of his testimony, in accordance with the comprehensive immunity provisions of 18 U.S.C. §§ 6001–6003, which authorize the immunization of witnesses before all federal agencies. If the court grants immunity to the witness pursuant to 18 U.S.C. § 6002, the witness is then required to answer. If the witness still refuses to answer, the court may hold him in contempt; but the witness nevertheless retains the right to appeal any such contempt order.

The Committee believes this system of judicial review of CIDs could not be made more fair and thorough. Strong evidence that the Division has responsibly discharged its current CID powers lies in the fact that out of 1,700 CIDs for documents issued by the Division since 1962, less than fifteen have ever resulted in disputes before a court. Speculative fears of overbearing and inquisitorial demands are not borne out by this commendable record.

Statement of Conduct Under Investigation

Any concern that the CID oral examinations authorized by this bill might be virtually unlimited in scope, with a CID witness receiving only a vague description of the general subject matter of the inquiry, is unfounded.

Section 2(b)(1), as amended by the Committee, expressly provides that each CID shall "state in appropriate detail the nature of the conduct . . . or activities . . . which are under investigation and the provision of law applicable thereto." [38]

Right To Inspect and Correct Transcripts

Section 3(i)(4) provides that:

> When the testimony is fully transcribed, the transcript shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the transcript by the officer with a statement of the reasons given by the witness for making them.

This power to review and correct his transcript is an important safeguard for a CID witness. It is supplemented by an additional provision of section 3(i)(4), which provides that:

> Upon payment of reasonable charges therefor, the investigator shall furnish a copy of the transcript to the witness only, except that the Assistant Attorney General in charge of the Antitrust Division may for good cause limit such witness to inspection of the official transcript of his testimony.

Thus, this bill gives any CID witness an absolute right to inspect the transcript of his CID testimony. Significantly, no grand jury witness has such a right.

In most cases, the CID witness will also routinely receive a copy of his transcript. However, in investigations where there is a possibility of witness intimidation, economic reprisal, or the "programmed" formulation of a common defense by possible co-conspirators who "tailor" their testimony to match the evidence held by the government, the Assistant Attorney General may find "good cause" sufficient to deny the CID witness a copy of his transcript.[39] Even in that event, the CID witness may appeal the denial of a copy of his transcript, under section 5(c) of the Act.

This "good cause" transcript access test is identical to the transcript access provisions of the Administrative Procedure Act, 5 U.S.C. § 555(c), which governs investigations by all federal agencies.

Furthermore, not only the witness, but also his counsel or other "duly authorized representative" may always examine any documents, answers to interrogatories, or transcripts of testimony produced by the witness—so long as the witness consents, in accord with section 4(c)(3).

Right To Discover CID Information

In accord with section 4, information submitted pursuant to a CID will remain confidential, and will be available to no one during the investigation except Division attorneys, the CID recipient, his counsel, and under certain circumstances, the FTC. However, if a civil action based on the CID information is subsequently commenced, the defendants in the civil action may invoke their full discovery rights under the Federal Rules of Civil Procedure, and obtain CID information relevant to their defense, in accordance with those rules. They will thus be fully able to protect their rights at trial by interrogating, cross-examining, and impeaching CID witnesses, both during pre-trial discovery, and at the trial itself. [40]

However, as the Division's statistics reveal, about three-fourths of all CID investigations never culminate in civil or criminal proceedings—instead, most investigations simply clear suspected violators of any wrongdoing. In these many cases, CID investigative files will remain permanently confidential, and barred from public disclosure—the Freedom of Information Act notwithstanding—under section 5(c) of this bill.[41]

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[38] The statement must be reasonably specific, but, as the court noted in *Gold Bond Stamp Co., supra*, "Necessarily, therefore, the nature of the conduct must be stated in general terms. To insist upon too much specificity with regard to the requirement of this section would defeat the purpose of the Act, and an overly strict interpretation of this section would only breed litigation and encourage everyone investigated to challenge the sufficiency of the notice." *Gold Bond, supra*, at 397.

[39] *U.S.* v. *Rose*, 215 F.2d 617 (3d Cir. 1954).

[40] But the scope of civil discovery is not unlimited: The information sought must either "relevant to claims or defenses" in the pending action, or else "reasonably calculated" to lead to relevant evidence, F. R. Civ. P. 26(b)(1). And the court has broad discretion to set limits and conditions upon discovery, for example, by issuing a protective order under F.R. Civ. P. 26(c) to guard "any person" from "annoyance, embarrassment, oppression, or undue burden of expense." The Committee stresses that nothing in this bill in any way alters the postcomplaint procedures established by the Federal Rules.

[41] Under section 4(c) of the 1962 Act, the Division must return *original* CID documents to the CID recipient who produced them, but the Division may retain *copies* of these original documents. Section 4(c)(1) of this bill follows the 1962 Act, and requires the Division to return only original documents—not copies. During Subcommittee and full Committee debate on H.R. 13489, it was claimed that retention of copies and other information obtained by a CID enables the Division to compile "dossiers" on CID recipients. However, the Committee is persuaded that such information will largely consist of impersonal, economic data on business contracts and practices, rather than material of an intimate, personal nature. Moreover, retention of such information serves an important and legitimate law enforcement purpose, for it often includes facts of long-term and continuing significance to the Division, like the details of patent licensing agreements or long-term exclusive supply contracts. Retention of copies in these instances will avoid needless, future "rounds" of CIDs. Such information is also important for consistent and evenhanded enforcement: It details business practices that have survived past scrutiny, as well as those that have not, and by referring to them, the Division may easily be able to vindicate similar practices that come under investigation at some future time. Such equitable treatment may be impossible if the Division is immediately stripped of all such information once it closes an investigation. Nor has there been any documented instance, much less any allegation, that the Division has abused its powers under the 1962 Act to retain copies of CID documents. Nor does retention of copies interrupt the business operations of the CID recipient, for he continues to hold the originals. Finally, it is plain that great administrative burdens would be imposed upon the Division were it required to return all such information, much of which may even have been incorporated in internal departmental memoranda. Such burdens are imposed upon no other federal agency. For these reasons, the "dossier" amendment was rejected.

These Powers Are Appropriate for a Prosecutor

The claim has been made that while it may be entirely proper to give these investigative powers to an "independent regulatory agency," it is improper to grant them to a "prosecutor," who is under the control of the executive branch of government. Such a grant, it is claimed, is "alien to our legal traditions." [42]

This contention ignores the fact that these same powers have long been exercised by the chief antitrust prosecutors of nineteen different states. No court in any of those states has ever accepted this argument, and invalidated these state prosecutorial powers.[43] Significantly, while many of these state CID statutes were first enacted many years ago—Texas (1903), Arizona (1912), North Carolina (1913), Florida (1915)—many others are of recent origin—Illinois (1969), New Jersey (1970), Connecticut (1971), New Hampshire (1973), Virginia (1974). And many of the early state statutes have been recently re-enacted, e.g., Florida (1973), and Arizona (1974).

Moreover, this same objection can be raised against the Division's current CID authority, and it has been decisively rejected by the federal courts.[44]

Furthermore, such powers are not held only by "independent regulatory agencies." Many executive-branch law enforcement officials also routinely use these very same investigative power—including the Secretaries of the Treasury, Labor, HEW, Transportation, and Agriculture. These officials have the power to refer evidence of civil and criminal violations of law, uncovered in the course of their civil investigations, to the U.S. Attorney General.[45]

The Committee therefore rejects the claim that these powers are inappropriate for a prosecutor.

V. Section-by-Section Explanation of H.R. 13489

Section 2(c): Defines "antitrust investigation" to mean any inquiry into possible completed or continuing antitrust violations, or any inquiry into planned mergers and acquisitions that might, upon future consummation, violate the antitrust laws.

Section 2(f): Defines "person" to include natural persons as well as legal entities.

Section 2(h): Defines "custodians" who will maintain confidentiality of CID investigative files in accord with section 4.

Section 3(a): Authorizes issuance of CIDs for documents, answers to written interrogatories, and oral testimony, to any person, whether a target or nontarget, who has information relevant to a civil antitrust investigation.

Section 3(b)(1): Requires each CID to state the nature of the conduct or activities under investigation.

Section 3(b)(2): Requires CIDs for documents to describe the materials sought with definiteness and certainty, to prescribe return dates,

[42] S. Rpt. No. 803, Part II, 94th Cong., 2d Sess. (1976), p. 196
[43] See, *inter alia*, *Londerholm* v. *American Oil Co.*, *supra*.
[44] *Hyster* v. *U.S.*, 338 F. 2d 183, 186 (9th Cir. 1964).
[45] In some cases, federal statutes expressly require that they do so, e.g., 29 U.S.C. § 308(1).

and to identify the Antitrust Division custodian who will receive the documents.

Section 3(b)(3: Establishes similar requirements for CIDs for answers to written interrogatories.

Section 3(b)(4): Requires that CIDs for oral testimony state the date, time, and place of the oral testimony, and specify the antitrust investigators who will conduct the oral examination, and the custodian who will receive the transcript.

Section 3(c): Prohibits CIDs from requiring any documents, information, or testimony that may not be disclosed pursuant to a grand jury subpoena or a civil discovery request under the Federal Rules of Civil Procedure.

Section 3(d): Provides for service of CIDs upon persons within and without the United States.

Section 3(e)(1): Sets requirements for serving CIDs upon business entities.

Section 3(e)(2): Sets requirements for serving CIDs upon natural persons.

Section 3(f): Sets requirements for proof of service of CIDs.

Section 3(g): Establishes requirements for compliance with CIDs for documents.

Section 3(h): Establishes similar requirements for compliance with CIDs for answers to written interrogatories.

Section 3(i)(1): Establishes procedures governing CID oral examinations. The "officer authorized to administer oaths and affirmations" will typically be the stenographer who records the testimony and forwards the transcript to the antitrust investigator.

Section 3(i)(2): Requires the antitrust investigator to exclude everyone from the CID oral examination except the CID witness, his counsel, and the stenographer. The Publicity In Taking Evidence Act of 1913 accordingly shall not apply to CID oral examinations.

Section 3(i)(3): Establishes venue for CID oral examinations.

Section 3(i)(4): Requires that CID witnesses be permitted to review and correct the transcript of their testimony, and receive a copy of their transcript, unless there is good cause to limit them to an inspection of their transcript.

Section 3(i)(5)(A): Grants every CID witness an absolute right to be represented and advised by counsel throughout the CID oral examination, and permits the CID witness or his counsel to object to any question on the basis of "any constitutional or other legal right or privilege."

Section 3(i)(5)(B): Authorizes the immunization of any CID witness who refuses to answer on grounds of the privilege against self-incrimination.

Section 3(i)(6): Grants witnesses in CID oral examinations the standard witness fees provided by law to witnesses in other federal proceedings.

Section 4(a): Requires the Assistant Attorney General in charge of the Antitrust Division to appoint custodians for CID investigative files.

Section 4(b): Authorizes the custodian to inspect and copy original documents produced pursuant to a CID. To avoid business disruption, the CID recipient may submit copies instead of original documents.

Section 4(c)(1): Requires that the custodian take possession of all CID investigative files, and be responsible for their use, and the return of original documents to the CID recipient pursuant to section 4(e).

Section 4(c)(2): Permits the custodian to make copies of CID investigative files for official use by Division personnel.

Section 4(c)(3): Permits the custodian to disclose CID information only (A) to Division personnel for official use; (B) to the CID recipient who produced the information, and his counsel or other authorized representative; (C) to any person, upon the consent of the CID recipient, in the case of documents and answers to interrogatories; and (D) in the case of transcripts, to any person, upon the consent of the CID witness, unless that witness is himself limited to an inspection of his transcript.

Section 4(d)(1): Permits the custodian to deliver CID investigative files to Justice Department attorneys, who in accord with their official duties may use these files in civil antitrust cases, before grand juries investigating possible criminal antitrust violations, and in federal regulatory and administrative agency proceedings.

Section 4(d)(2): Gives the custodian the discretionary power to deliver CID investigative files to the Federal Trade Commission, in response to a written request by the FTC. All restrictions on Justice Department use of these files apply equally to the FTC.

Section 4(e): Upon written request by the CID recipient who produced any CID documentary material, and upon the completion of the CID investigation or any subsequent court action, grand jury proceeding, or federal administrative agency proceeding involving such CID documents, the original documents shall be returned to CID recipient who produced them.

Section 4(f): Establishes "housekeeping" provisions governing the transfer of CID files between successive CID custodians.

Section 5(a): Adds a new provision to the 1962 Antitrust Civil Process Act, which permits the Division to extend the time within which a CID recipient may file his own petition challenging a CID's legality. This will give the Department and businessmen more time to resolve possible CID disputes "out of court."

Section 5(b): Conforming change, to extend the custodian's current duties regarding CID documentary material to embrace answers to written interrogatories and transcripts of oral testimony as well.

Section 6: Makes criminal penalties set by 1962 Act for obstructing compliance with a CID for documents equally applicable to willful obstruction in cases of CIDs for answers to written interrogatories and oral testimony.

Section 7: Provides that H.R. 13489 will be effective upon the date of enactment.

VI. Committee Action

On April 4, 1974, the Department of Justice transmitted to the Speaker of the House a bill to amend the Antitrust Civil Process Act, which was introduced as H.R. 13992 by Committee Chairman Rodino. No action was taken on this bill during the 93d Congress, but without any changes, it was re-transmitted on February 13, 1975, and reintroduced in the 94th Congress as H.R. 39. The Judiciary Subcommittee

on Monopolies and Commercial Law held four days of hearings on H.R. 39 in May and July of 1975. Testimony was presented by Assistant Attorney General Thomas E. Kauper, in charge of the Antitrust Division, and by representatives of the U.S. Chamber of Commerce; the Business Roundtable; the Association of the Bar of the City of New York; and the Corporate Accountability Research Group. The Subcommittee received additional written statements on H.R. 39 from the National Association of Manufacturers, the Consumers Union, the Administrative Office of the United States Courts, the Department of Commerce, the Department of Justice, and President Gerald R. Ford.

In public session on April 30, 1976, the Subcommittee on Monopolies and Commercial Law marked up H.R. 39 and ordered 8 to 0 that, as amended, the bill be introduced and reported favorably to the full Committee on the Judiciary. Reintroduced as H.R. 13489, the bill was considered and amended in public session on May 18, 1976, by the full Committee on the Judiciary, which by unanimous voice vote, a quorum being present, ordered that H.R. 13489, as amended, be reported favorably to the House.

VII. Information Submitted Pursuant to Rules X and XI

A

The Committee, in considering H.R. 13489, made no specific oversight findings pursuant to clause 2(b)(1) of Rule X. However, where relevant, the Subcommittee has drawn on material from its merger oversight hearings of March 10, 1976, and from its hearings on H.R. 39 held in May and July of 1975.

B

No new budget authority is provided.

C

No estimate or comparison was received from the Director of the Congressional Budget Office, and none is necessary, as no budget authority is provided.

D

No related oversight findings and recommendations have been made by the Committee on Government Operations under clause 2(b)(2) of Rule X.

E

Inflationary Impact Statement.

Pursuant to clause 2(1)(4) of Rule XI, the Committee concluded that there will be no inflationary impact on the national economy. In fact, because this bill improves antitrust enforcement, it will result in a more competitive and efficient economy, and resulting lower prices and costs. Further, it will result in a saving of time, manpower, and money by making Antitrust Division investigations more efficient and expeditious.

VIII. Executive Communications

The White House,
Washington, D.C., March 31, 1976.

Hon. Peter W. Rodino, Jr.,
Chairman, the Committee on the Judiciary,
House of Representatives, Washington, D.C.

Dear Chairman Rodino: During the last year and a half, my Administration has supported effective, vigorous, and responsible antitrust enforcement. In December 1974, I signed legislation increasing penalties for antitrust violations. In addition, I have submitted several legislative proposals for regulatory reform which would expand competition in regulated industries. Assuring a free and competitive economy is a keystone of my Administration's economic program.

In October 1974, I announced my support of amendments to the Antitrust Civil Process Act which would provide important tools to the Justice Department in enforcing our antitrust laws. My Administration reintroduced this legislation at the beginning of this Congress and I strongly urge its favorable consideration.

I have asked the Department of Justice to work closely with your Committee in considering this antitrust legislation. I would hope that the result of this cooperation will be effective and responsible antitrust legislation.

Sincerely,

Gerald R. Ford.

Office of the Attorney General,
Washington, D.C., February 13, 1975.

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

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. 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,

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[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. 480–18; 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.

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.

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.

[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).

DEPARTMENT OF JUSTICE.
Washington, D.C., January 22, 1976.

Hon. PETER W. RODINO, Jr.,
Chairman, Subcommittee on Monopolies and Commercial Law, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CHAIRMAN RODINO: When I appeared before your Subcommittee on Monopolies and Commercial Law to testify in support of H.R. 39, Mr. Mazzoli requested that I supply the Subcommittee with specific instances in which the Department's antitrust investigations were hindered or thwarted by the absence of investigatory authority that H.R. 39 would provide. See Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, House of Representatives, 94th Cong., 1st Sess. 37–38 (1975).

We have reviewed our experience under the Antitrust Civil Process Act of 1962 with attorneys in our litigating sections and have compiled a representative list of investigations that have been impeded because of restrictions upon our pre-complaint authority. These case studies, which are similar in form to materials prepared for the Congress in connection with the 1962 legislation, are attached to this letter as Appendix A. As the attached examples reveal, investigatory difficulties caused by limitations on our pre-complaint authority fall into reasonably identifiable patterns that may be conveniently summarized.

The inability of the Department to issue a civil investigative demand (CID) to parties who have important information but are not under investigation has been a recurring problem, particularly in merger investigations. Under the Clayton Act, in order for the government to prove that the effect of a merger will be substantially to lessen competition, it must demonstrate relevant geographic and product markets. Competitors, trade associations, and suppliers or customers will frequently have the market data essential to resolving these factual issues. In a variety of differing contexts, as the attached examples document, these third parties have refused to supply us with this information voluntarily.

The absence of necessary product or market data is often a determinative factor in our decision whether to file a civil complaint. Furthermore, in many merger investigations it is important that we be able to move quickly and file suit before the transaction is consummated in order to avoid problems associated with divestiture in the event we are successful in establishing the illegality of the proposal. In these situations it is especially important that the Department be able to go directly to parties that we know possess needed information even if it could be shown that the information would be available from less accessible sources.

More generally, the deposition authority that H.R. 39 would confer on the Department would contribute very significantly to our ability to make a fully informed decision whether or not to bring suit. It would be most valuable as a supplement to existing authority by permitting antitrust investigators to question corporate officials when an examination of documents has produced an inconclusive or ambiguous

picture of the transaction or policy under investigation. Deposition authority, of course, may be absolutely crucial with respect to corporate policies that are pursued but are never reduced to writing.

Corporate officials may also find that depositions are less burdensome than requests for documents. Resort to oral examination to supplement written submissions would not only allow antitrust investigators to make a more informed judgment of when suit is or is not warranted, but would also facilitate far better utilization and conservation of Department resources than is possible under present law.

The Department's need for authority to take depositions may also arise in two more specific contexts. First, in some cases a company's policies as expressed in writing vary materially from practices actually followed. For example, a company frequently adopts and circulates to its executives a written directive condemning various anticompetitive practices while at the same time informally encouraging such anticompetitive conduct by exerting strong pressures upon employees to meet unrealistic sales quotas. There may also be occasions in which to protect itself a company feels compelled to assume a particular public position in writing but declines to follow that policy in reality. By authorizing the Department to obtain only written documents, restrictions in existing law create the possibility that decisions whether or not to bring suit may be based upon erroneous perceptions of the anticompetitive impact of particular business policies. The availability of deposition authority would significantly reduce this risk.

Second, deposition authority is needed when documents are simply not available for whatever reason as, for example, if they have been destroyed. The issuance of a CID is not normally the first step in our investigatory process. Antitrust investigators generally first seek to obtain information informally from industry sources, other governmental agencies, or the target company itself. However, the specific prohibition against destruction of documents, 18 U.S.C. § 1505, applies only after a CID has been issued. If a business learns of an investigation before issuance of a CID and destroys incriminating documents, then an antitrust investigation may be completely thwarted. In this or other situations when documents do not exist, deposition authority may provide the only method for reconstructing the company policy or specific transactions and thus permit a meaningful investigation.

During my testimony I also indicated a continuing willingness to work with the Subcommittee and respond to whatever issues might arise with respect to H.R. 39 during the hearings. To the extent that there was a common theme in the testimony of persons opposed to H.R. 39, it was a concern that expansion of the Department's pre-complaint investigatory powers would be a unique threat to the civil liberties of business.

The enactment of H.R. 39 would confer upon the Department less comprehensive investigatory powers than are presently exercised by an increasing number of state Attorneys General (e.g., New Jersey, Illinois and Texas), numerous executive departments (e.g., Department of Labor), and many independent regulatory agencies (e.g., Securities and Exchange Commission and Federal Trade Commission). Some witnesses before the Subcommittee sought to distinguish the FTC's authority by noting the differences between its statutory mandate and the Department's. However, the FTC's powers, 15 U.S.C.

§ 49, can be used in investigations directly analogous to those pursued by the Department. The powers conferred by H.R. 39 are thus certainly not unique. A representative list of states, departments, and agencies possessing similar investigatory authority was contained in our March 5, 1975, letter to you which may be found in the Hearings at pages 185–186. We have sought to supplement that information in Appendix B.

Even though the powers conferred by H.R. 39 are not unique, the bill contains comprehensive safeguards that protect against governmental overreaching. A recipient of a CID may seek to quash the CID in court by showing that it is oppressive, unreasonable, irrelevant, or has been issued in bad faith. A witness has the right to the presence and advice of counsel during any deposition. He may refuse to answer any question on the grounds of privilege, self-incrimination, or other lawful grounds. All refusals to answer must be honored unless the government attorney can obtain a judicial order compelling an answer. The testimony of a witness must be transcribed, and he has a right to review and correct the transcript. The witness may also obtain a copy of the transcript except in very limited circumstances.

If the Department ultimately files a civil complaint based upon information obtained pursuant to a CID, the defendant's discovery rights would be governed by the Federal Rules of Civil Procedure. Thus the rights of witnesses regarding depositions under H.R. 39 are virtually identical to witnesses deposed pursuant to the Federal Rules of Civil Procedure and substantially exceed the rights of grand jury witnesses. This is important since civil complaints have accounted for about 70% of the Department's cases in recent years.

The most peculiar argument of opponents to H.R. 39 is that representatives of all target companies should be permitted to participate in depositions and cross examine witnesses. Such a concept is unworkable in practice, and unprecedented in concept.

As I explained in greater detail in my letter to you of November 19, 1975, it would be impossible to provide every target of an investigation with an opportunity to participate in every deposition hearing pursuant to a CID simply because of the targets of a particular investigation are not known until substantial material and information have been obtained. It is often very difficult to determine precisely when a company becomes a target, and companies that are targeted late in the investigation will, of course have had no opportunity to participate in depositions that were taken earlier. Amendment of H.R. 39 to provide such a right would therefore raise many complex procedural and substantive problems that could only delay timely investigations.

The mere presence of representatives of target companies at depositions could itself produce counterproductive and anti-competitive consequences. When the Department investigates possible collusive conduct, many of the companies involved are competitors. Assuming they could be identified, if representatives of all targets are present during depositions, then an officer of one company may be divulging business strategies and policies not only to antitrust investigators but also to his chief business rivals. The Department is sensitive to the legitimate business interest in confidentiality of trade secrets and business practices and has therefore recommended that CIDS be specifically exempted from the Freedom of Information Act. Adoption of

an adversary procedure for depositions is inconsistent with this legitimate interest. The presence of representatives of targets would also discourage third party witnesses from cooperating with antitrust investigators. An employee, customer, or supplier whose economic survival is dependent upon the target will be reluctant to divulge information if he fears retaliation.

The presence and participation of counsel for the targets at depositions of other parties would turn the investigatory process into an adversary proceeding and thereby delay and complicate every investigation. As Chief Justice Warren noted for the Supreme Court in 1960 in an analogous context, "The Federal Trade Commission could not conduct an efficient investigation if persons being investigated were permitted to convert the investigation into a trial." *Hannah* v. *Larche*, 363 U.S. 420, 446. This applies equally well to antitrust investigations conducted by the Department of Justice.

It is important to remember that the Department's objective at the pre-complaint stage of the investigation is not to "prove" its case but rather to make an informed decision on whether or not to file a complaint. In over 80% of our investigations in which CIDs are issued, we ultimately decide not to file a case. There can be no doubt that this is preferable to filing complaints based upon sketchy or inaccurate information. If a complaint is filed, the defendant will have the right to appear and defend fully against the allegations, but the legitimate investigatory purposes of H.R. 39 would be destroyed if it required trial-type adversary procedures.

The hearings disclose a number of additional narrow objections to H.R. 39, many of which appear to be based upon a misunderstanding of Departmental policy, the mechanics of an antitrust investigation, or the provisions of H.R. 39. An attempt has been made to respond to these matters in Appendix B.

I would welcome the opportunity to provide your Subcommittee and staff with any additional information or assistance that may help you in proceeding expeditiously with this bill.

Sincerely,

THOMAS E. KAUPER,
Assistant Attorney General, Antitrust Division.

APPENDIX A

"CASE STUDIES" DEMONSTRATING NEED FOR ADDITIONAL PRE-COMPLAINT INVESTIGATORY POWERS

1. We are currently involved in an investigation of one of the largest mergers, in terms of dollar value, to date. An analysis of the competitive impact of the merger in several key markets will determine whether a suit under the Clayton Act will be filed. It is most important that this analysis take into account the most comprehensive and reliable data available. In one of these markets, information necessary for a definitive analysis is not available from public sources. However, there is an industry trade association which reportedly compiles detailed sales and market information annually from its members. We have requested the association to provide this information voluntarily but it has refused. Without this data the result may be a lawsuit based on potentially unreliable figures from some private sources in the industry or a decision not to proceed because of insufficient data.

2. In 1975, two large industrial corporations informed the Antitrust Division that a joint venture between the two would be established by an agreement to be signed approximately six weeks later. The joint venture would manufacture products involving billions of dollars in sales in an already highly concentrated market. Antitrust counsel for the parties offered to provide us with selected documents containing relevant industry data. Some documents revealed positions taken by company personnel which appeared inconsistent with positions taken by the companies during negotiations. In addition, throughout the investigation, there was a concern that a comprehensive review of the parties' files would have produced important information not available in the selective documents provided by counsel. It would have been extremely helpful to have been able to obtain a broader file disclosure and to depose company personnel on crucial market issues. In short, we had to analyze this important and complex transaction almost entirely on the basis of documents selected by counsel with an assumed bias in the outcome of our evaluation.

3. Some time ago, the Division learned of a contract between two firms which seemed to involve an agreement by the companies not to compete. An investigation was opened and a CID was issued to both parties seeking documents concerning the possible anti-competitive agreement. One document suggested that officials of both companies had met privately, and it appeared that competitive concessions had possibly been made. No such meeting was recorded in any documents produced pursuant to the CID. The possibility of interviewing these officials has been considered but we have found in similar situations that the disadvantages of not having the parties under oath and the absence of a formal record of the interview limits

the usefulness of this approach. A comprehensive analysis of this matter requires the ability to depose these two individuals under oath to determine the circumstances under which the contract was negotiated.

4. We are currently investigating the acquisition by a foreign company of a domestic firm which manufactures certain chemical products. It appears that the acquisition may eliminate competition in several markets involving particular chemical products. One of these markets is very highly concentrated, i.e., the top four firms may control as much as 90 percent of the market. However, analysis of the competitive impact of the transaction in that market has been very difficult because of the technical nature of the products involved. The companies argue that these products are easily produced by any company with a broad chemical product line. We have sought market data from the two companies to clarify the situation, but both companies have denied that the information exists in documentary form and have refused to have their officials interviewed. With the power to depose company officials or to propound interrogatories on these issues, we could properly evaluate the competitive issues.

5. In mid-1975, the Division investigated an important acquisition involving large manufacturers of consumer products. The transaction was eventually terminated when the Division expressed its opposition. However, that decision was made without the benefit of industry data which three major competing manufacturers refused to provide voluntarily. This data was readily accessible and would not have unduly burdened the companies. Because of the lack of cooperation this investigation took far more time and effort than it would have if we could have obtained appropriate data, and our conclusions were reached without the benefit of all relevant information.

6. We are currently investigating the merger of two very large domestic corporations. One key issue is whether technology utilized to produce certain products is transferable from one product area to another. A large United States company manufactures products in both relevant areas but has refused to furnish us with information necessary to assess the technology transfer issue. The ability to depose technical personnel may be crucial here since documents alone may be insufficient to answer the complex technological questions raised.

7. Several years ago, we issued a CID to a professional association to determine whether association members had compiled and utilized a fee schedule. Shortly before the CID was served but after the association learned of our investigation, it formally rescinded its fee schedule. Counsel for the association argued that the matter was moot and that the investigation therefore should be terminated. Because of the circumstances under which the schedule had been withdrawn, it was necessary to determine whether the members had in fact ceased using it. One member was interviewed by the staff, but the results were inconclusive since the interviewee was under no obligation to answer the questions fully and accurately. Authority to depose members would have allowed us to determine the motivation and effectiveness of the alleged repeal of the fee schedule.

8. We are currently investigating a significant merger of two direct competitors in the plastics industry. Sales of the specific product involved amounted to $200 million a year. The top four firms that manufacture this product have approximately 80 percent of the market. Market analysis problems abound in this area due to complex product technology. Two firms that make the specific product involved have refused to allow their personnel to be interviewed. This lack of cooperation has largely frustrated this investigation.

9. We have received complaints that a large service corporation has engaged in what may be a tying arrangement, i.e., it sells its service only to customers that agree to purchase related products. A CID was issued to the company, and, after a court struggle, documents were submitted. However, the investigation is now stalled because the documents are inconclusive. If the oral testimony of persons who have negotiated the relevant contracts could be taken under oath, we could accurately determine whether there has been an anti-competitive effect or purpose. The parties have refused to cooperate voluntarily.

10. In 1970 we issued a CID to a trade association which, because of a protracted court fight, was not enforced until 1973. Documents we did receive were dated and some were ambiguous. Moreover, there are some difficult factual questions concerning the possibly anti-competitive practices flowing from the relationship of the national trade association to local affiliates. Documents have been simply inconclusive on these questions. In lieu of another documentary request with its consequent burden on the association and on the government, it would be more efficient and convenient for all concerned if we could have updated our investigation through depositions and interrogatories. The investigation remains open and will require a substantial input of resources to complete.

11. We are currently investigating a very important service industry to determine whether certain common practices in the industry are in effect disguised price fixing in violation of the Sherman Act. Because of the market power of the target of this investigation, its customers have been extremely reluctant to talk freely and fully with the staff. If we had the power to obtain the oral testimony under oath of officials of these purchasing companies, we would now be in a much better position to evaluate this complex matter.

12. In 1972 we investigated a proposed acquisition involving agricultural products. The acquiring company declined to comply with a letter request. We then served a CID on it, and the company initially took the position that it would not comply in viey of the ruling in *United States* v. *Union Oil Company of California*, 343 F2d 29 (9th Cir. 1965). That case holds that parties to an unconsummated merger cannot be forced to comply with a CID because the statute does not apply to "future" violations. The reluctant company did eventually "voluntarily" produce some of the material we had demanded, but we were unable to put together the facts in time to make an intelligent decision on whether or not to sue before the merger was consummated. Thus, our ultimate decision not to challenge this acquisition was delayed until after consummation because of our inability to obtain necessary information quickly.

13. An investigation was commenced into possible restrictive business practices employed by some companies pursuant to which they would not deal with a particular class of subcontractors. Although there was written evidence of such a policy, documents produced by

each company provided an insufficient basis upon which to determine whether the firms had in fact complied with this policy. (The fact of compliance was crucial to a determination of actual anti-competitive effect.) Many of the documents relevant to the firms' policy were ambiguous, and there were some indications that this was intentional because of pressures brought to bear upon the companies from conflicting sources. It would have been extremely helpful to have deposed officials of these companies in order to determine precisely the policies and tranactions of the firms involved. We were able to interview company officials only after repeated requests. Initial refusals by the company delayed the investigation significantly.

14. Several years ago we conducted an investigation into possible anti-competitive practices and procedures on the part of major integrated oil companies with regard to the acquisition of rights to crude oil owned by the government. The question of access to pipeline facilities by independents was also part of this investigation. It was not a criminal investigation because it was not clear whether the bidding patterns were the result of legitimate joint ventures or to what extent the situation was the result of Interior Department bidding procedures. We undertook the investigation without the use of existing CID authority, and most of the oil companies cooperated fully. However, the investigation took much longer than was necessary because one oil company refused to cooperate. It took approximately a year for this company to produce a limited number of documents, during which time we unsuccessfully sought to arrange interviews. If we had had the power to depose appropriate officials of the uncooperative oil company, we could have avoided much of the time and effort spent in a futile attempt to secure important information.

APPENDIX B

During the Hearings on H.R. 39, held last May and July, opponents of H.R. 39 raised five major objections: that the investigative authority H.R. 39 would provide is largely unprecedented, and improper if vested in an agency whose primary responsibility is law enforcement; that H.R. 39 contains inadequate safeguards against possible prosecutorial abuse; that authority to obtain precomplaint oral testimony infringes the rights of innocent third parties; that target companies are entitled to full participation in precomplaint investigations; and that CID authority should not be available to assist the Department's participation in regulatory proceedings. This memorandum examines each of these arguments and demonstrates that none can withstand critical analysis.

I. Many Federal executive and regulatory agencies, and State Attorneys General, already possess investigative powers comparable to those embodied in H.R. 39, for use in business-related law enforcement activities.

A. One objection to H.R. 39 that was raised repeatedly in the hearings was the alleged uniqueness of the CID authority that would result from enactment of the bill. This particular objection was unexpected. Our letter to you, dated March 5, 1975, listed a large number of states possessing substantially equivalent tools of investigation for possible violations of the various state antitrust laws. (See Hearings, p. 184, n. 1). We also noted the many provisions of federal law that grant a wide variety of government agencies comparable or greater powers of investigation, designed to assist the law enforcement responsibilities of those agencies. (See Hearings, p. 186, n. 2).

We have emphasized that the additional civil investigative tools we seek through enactment of H.R. 39 are neither novel nor exceptionally broad; rather they are virtually identical to those long vested in the Federal Trade Commission. Opponents of the bill have contended, however, that such investigative authority may be proper for an administrative agency such as the FTC, but not for the Attorney General, whose responsibilities are primarily those of law enforcement.

This argument fails to recognize that the FTC has important civil law enforcement responsibilities and uses its full investigative powers in discharging them. Commission adjudicative proceedings lead to cease and desist orders. Violations of such orders are enforceable either by contempt proceedings, if the order has been enforced on appeal by a federal court, or by civil actions in which federal courts may impose penalties up to $10,000 for each violation. The Commission is also directed to refer evidence of possible criminal conduct obtained in its investigations to the Attorney General for possible prosecution.

The argument that investigative tools appropriate for the FTC and other administrative agencies are improper when given to the Attorney General has already been answered by the Court of Appeals for the Ninth Circuit. Rejecting a broad constitutional challenge to the existing CID statute, the court noted:

In this case, Hyster makes much of the fact that the Attorney General, whose duties include prosecution, is the party on whom the power to demand is conferred. The theory is that while it may be proper to confer such authority upon the Federal Trade Commission . . . or the Administrator of the Wage and Hour Division of the Department of Labor . . . or on other "quasi-judicial" or "administrative" bodies or officers, it is not proper to confer it upon the Attorney General.

We are not convinced. The FTC and the Administrator have investigative and enforcement powers and duties, primarily civil in nature. So do many other commissions and administrators. . . . So does the Attorney General under the antitrust laws. . . . He also has the duty to institute prosecutions.

We have no doubt that it is within the power of administrators or administrative boards or commissions, if in the course of authorized investigations they uncover evidence of the commission of crimes, to refer that evidence to the Attorney General. In some cases, Congress has expressly conferred such authority. . . . In our case the Act, section 4(d) . . . authorizes delivery of documents to an attorney authorized to appear before a grand jury in a proceeding involving antitrust violations.

The fact that the Attorney General can himself institute a prosecution, instead of referring the information to someone else, may be a distinction, but we do not think that it makes a constitutional difference. He is still a public officer, exercising functions conferred upon him by law. There is no presumption that he will abuse his powers, quite the contrary, and there certainly is no showing that he is doing so in this case. *Hyster Co.* v. *United States*, 338 F.2d 183, 186 (9 Cir. 1964).

B. As noted in our March 5, 1975 letter, there are over three dozen provisions in the United States Code authorizing government agencies (other than the Department of Justice) to obtain compulsory testimony. There are penalties for failure to comply. For example, two agencies that are charged with investigation of business activities are the Securities and Exchange Commission and the Internal Revenue Service. The SEC may depose witnesses and secure documents, investigate incipient violations, and unlike H.R. 39, may seek substantial fines and criminal penalties for failure to comply.[1] The Internal Revenue Service may subpoena any person, and examine books and documents.[2] These agencies are expressly authorized to initiate civil enforcement proceedings, either in their own names or through the Department of Justice, and to refer evidence of criminal violations of their statutes to the Attorney General (see, e.g., 15 U.S.C. 77u). And agency attorneys who have conducted these investigations provide active assistance to the Department or the United States Attorneys in prosecutions resulting from such referrals.

[1] See 15 U.S.C. §§ 77s, 77x, 77yyy, 78ff, 78u, 79r, 79z–3, 80a–41, 80a–48, 80b–9, and 80b–17.

[2] 26 U.S.C. 7602. The investigative nature of this authority is stressed by the long standing provision that provides for up to 3 years in jail for persons who "obstruct or impede" by corruption or threats of force the work of the Treasury investigator.

This investigative authority has long existed, and has been retained and expanded through subsequent Congressional amendments. Congress has recently recognized again the need for investigative authority in government agencies. Creating the Energy Research and Development Agency and the Nuclear Regulatory Commission in 1974, Congress retained the investigative authority possessed by the AEC (42 U.S.C. 2201(c)), and gave additional specific investigative authority to the NRC (42 U.S.C. § 5846).

C. After further review of the state statutes, we have identified another state, Washington, that has precomplaint investigative authority for antitrust enforcement (Rev. Code of Washington, Title 19, Sec. 19.86.110). We also discovered that the Missouri statute has been amended (Rev. Stats. Mo. Chap. 416, sec. 416.091).

Many of these state laws are of recent origin. Three states have recently enacted state antitrust laws: Washington, chapter 19.86—amended 1970; the "New Jersey Antitrust Act," effective 1970; and the Virginia "Fair Trade Act" in 1974. The New Jersey and Virginia statutes have provisions comparable to those in HR. 39. Under those laws any person may be subpoenaed, persons may be deposed and documents obtained. And, in at least one respect, both the New Jersey and Virginia laws are broader than H.R. 39. Any incipent violation of the state antitrust law may be investigated—not just "mergers . . . or similar transactions" as would be authorized by H.R. 39.

In addition, many other states have authority to investigate incipient violations—Hawaii, Illinois, Missouri, New Jersey, New York, Virginia and Washington. Also many other states have investigative authority to obtain the production of documents and testimony from witnesses: Arizona, Connecticut, Kansas, Louisiana, Maine, New Hampshire, North Carolina, Puerto Rico, and South Carolina. Some of these provisions relating to testimony are very old—Arizona, Kansas, Louisiana, Maine, and North Carolina—others more recent. There has been much litigation concerning these state statutes. Decisions can be found both upholding the authority of the state officials to employ these useful tools, and also protecting the rights of the persons subject to subpoena. One recent case is particularly pertinent to claims that H.R. 39 would provide unique powers.

In *State ex rel. Londerholm* v. *American Oil Co.*, 202 K. 185, 446 P.2d 754, 757 (1968), the Supreme Court of Kansas observed that the:

> . . . procedure here involved is an historically well-known legislative device enabling the state's chief law enforcement officer to gather information necessary for effective enforcement of our antitrust laws. The proceding is not adversary but is *ex parte;* it is investigative and not adjudicatory. Of course, facts uncovered through it may lead to an adjudicatory hearing, civil or criminal, the same as information disclosed by any other method of investigation. That which the corporate appellants are really asserting is the right to be present during the attorney general's investigation. The right to an adjudicatory hearing includes the right to counsel. But we know of no constitutional right in anyone to be present at an

> investigation simply because his conduct is the subject of the inquiry and he may be in the future prosecuted as a result of information developed during the investigation. A witness appearing in an inquisition could well be a former employee of a corporation or he could be a person without any business connection with the corporation; in either event we know of no right in the corporation to be notified of the proceeding, to appear thereat or to be represented by counsel. It is true vitally relevant information concerning violations of our antitrust laws may sometimes be secured only through the testimony of employees or agents of those corporations suspected of irregularities.

The court then held that "where an employee is questioned about possible antitrust law violations by his corporate employee the corporation has no constitutional right to be represented by counsel."

II. Safeguards in present law and H.R. 39 effectively guarantee that investigative powers will not be abused.

A. Present law (15 U.S.C. 1314(b)) authorizes any CID recipient to petition a district court to modify or set aside the demand, basing his claim on "any constitutional or other legal right of such person." 15 U.S.C. 1312(c) forbids any CID requirement which would be unreasonable if contained in a grand jury subpoena. H.R. 39 would preserve these protections; it would also specifically authorize a CID recipient to refuse to comply with its demands "on grounds of privilege, or self-incrimination or other lawful grounds." Additionally, the Department has proposed to amend 15 U.S.C. 1312(c) to provide a right of objection to written interrogatories which impose "an undue or oppressive burden."

Existing case law establishes broad standards for reviewing CIDs and grand jury subpoenas. All recognized objections to these subpoenas would be available under H.R. 39 to third parties as well as to investigatory targets, and could be raised in opposition to a CID seeking oral testimony.

Opponents of H.R. 39 frequently express concern that precomplaint investigatory powers are subject to abuse. But case law shows that courts will not permit use of CIDs to conduct "fishing expeditions." An appropriate ground for objection to a CID is that the Department lacks jurisdiction over the activities under investigation by reason of an antitrust exemption (see *Texas Board of Public Accountancy* v. *United States*, — F. 2d — (5th Cir. 1975). *cert. den.* 12/15/75; *Amateur Softball Assn.* v. *United States*, 467 F. 2d 312 (10th Cir. 1972); *Chattanooga Pharmaceutical Assn.* v. *United States*, 358 F. 2d 864 (6th Cir. 1966); and the courts have closely scrutinized allegations that an antitrust investigation has been improperly motivated (see *American Pharmaceutical Assn.* v. *United States*, 344 F. Supp. 9 (E.D. Mich. 1971); *United States* v. *United States Gypsum Co.*, 1974 Trade Cases, ¶75, 352 (W.D. Pa); *Petition of Cleveland Trust Co.*, 1972 Trade Cases, ¶75, 352 (W.D. Pa.).

The limitations and protections embodied in the ACPA are obviously substantial ones, and the Division has always taken them very seriously. Perhaps the best evidence that there has not been abuse is the fact that, of nearly 1700 CIDs issued in the past 13 years, there are

scarcely more than a dozen reported cases in which a recipient has found it necessary to invoke the assistance of a federal court to protect its perceived rights and privileges. Since all existing safeguards are carried forward by H.R. 39, there is no reason to expect any different result if the bill is enacted.

B. Opponents of H.R. 39 have raised the spectre of innocent parties being forced to expose themselves to contempt citations in order to obtain appellate review of court orders enforcing CIDs. Such claims are based on a misunderstanding of the ACPA. 15 U.S.C. 1314(d) expressly provides that a final order enforcing, modifying or setting aside a CID shall be appealable pursuant to 28 U.S.C. 1291. This section is unchanged by H.R. 39. A petition to enforce, or to modify or set aside a CID is an original proceeding in district court. No other dispute is before the court in such a proceeding. The court's order resolving the dispute thus presented is necessarily final and appealable. To our knowledge no person subject to an order enforcing a CID has found it necessary to place himself in contempt as a predicate to seeking appellate review.

C. 15 U.S.C. 1312(a) requires that all CIDs be issued by the Attorney General or the Assistant Attorney General in charge of the Antitrust Division. The authority is not further delegable. In practice this means that all CIDs are reviewed and approved personally by the Assistant Attorney General. This is not the Division's practice with respect to grand jury subpoenas, which are usually approved only by the section or field office chief who supervises the investigating attorney. Thus the statutory requirement insures that CIDs receive closer scrutiny and more extensive review than grand jury subpoenas. Indeed, even if this were not required by statute it would probably be the practice in any event; the policy issues raised by civil investigations are likely to be more subtle and complex than those presented by the type of hard-core offense which the Division prosecutes criminally.

We believe that this factor is highly relevant in assessing broad claims that CID powers are likely to be abused, and that H.R. 39 would confer an inquisitorial power on the Division more sweeping than that possessed by a grand jury.

D. A well-established basis for objecting to a CID is a claim that it seeks material irrelevant to the proper scope of the investigation. See *Materials Handling Institute* v. *McLaren*, 426 F. 2d 90 (3d Cir. 1970). Opponents of H.R. 39 have alleged, however, that this affords a hollow right to persons subject to oral deposition, since they would be afforded no basis to know the scope of the intended questioning or its relevance to the investigation.

In fact, a person from whom oral testimony is sought will rarely, if ever, be in doubt about the nature of the inquiry. We contemplate that a notice for the taking of a CID deposition will almost invariably be preceded, or accompanied by, a CID for documents. This procedure is sound investigative practice. It enables the investigator to prepare himself for the deposition and to focus his questions. A CID seeking documents serves a purpose analogous to a bill of particulars, stating the nature of the conduct under investigation and describing the classes of documents sought with sufficient specificity to permit their identification. Such CID requests will serve the same function in defining the scope of investigation under H.R. 39 as they do under present law.

In rare instances oral testimony unrelated to documentary evidence may be sought. Counsel for the prospective deponent, however, will surely insist upon adequate foreknowledge of the scope of inquiry to permit a determination of relevance before agreeing to produce his client for deposition. The antitrust investigator has strong incentives to satisfy that legitimate need, since failure of a witness to cooperate voluntarily can only delay or impede the investigation.

Finally, of course, no testimony can be compelled under H.R. 39 except by order of a Federal district court. Such an order will not issue unless the Department establishes the propriety of the investigation, the reasonable scope of the inquiry, the relevance of the information sought by deposition, and the absence of any other valid objection.

III. H.R. 39, and amendments proposed by the Department of Justice, protect the rights of recipients of CID demands for oral testimony.

A. Several witnesses opposing H.R. 39 have focused on the allegedly inquisitorial nature of provisions for the taking of oral testimony. They have analogized a CID deposition proceeding to a grand jury proceeding, and suggested that it would lack the essential protections afforded by the grand jury procedure. These allegations have greatly distorted the nature of the precomplaint deposition, and ignored the careful safeguards provided in H.R. 39 and our suggested amendments.

Under H.R. 39, a person compelled to appear to give oral testimony may be accompanied by counsel, who may interpose himself between the questioner and his client when he believes the questioning threatens his client's interest. This protection is not afforded a grand jury witness. Under H.R. 39, counsel may object on the record when he believes the deponent is entitled to refuse to answer a question "on the grounds of privilege, self-incrimination or other lawful grounds." He may advise his client to refuse answers to any or all questions propounded. In either event, the witness' silence must be respected, unless the government attorney obtains a district court order compelling an answer. The proceeding to obtain such an order would be fully adversary, and the deponent would have the right to counsel.

The deponent may also clarify or complete answers "otherwise equivocal or incomplete on the record" at the conclusion of the examination. The Department has proposed an amendment to H.R. 39, to permit the deponent to examine his transcribed testimony and to request the hearing officer to enter changes on the transcript, provided reasons for such changes are indicated. Counsel would obviously be available to assist the witness in examining and completing the record.

The Department has also proposed an amendment which would exclude from the examination all persons except the deponent, his counsel, the hearing officer and the stenographer. This is in large part a protection for the witness, enabling him to preserve, to the extent he so desires, the confidentiality of his testimony. It obviously affords no opportunity for the investigator to intimidate these witnesses; the presence of counsel protects against this.

The hearing officer is not a Department official, but a neutral party, with authority to administer oaths in the jurisdiction. In most instances the stenographer will also serve as hearing officer, as is the practice in depositions under the Federal Rules of Civil Procedure. His function is essentially a housekeeping one, much like the "presiding

official" in an FTC investigational hearing. He has no authority to compel answers, or to impose sanctions for noncooperation. The decision to answer particular questions, or terminate the entire proceeding, always lies within the discretion of deponent and his counsel.

B. H.R. 39 affords any deponent the right to obtain a copy of his transcribed testimony, except that for good cause shown he may be limited to inspection of the official transcript. The burden of establishing good cause would be upon the Department. This is a significant right, not afforded to grand jury witnesses; at least one supporter of the legislation has suggested that it may impede investigations by facilitating dissemination among target companies who can thus orchestrate a joint defense. (See Hearings, at p. 151). This is undoubtedly true, but it is also true that any witness who wishes to cooperate with potential defendants is always free to do so.

The Department favors retaining the witness' right to obtain a copy of his testimony. Our purpose in seeking authority to compel oral testimony from third parties is investigative, not to coerce or entrap innocent parties. A witness may always choose not to obtain a copy, if he fears that he may be forced to reveal it to a target of the investigation such as an employer or major customer or supplier.

C. Perhaps implicitly recognizing the adequacy of safeguards for witness' rights, some opponents of H.R. 39 advance the somewhat inconsistent suggestion that enactment may make antitrust enforcement more complex, costly and time-consuming by adding a preliminary stage of adversary proceedings, litigation and appeals involving depositions and interrogatories. The short answer is that such has not been the history of CID investigations. We are confident it will not be in the future.

As noted earlier, fewer than one percent of the nearly 1700 CIDs issued by the Antitrust Division have required adjudication by the courts. One reason is the disincentive to litigate at the investigatory stage unless it is absolutely necessary. One important element of efficient investigation is timeliness; resort to the courts to enforce our demands, even when successful, inevitably delays the inquiry while the evidence becomes stale, and the activities under investigation may lose their immediate importance.

We have every interest in tailoring our demands to satisfy the legitimate concerns of recipients, so that compliance will be expeditious and voluntary. This interest is even stronger with respect to CID's directed to third parties under H.R. 39. While target companies may employ resistance to prevent disclosure to the Department of illegal acts, there will be little reason to suspect third parties of being so motivated. In most cases, therefore, it should be possible to reach an accommodation between our needs and the interests of the CID recipient, without resort by either side to litigation.

IV. Adversary participation by target companies in precomplaint investigations would be unprecedented, unworkable, and unnecessary to the protection of legitimate interests.

A. Those who oppose extension of CID authority to include the obtaining of oral or written testimony from third parties urge that any such authority should be conditioned on a right of counsel for the target to notice of such proceedings, an opportunity for adversary participation, and access to materials and transcripts collected. The

Department of Justice is convinced that such an amendment to H.R. 39 would destroy the utility of any deposition power for the following reasons:

(1) At the preliminary stages of an investigation it is impossible to know who the targets are since the objective at this point is to determine whether an antitrust violation has occurred and if so, who has committeed the violation. Thus, as a practical matter it would be impossible to implement this recommendation.

(2) The participation of representatives of the target would greatly complicate and delay the progress of the investigation. Assuming that the targets could be identified, it is not uncommon for an investigation to involve a large number of potential defendants. The presence of attorneys for each target would certainly bog down the investigation.

(3) The mere presence of representatives of the target would discourage third parties from cooperating with antitrust investigators. The target could retaliate against such parties, who might be employees of the target, competitors or customers. An employee, customer, or supplier whose economic survival is dependent on the target is unlikely to be comfortable in giving adverse information about the target in its presence. Yet they are most likely to possess the needed information about antitrust violations.

(4) The participation of the target would provide it with specific detailed knowledge of where the investigation is headed. The target could thus destroy crucial documents or fabricate a defense on the basis of that knowledge, thereby thwarting the investigation.

The proposed participation of the target at the precomplaint stage is unprecedented in American jurisprudence whether one looks to civil or criminal analogies. Courts have consistently held that no such right exists at the investigatory stage. See, e.g., *Hannah* v. *Larche*, 363 U.S. 420 (1960). It would transform the pre-complaint investigation into a mini-trial; the investigatory function would be converted into an adversary proceeding.

Except for preventing the detection of antitrust violations, the target has no substantial interest in participating at this stage since it will have a full opportunity to present a defense if suit is filed. Pre-complaint statements would generally be inadmissible in subsequent litigation as hearsay. The government would be required to prove its case in court at which time the target would have every opportunity to make its defense.

B. It has been asserted by some that under the new Federal Rules of Evidence, Rule 802(d)(1), CID oral deposition testimony would be admissible at trial as proof of the matters asserted. It is argued that this rule is unfair to the defendant because he had no opportunity to cross-examine the witness during the oral deposition.

Rule 802(d)(1) would authorize the introduction of CID oral deposition testimony as non-hearsay only in two limited circumstances. First, when the deponent testifies at trial, is subject to cross-examination concerning his CID statements, and those statements are inconsistent with his trial testimony, then the CID statements are admissible to prove the truth of the matters asserted. No unfairness is involved in this case because the defendant may cross-examine the deponent concerning his CID statements.

Second, when the deponent testifies at trial and is subject to cross-examination concerning his CID statements, those statements are admissible as non-hearsay if (1) consistent with his trial testimony, and (2) offered to rebut a charge of recent fabrication or improper influences or motive. Again, there is no unfairness to the defendant because the admissible CID statements are subject to full cross-examination.

C. Insistence on participation by the target at the investigative stage is grounded in part on the allegation that our purpose in seeking additional civil investigative authority is to gather information in cases we have already decided to file. But once we have satisfied ourselves that a violation exists which merits prosecution, the civil discovery rules are fully adequate for that purpose. Where our pre-complaint investigatory tools are inadequate today, as the cases discussed in Appendix A illustrate, is in affording us sufficient information to make a reasoned determination as to whether a violation exists which should be prosecuted.

Since enactment of the ACPA, only fifteen percent of our CID investigations have resulted in the filing of cases. From our perspective, one vital purpose of pre-complaint investigation is establishment to our satisfaction that a violation does not exist. This permits redeployment of limited resources to more productive use. At present we too often face the Hobson's choice of closing promising investigations for want of sufficient evidence of violation, or filing weak cases in the expectation that such evidence will be developed in post-complaint pretrial discovery.

The Division's ability to file civil actions to trigger pretrial discovery is an unacceptable alternative to adequate pre-complaint investigatory tools. To file suit solely to trigger discovery rights would be an abuse of the judicial process. "The compulsory processes of the judicial system should not be made available for other than judicial purposes. . . . [A plaintiff] cannot pretend to bring charges in order to discover whether actual charges should be brought." Judicial Conference of the United States, Procedure in Anti-trust and Other Protracted Cases, 13 F.R.D. 62, 67 (1951). Moreover, the decision to sue commits Division resources to expensive litigation, and burdens overcrowded court dockets with cases likely to be complex and time-consuming. And the mere announcement of such a suit commands extensive public attention, which may adversely affect named defendants, no matter what the outcome of the litigation.

We believe that providing the Division with necessary tools for effective pre-complaint investigation will substantially benefit both the business community, by reducing the risk of unwarranted prosecutions, as well as the public interest, by increasing prosecutions of major violations. It is clear that interjection of the target into an adversary role at the investigative stage would defeat both objectives.

V. Use of CID authority to support participation in regulatory proceedings would advance the public interest in a competitive economy.

A. H.R. 39 would authorize the Antitrust Division to use its CID investigative powers to gather information relevant to our participation in pending administrative or regulatory agency proceedings. This

authority is sought in recognition of the Division's expanding role as an advocate of procompetitive policies in proceedings before the agencies.

The economic importance of this activity is substantial; approximately 20% of the GNP is currently subject to regulation. The Federal Trade Commission has recognized the importance of this activity, and recently commenced its own program of participation on competitive issues before administrative and regulatory bodies. Obviously the Commission's investigative powers, similar to those we seek in H.R. 39, are available to it in this effort.

B. Some have objected to this authority because it would give the Department broader discovery powers than may be available to other parties in a proceeding. But the Department does not participate on the same footing as other parties, who are asserting their private interests in obtaining a benefit or protection from the regulators. Our interest is as an advocate, often the only one, of the public interest in maximizing competition in the determination of regulatory policy. Where our arguments are unpersuasive for want of adequate supporting data available only in the files of private parties without incentive or duty to produce it, it is the public interest which suffers.

It is also argued that use by the Division of CID powers would nullify the host agency's ability to control discovery proceedings under its own rules. We believe this exaggerates the situation. It should be emphasized that all information so gathered to assist our participation would be subject to examination by other parties and the agency to the same extent as other information sought to be entered in the record of the proceeding. Moreover, we anticipate that we would most often make use of CID information in rulemaking proceedings, of industry-wide consequence, where agency procedures are usually informal, and no discovery is provided for by agency statutes or rules.

It is true that under H.R. 39 the scope and propriety of a CID investigation would be subject to determination by a federal judge, rather than an administrative law judge. We would not agree, however, with the argument that federal judges are less qualified than the ALJ's to evaluate relevance and other issues in the context of the regulated industry involved. On the contrary, we would expect federal judges, especially those sitting in districts where major corporations maintain their principal places of business, and where discovery contests are most often decided, to be fully competent to assess the merits of highly sophisticated commercial issues. And this procedure has its parallel in Federal civil practice today: district courts where discovery is sought may be called upon to rule on objections in cases being litigated under the control of courts in other districts.

Finally, it is suggested that existing inadequacies in agency discovery rules should be addressed directly, through legislation to amend those rules. We agree, and would view with favor such an effort. As a practical matter, however, such piecemeal reform is a long-term project at best. Permitting the Division to supplement agency discovery rules where necessary promises more immediate benefits to the public interest in promoting competition in regulated industries.

U.S. DEPARTMENT OF JUSTICE,
Washington, D.C., May 17, 1976.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: On April 28, 1976, the Subcommittee on Monopolies and Commercial Law favorably reported H.R. 39 to the Committee on the Judiciary. During the course of its deliberations, the Subcommittee considered and rejected an amendment that would have changed existing statutory provisions governing retention of copies of CID material by the Department of Justice.

The Department of Justice strongly supports the Subcommittee's action on this issue.

Under present law, the Department is specifically authorized to make copies of documentary material submitted pursuant to a CID, § 4(c) of the Antitrust Civil Process Act, 15 U.S.C. § 1313(c). At the conclusion of an investigation or a case arising therefrom, the Department is required to return materials to the person who produced them. However, § 4(e) of the Act, 15 U.S.C. § 1313(e), specifically permits the Department to retain copies of documents it has made pursuant to § 4(c).

The Department strongly opposes any amendment that would alter this statutory scheme by requiring it to return all copies it has made of CID materials, for the following reasons:

1. *Retention of this material serves an important and legitimate law enforcement purpose.*—The Antitrust Division of the Department of Justice is organized into litigating sections that have responsibility for enumerated commodities or industries. In order to develop familiarity with these commodities or industries, it is important for Department attorneys to have ready access to historical data describing the organization and operation of various industries. The Department routinely destroys copies it has made of CID data, but some of it is retained in order to provide information on industry structure and common practices or to assist the Department in applying the law consistently within a given commodity or industry classification. This information generally involves impersonal market or economic data and thus does not present the kinds of concerns ordinarily associated with governmental information-gathering activities.

2. *Companies are not prejudiced or injured by the present statutory scheme.*—The present statute carefully minimizes the potential for disruption of business operations in antitrust investigations. A recipient of a CID may supply the Department with copies of documents in lieu of originals, § 4(b), 15 U.S.C. § 1313(b), thus assuring continuity of business operations; of course, even if the recipient decides to give original documents to the Department, it may first make copies for internal use. Companies have no proprietary interest in copies of CID material made by the Department during the course of its investigations.

3. *There has been no allegation, let alone documented instance, of abuse arising under this statutory scheme.*—Since enactment of the

Antitrust Civil Process Act of 1962, the Department has issued about 1700 CIDs, yet the hearings on the Civil Process Act amendments in the House and the Senate do not disclose any claim that the Department's retention policy has been abused or utilized unfairly. In light of the searching consideration of these amendments undertaken by both Houses of Congress, the deficiency in the record indicates that change is not warranted.

The Department believes that the Subcommittee properly defeated efforts to amend the Antitrust Civil Process Act so as to require the Department to return, in addition to originals and copies submitted in lieu of originals, all copies of CID material that it makes in the course of its antitrust investigations. We encourage the Committee on the Judiciary to reject any similar attempt that may be advanced during its consideration of H.R. 13489 (as H.R. 39 has been renumbered).

Sincerely,

JOE SIMS,
Deputy Assistant Attorney General Antitrust Division.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman) :

ANTITRUST CIVIL PROCESS ACT

* * * * * * *

DEFINITIONS

SEC. 2. For the purposes of this Act—

(a) The term "antitrust law" includes:

(1) Each provision of law defined as one of the antitrust laws by section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 730, as amended; 15 U.S.C. 12), commonly known as the Clayton Act;

(2) The Federal Trade Commission Act (15 U.S.C. 41 and the following) ; and

(3) Any statute hereafter enacted by the Congress which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to (A) any restraint upon or monopolization of interstate or foreign trade or commerce, or (B) any unfair trade practice in or affecting such commerce;

(b) The term "antitrust order" means any final order, decree, or judgment of any court of the United States, duly entered in any case or proceeding arising under any antitrust law;

(c) The term "antitrust investigation" means any inquiry conducted by any antitrust investigator for the purpose of ascertaining whether any person is or has been engaged in any antitrust violation *or in any activities in preparation for a merger, acquisition, joint venture, or similar transaction, which, if completed, may violate the antitrust laws*;

(d) The term "antitrust violation" means any act or omission in violation of any antitrust law or any antitrust order;

(e) The term "antitrust investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any antitrust law;

[(f) The term "person" means any corporation, association, partnership, or other legal entity not a natural person;]

(f) The term "person" means any natural person, partnership, corporation, association, or other legal entity;

(g) The term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document; and

(h) The term "custodian" means the [antitrust document] custodian or any deputy custodian designated under section 4(a) of this Act.

CIVIL INVESTIGATIVE DEMAND

SEC. 3. (a) Whenever the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, has reason to believe that any person [under investigation] may be in possession, custody, or control of any documentary material, *or may have any information*, relevant to a civil antitrust investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such *documentary* material for [examination] *inspection and copying or reproduction or to answer in writing written interrogatories or to give oral testimony concerning documents or information or to furnish any combination of such documents, written answers, or oral testimony.*

[(b) Each such demand shall—

[(1) state the nature of the conduct constituting the alleged antitrust violation which is under investigation and the provision of law applicable thereto;

[(2) describe the class or clauses of documentary material to be produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

[(3) prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

[(4) identify the custodian to whom such material shall be made available.

[(c) No such demand shall—

[(1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged antitrust violation; or

[(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged antitrust violation.]

(b) *Each such demand shall—*

(1) state in appropriate detail the nature of—

(A) the conduct constituting the alleged antitrust violation, or

(B) the activities in preparation for a merger, acquisition, joint venture, or similar transaction, which, if completed, may violate the antitrust laws,

which are under investigation and the provision of law applicable thereto;

(2) if it is a demand for production of documentary material,

(A) describe the class or classes of documentary material to be produced thereunder with such definiteness and certainty as to permit such material to be fairly identified; and

(B) prescribe a return date or dates which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(C) identify the custodian to whom such material shall be made available; or

(3) if it is a demand for answers to written interrogatories,

(A) propound with definiteness and certainty the written interrogatories to be answered; and

(B) prescribe a date or dates at which time answers to written interrogatories shall be made; and

(C) identify the custodian to whom such answers shall be made available; or

(4) if it is a demand for the giving of oral testimony,

(A) prescribe a date, time, and place at which oral testimony shall be commenced; and

(B) identify the antitrust investigator or investigators who shall conduct the oral examination and the custodian to whom the transcript of such examination shall be made available.

(c) No such demand shall require the production of any document, the submission of any information, or any oral testimony if such document, information, or testimony would be protected from disclosure under—

(1) the standards applicable to subpenas or subpenas duces tecum issued by a court of the United States in aid of a grand jury investigation, or

(2) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this Act.

(d) *(1)* Any such demand may be served by any antitrust investigator or by any United States marshal or deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) Any such demand or any petition filed under section 5 of this Act may be served upon any person who is not within the territorial

jurisdiction of any court of the United States, in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this Act by such person that such court would have if such person were personally within the jurisdiction of such court.

(e) *(1)* Service of any such demand or of any petition filed under section 5 of this Act may be made upon a partnership, corporation, association, or other legal entity by—

[(1)] *(A)* delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

[(2)] *(B)* delivering a duly executed copy thereof to the principal office or place of business of the partnership, corporation, association, or entity to be served; or

[(3)] *(C)* depositing such copy in the United States mails, by registered or certified mail, *return receipt requested*, duly addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) Service of any such demand or of any petition filed under section 5 of this Act may be made upon any natural person by—

(A) delivering a duly executed copy thereof to the person to be served; or

(B) depositing such copy in the United States mails, by registered or certified mail, return receipt requested, duly addressed to the person to be served at his residence or principal office or place of business.

(f) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(g) The production of documentary material in response to a demand served pursuant to this section shall be made under a sworn certificate by the person, if a natural person, to whom the demand is directed or, if not a natural person, by a person or persons having knowledge of the facts and circumstances relating to such production, to the effect that all of the documentary material described by the demand which is in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the custodian.

(h) Each interrogatory in a demand served pursuant to this section shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objections shall be stated in lieu of an answer, and it shall be submitted under a sworn certificate by the person, if a natural person, to whom the demand is directed or, if not a natural person, by a person or persons responsible for answering each interrogatory, to the effect that all information required by

the demand which is in the possession, custody, or control of the person to whom the demand is directed has been furnished.

(i) (1) The examination of any person pursuant to a demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed. Upon certification the officer before whom the testimony is taken shall promptly transmit the transcript of the testimony to the possession of the antitrust investigator conducting the examination.

(2) The antitrust investigator or investigators conducting the examination shall exclude from the place where the examination is held all other persons except the person being examined, his counsel, the officer before whom the testimony is to be taken, and any stenographer taking such testimony. The provisions of the Act of March 3, 1913 (ch. 114, 37 Stat. 731; 15 U.S.C. 30), shall not apply to such examinations.

(3) The oral testimony of any person taken pursuant to a demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon between the antitrust investigator conducting the examination and such person.

(4) When the testimony is fully transcribed, the transcript shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the transcript by the officer with a statement of the reasons given by the witness for making them. The transcript shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the transcript is not signed by the witness within thirty days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor. The officer shall certify on the transcript that the witness was duly sworn by him and that the transcript is a true record of the testimony given by the witness and promptly send it by registered or certified mail to the investigator. Upon payment of reasonable charges therefor, the investigator shall furnish a copy of the transcript to the witness only, except that the Assistant Attorney General in charge of the Antitrust Division may for good cause limit such witness to inspection of the official transcript of his testimony.

(5) (A) Any person compelled to appear under a demand for oral testimony pursuant to this section may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, either upon the request of such person or upon counsel's own intiative, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall state for the record the reason for the objection. An objection may properly be made, received, and entered upon the record

when it is claimed that such person is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. If such person refuses to answer any question, the antitrust investigator conducting the examination may petition the district court of the United States pursuant to section 5 of this Act for an order compelling such person to answer such question. Such person shall not otherwise object to or refuse to answer any question, and shall not by himself or through counsel otherwise interrupt the oral examination.

(B) If such person refuses to answer any question on grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provision of part V of title 18, United States Code.

(6) Any person appearing for oral examination pursuant to a demand served under this section shall be paid the same fees and mileage which are paid to witnesses in the district courts of the United States.

[ANTITRUST DOCUMENT CUSTODIAN**]** *CUSTODIAN OF DOCUMENTS, ANSWERS, AND TRANSCRIPTS*

SEC. 4. (a) The Assistant Attorney General in charge of the Antitrust Division of the Department of Justice shall designate an antitrust investigator to serve as **[**antitrust document**]** custodian *of documentary material, answers to interrogatories, and transcripts of oral testimony made available to him under section 3 of this Act*, and such additional antitrust investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(b) Any person, upon whom any demand **[**issued**]** under section 3 *of this Act for the production of documentary material* has been duly served, shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person (or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to section 5(d) of this Act) on the return date specified in such demand (or on such later date as such custodian may prescribe in writing). Such person may upon written agreement between such person and the custodian substitute **[**for copies**]** *copies for originals* of all or any part of such *documentary* material **[**originals thereof**]**.

[(c) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this Act. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than a duly authorized officer, member, or employee of the Department of Justice. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the cus-

todian shall be available for examination by the person who produced such material or any duly authorized representative of such person.

[(d) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged antitrust violation, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

[(e) Upon the completion of (1) the antitrust investigation for which any documentary material was produced under this Act, and (2) any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material (other than copies thereof made by the Department of Justice pursuant to subsection (c)) which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

[(f) When any documentary material has been produced by any person under this Act for use in any antitrust investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General or upon the Assistant Attorney General in charge of the Antitrust Division, to the return of all documentary material (other than copies thereof made by the Department of Justice pursuant to subsection (c)) so produced by such person.

[(g) In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material produced under any demand issued under this Act, or the official relief of such custodian from responsibility for the custody and control of such material, the Assistant Attorney General in charge of the Antitrust Division shall promptly (1) designate another antitrust investigator to serve as custodian thereof, and (2) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated. Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this Act upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian]

(c) (1) The custodian to whom any documentary material, answers to interrogatories, or transcripts of oral testimony are delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return of documentary material, pursuant to this Act.

(2) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any duly authorized official or employee of the Department of Justice under regulations which shall be promulgated by the Attorney General. Such material, answers, and transcripts may be used by any such officer or employee in connection with the taking of oral testimony pursuant to this Act.

(3) The custodian shall not make available for examination any documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, except—

(A) as permitted under paragraph (2) of this subsection;

(B) as permitted under such reasonable terms and conditions as shall be promulgated by the Attorney General, to the person who produced such material, answers, or oral testimony, or his duly authorized representative upon the request of such person;

(C) with respect to such materials and answers, to any other person, with the consent of the person who produced such material or answers; or

(D) with respect to transcripts of oral testimony, to any other person, with the consent of the person who produced such transcripts, unless the person who produced such transcripts is limited to inspection of the official transcript of his oral testimony pursuant to section 3(i)(4) of this Act.

(d) (1) Whenever any attorney of the Department of Justice has been designated to appear (A) before any court or grand jury in any case of proceeding involving any alleged antitrust violation, or (B) before any Federal administrative or regulatory agency in any proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony may deliver to such attorney such documentary material, answers to interrogatories, or transcripts of oral testimony for official use in connection with any such case or any such proceeding as such attorney determines to be required. Upon the completion of any such case or any such proceeding, such attorney shall return to the custodian any such materials, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or Federal administrative or regulatory agency through the introduction thereof into the record of such case or such proceeding.

(2) The custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony may deliver to the Federal Trade Commission, in response to a written request, copies of such documentary material, answers to interrogatories, or transcripts of oral testimony for use in connection with an investigation or proceeding under the Commission's jurisdiction. Such material, answers, or transcripts may only be used by the Commission in such manner and subject to such conditions as apply to the Department of Justice under this Act.

(e) If any documentary material (other than copies thereof) has been produced in the course of any antitrust investigation by any person pursuant to a demand under section 3 of this Act and—

(1) any case or proceeding before any court or grand jury arising out of such investigation, or any proceeding before any Federal administrative or regulatory agency involving such material, has been completed, or

(2) no case or proceeding, in which such material may be used, has been commenced within a reasonable time after completion

of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material which has not passed into the control of any court, grand jury, or agency through the introduction of such material into the record of such court, grand jury, or agency.

(f) In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced under any demand issued pursuant to section 3 of this Act, or the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Assistant Attorney General in charge of the Antitrust Division shall promptly (1) designate another antitrust investigator to serve as custodian of such material, answers, or testimony and (2) transmit in writing to the person who produced material, answers, or testimony pursuant to a demand under section 3 of this Act, notice as to the identity and address of the successor so designated. Any successor designated under this subsection shall have with regard to such material, answers, or transcripts all duties and responsibilities imposed by this Act upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation.

JUDICIAL PROCEEDINGS

SEC. 5. (a) Whenever any person fails to comply with any civil investigative demand duly served upon him under section 3 or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General, through such officers or attorneys as he may designate, may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this Act, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(b) Within twenty days after the service of any such demand upon any person, or at any time before the [return] *compliance* date specified in the demand, whichever period is shorter, *or within such period exceeding twenty days after service or in excess of such compliance date as may be prescribed in writing, subsequent to service, by the antitrust investigator named in the demand,* such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such [custodian] *antitrust investigator* a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground

upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this Act, or upon any constitutional or other legal right or privilege of such person.

(c) At any time during which any custodian is in custody or control of any documentary material, *answers to interrogatories, or transcripts of oral testimony,* delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this Act.

(d) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this Act. Any final order so entered shall be subject to appeal pursuant to section 1291 of title 28 of the United States Code. Any disobedience of any final order entered under this section by any court shall be punished as a contempt thereof.

(e) To the extent that such rules may have application and are not inconsistent with the provisions of this Act, the Federal Rules of Civil Procedure shall apply to any petition under this Act.

(f) Any material provided pursuant to any demand issued under this Act shall be exempt from disclosure under section 552 of title 5, United States Code.

* * * * * * *

SECTION 1505 OF TITLE 18, UNITED STATES CODE

§ 1505. Obstruction of proceedings before departments, agencies, and committees

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein; or

Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part with any civil investigative demand duly and properly made under the Antitrust Civil Process Act or section 1968 of this title willfully removes from any place, conceals, destroys, mutilates, alters, or by other means falsifies any *oral testimony, written information, or* documentary material which is the subject of such demand, *or attempts to or solicits another to do so*; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors

to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

APPENDIX I

That this Act may be cited as the "Antitrust Civil Process Act Amendments of 1976".

DEFINITIONS

SEC. 2. Section 2 of the Antitrust Civil Process Act (15 U.S.C. 1311) is amended—

(1) by amending subsection (c) to read as follows:

"(c) The term 'antitrust investigation' means any inquiry conducted by any antitrust investigator for the purpose of ascertaining whether any person is or has been engaged in any antitrust violation or in any activities in preparation for a merger, acquisition, joint venture, or similar transaction, which, if completed, may violate the antitrust laws;".

(2) by amending subsection (f) to read as follows:

"(f) The term 'person' means any natural person, partnership, corporation, association, or other legal entity;".

(3) by amending subsection (h) to read as follows:

"(h) The term 'custodian' means the custodian or any deputy custodian designated under section 4(a) of this Act.".

CIVIL INVESTIGATIVE DEMANDS

SEC. 3. Section 3 of such Act (15 U.S.C. 1312) is amended to read as follows:

"CIVIL INVESTIGATIVE DEMANDS

"SEC. 3. (a) Whenever the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, has reason to believe that any person may be in possession, custody, or control of any documentary material, or may have any information, relevant to a civil antitrust investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction or to answer in writing written interrogatories or to give oral testimony concerning documents or information or to furnish any combination of such documents, written answers, or oral testimony.

"(b) Each such demand shall—

"(1) state in appropriate detail the nature of—

"(A) the conduct constituting the alleged antitrust violation, or

"(B) the activities in preparation for a merger, acquisition, joint venture, or similar transaction, which, if completed, may violate the antitrust laws,

which are under investigation and the provision of law applicable thereto;

"(2) if it is a demand for production of documentary material,

"(A) describe the class or classes of documentary material to be produced thereunder with such definiteness and certainty as to permit such material to be fairly identified; and

"(B) prescribe a return date or dates which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

"(C) identify the custodian to whom such material shall be made available; or

"(3) if it is a demand for answers to written interrogatories,

"(A) propound with definiteness and certainty the written interrogatories to be answered; and

"(B) prescribe a date or dates at which time answers to written interrogatories shall be made; and

"(C) identify the custodian to whom such answers shall be made available; or

"(4) if it is a demand for the giving of oral testimony,

"(A) prescribe a date, time, and place at which oral testimony shall be commenced; and

"(B) identify the antitrust investigator or investigators who shall conduct the oral examination and the custodian to whom the transcript of such examination shall be made available.

"(c) No such demand shall require the production of any document, the submission of any information, or any oral testimony if such document, information, or testimony would be protected from disclosure under—

"(1) the standards applicable to subpenas or subpenas duces tecum issued by a court of the United States in aid of a grand jury investigation, or

"(2) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this Act.

"(d)(1) Any such demand may be served by any antitrust investigator, or by any United States marshal or deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

"(2) Any such demand or any petition filed under section 5 of this Act may be served upon any person who is not within the territorial jurisdiction of any court of the United States, in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this Act by such person that such court would have if such person were personally within the jurisdiction of such court.

"(e)(1) Service of any such demand or of any petition filed under section 5 of this Act may be made upon a partnership, corporation, association, or other legal entity by—

"(A) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

"(B) delivering a duly executed copy thereof to the principal office or place of business of the partnership, corporation, association, or entity to be served; or

"(C) depositing such copy in the United States mails, by registered or certified mail, return receipt requested, duly addressed to such partnership, corporation, association, or entity at its principal office or place of business.

"(2) Service of any such demand or of any petition filed under section 5 of this Act may be made upon any natural person by—

"(A) delivering a duly executed copy thereof to the person to be served; or

"(B) depositing such copy in the United States mails, by registered or certified mail, return receipt requested, duly addressed to the person to be served at his residence or principal office or place of business.

"(f) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

"(g) The production of documentary material in response to a demand served pursuant to this section shall be made under a sworn certificate by the person, if a natural person, to whom the demand is directed or, if not a natural person, by a person or persons having knowledge of the facts and circumstances relating to such production, to the effect that all of the documentary material described by the demand which is in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the custodian.

"(h) Each interrogatory in a demand served pursuant to this section shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objections shall be stated in lieu of an answer, and it shall be submitted under a sworn certificate by the person, if a natural person, to whom the demand is directed or, if not a natural person, by a person or persons responsible for answering each interrogatory, to the effect that all information required by the demand which is in the possession, custody, or control of the person to whom the demand is directed has been furnished.

"(i) (1) The examination of any person pursuant to a demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed. Upon certification the officer before whom the testimony is

taken shall promptly transmit the transcript of the testimony to the possession of the antitrust investigator conducting the examination.

"(2) The antitrust investigator or investigators conducting the examination shall exclude from the place where the examination is held all other persons except the person being examined, his counsel, the officer before whom the testimony is to be taken, and any stenographer taking such testimony. The provisions of the Act of March 3, 1913 (ch. 114, 37 Stat. 731; 15 U.S.C. 30), shall not apply to such examinations.

"(3) The oral testimony of any person taken pursuant to a demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon between the antitrust investigator conducting the examination and such person.

"(4) When the testimony is fully transcribed, the transcript shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the transcript by the officer with a statement of the reasons given by the witness for making them. The transcript shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the transcript is not signed by the witness within thirty days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor. The officer shall certify on the transcript that the witness was duly sworn by him and that the transcript is a true record of the testimony given by the witness and promptly send it by registered or certified mail to the investigator. Upon payment of reasonable charges therefor, the investigator shall furnish a copy of the transcript to the witness only, except that the Assistant Attorney General in charge of the Antitrust Division may for good cause limit such witness to inspection of the official transcript of his testimony.

"(5) (A) Any person compelled to appear under a demand for oral testimony pursuant to this section may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, either upon the request of such person or upon counsel's own initiative, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall state for the record the reason for the objection. An objection may properly be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege, including the privilege against self-incriminaton. If such person refuses to answer any question, the antitrust investigator conducting the examination may petition the district court of the United States pursuant to section 5 of this Act for an order compelling such person to answer such question. Such person shall not otherwise object to or refuse to answer any question, and shall not by himself or through counsel otherwise interrupt the oral examination.

"(B) If such person refuses to answer any question on grounds of the privilege against self-incrimination, the testimony of such person

may be compelled in accordance with the provisions of part V of title 18, United States Code.

"(6) Any person appearing for oral examination pursuant to a demand served under this section shall be paid the same fees and mileage which are paid to witnesses in the district courts of the United States.".

CUSTODIAN OF DOCUMENTS, ANSWERS, AND TRANSCRIPTS

SEC. 4. Section 4 of such Act is amended to read as follows:

"CUSTODIAN OF DOCUMENTS, ANSWERS, AND TRANSCRIPTS

"SEC. 4. (a) The Assistant Attorney General in charge of the Antitrust Division of the Department of Justice shall designate an antitrust investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony made available to him under section 3 of this Act, and such additional antitrust investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

"(b) Any person, upon whom any demand under section 3 of this Act for the production of documentary material has been duly served, shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person (or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to section 5(d) of this Act) on the return date specified in such demand (or on such later date as such custodian may prescribe in writing). Such person may upon written agreement between such person and the custodian substitute copies for originals of all or any part of such documentary material.

"(c) (1) The custodian to whom any documentary material, answers to interrogatories, or transcripts of oral testimony are delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return of documentary material, pursuant to this Act.

"(2) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any duly authorized official or employee of the Department of Justice under regulations which shall be promulgated by the Attorney General. Such material, answers, and transcripts may be used by any such officer or employee in connection with the taking of oral testimony pursuant to this Act.

"(3) The custodian shall not make available for examination any documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, except—

"(A) as permitted under paragraph (2) of this subsection;

"(B) as permitted under such reasonable terms and conditions as shall be promulgated by the Attorney General, to the person who produced such material, answers, or oral testimony, or his duly authorized representative, upon the request of such person;

"(C) with respect to such materials and answers, to any other person, with the consent of the person who produced such material or answers; or

"(D) with respect to transcripts of oral testimony, to any other person, with the consent of the person who produced such transcripts, unless the person who produced such transcripts is limited to inspection of the official transcript of his oral testimony pursuant to section 3(i)(4) of this Act.

"(d) (1) Whenever any attorney of the Department of Justice has been designated to appear (A) before any court or grand jury in any case or proceeding involving any alleged antitrust violation, or (B) before any Federal administrative or regulatory agency in any proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony may deliver to such attorney such documentary material, answers to interrogatories, or transcripts of oral testimony for official use in connection with any such case or any such proceeding as such attorney determines to be required. Upon the completion of any such case or any such proceeding, such attorney shall return to the custodian any such materials, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or Federal administrative or regulatory agency through the introduction thereof into the record of such case or such proceeding.

"(2) The custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony may deliver to the Federal Trade Commission, in response to a written request, copies of such documentary material, answers to interrogatories, or transcripts of oral testimony for use in connection with an investigation or proceeding under the Commission's jurisdiction. Such material, answers, or transcripts may only be used by the Commission in such manner and subject to such conditions as apply to the Department of Justice under this Act.

"(e) If any documentary material (other than copies thereof) has been produced in the course of any antitrust investigation by any person pursuant to a demand under section 3 of this Act and—

"(1) any case or proceeding before any court or grand jury arising out of such investigation, or any proceeding before any Federal administrative or regulatory agency involving such material, has been completed, or

"(2) no case or proceeding, in which such material may be used, has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material which has not passed into the control of any court, grand jury, or agency through the introduction of such material into the record of such court, grand jury, or agency.

"(f) In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced under any demand issued pursuant to section 3 of this Act, or the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Assistant Attorney General in charge of the Antitrust Division shall promptly (1) designate another antitrust investigator to serve as

custodian of such material, answers, or testimony and (2) transmit in writing to the person who produced material, answers, or testimony pursuant to a demand under section 3 of this Act, notice as to the identity and address of the successor so designated. Any successor designated under this subsection shall have with regard to such material, answers, or transcripts all duties and responsibilities imposed by this Act upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation.".

JUDICIAL PROCEEDINGS

SEC. 5. (a) The first sentence of subsection (b) of section 5 is amended to read as follows:

"Within twenty days after the service of any such demand upon any person, or at any time before the compliance date specified in the demand, whichever period is shorter, or within such period exceeding twenty days after service or in excess of such compliance date as may be prescribed in writing, subsequent to service, by the antitrust investigator named in the demand, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such antitrust investigator a petition for an order of such court modifying or setting aside such demand.".

(b) Subsection (c) of section 5 is amended by inserting ", answers to interrogatories, or transcripts of oral testimony," after "material".

(c) Section 5 is further amended by adding at the end thereof the following:

"(f) Any material provided pursuant to any demand issued under this Act shall be exempt from disclosure under section 552 of title 5, United States Code.".

CRIMINAL PENALTY

SEC. 6. The third paragraph of section 1505 of title 18, United States Code, is amended—

(1) by inserting "oral testimony, written information, or" before "documentary material"; and

(2) by inserting ", or attempts to or solicits another to do so" after "subject of such demand".

EFFECTIVE DATE

SEC. 7. The amendments to the Antitrust Civil Process Act made by this Act shall take effect on the date of enactment of this Act. Any such amendment which provides for the production of documentary material, answers to interrogatories, or oral testimony shall be effective with respect to any act or practice without regard to the date on which it occurred.

ADDITIONAL VIEWS OF MESSRS. McCLORY, WIGGINS, HUTCHINSON, FISH, COHEN, MOORHEAD, ASHBROOK, HYDE, AND KINDNESS

We object to those provisions in the bill that would permit the Department of Justice to compile dossiers on individuals in their business affairs as well as on corporations themselves. We do not object to the authority granted by the bill to the Department to obtain information relevant to an antitrust investigation. But once the Department's purpose in originally securing the information has ceased, when litigation is at an end or the investigation has been dropped, we believe that the Department should no longer retain the information merely to monitor the business affairs of individuals and corporations alike.

The Committee rejected an amendment offered by Mr. McClory in Subcommittee and re-offered by Mr. Wiggins on his behalf in full Committee which would have required the Department to return all information it held when such information became no longer necessary for current law enforcement purposes. The Committee took this action by a 17–11 roll call vote on the basis of three arguments: (1) that retention of the information was useful for the Department in monitoring antitrust activities, (2) that there had been no history of complaints or abuse, and (3) that the subject matter of the information was not likely to be "personal."

The first point needs little comment. Dossiers always facilitate law enforcement, and antitrust law enforcement is no exception. A library of dossiers would obviate the need to demonstrate anew that the information is relevant to any subsequent investigations. We do not consider this a matter of administrative economy but a circumvention of the very safeguards the bill carefully provides. What the majority has said by its action is that once an item of information is furnished in an antitrust investigation, a right to retain copies of that information vests in the Department in perpetuity. We find that result both unnecessary and undesirable.

It should be noted that this right in perpetuity vests whether or not the information ultimately turns out to be, in fact, relevant. Thus information which was never relevant to the case ultimately fashioned by the Department may be retained indefinitely. This right devolves upon the Department even though it was originally mistaken in its belief that the information was relevant; ironically, such a right would not obtain where the Department knew the truth all along, that the information was irrelevant.

Second, the majority contended that there was no history of complaints or abuse under current practice. This argument likewise does not withstand scrutiny. Current practice is dictated by the Antitrust Civil Practice Act of 1962, which limits CID's exclusively to corporations under investigation. The bill would expand CID authority to include human beings who are not under investigation but who may possess relevant information.

The short answer to the majority's argument is that it is the change in the current practice proposed by the bill that makes the McClory amendment more necessary than ever. Under current practice it is not possible to abuse individuals' rights of privacy, so limiting is the law. The safeguard of the McClory amendment finds its compulsion in the possibilities for abuse created by the bill.

Moreover, under current practice, corporations under investigation have had no basis to complain to the Department because retention of the information is blessed with express statutory authorization. In 1962, when Congress granted this authorization, it was thought that Fourth Amendment values were confined to a criminal law context. It was not until 1967 that the Supreme Court held that a search warrant might be necessary in an administrative context, declaring: "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Camara* v. *Municipal Court*, 387, U.S. 523, 530 (1967). Since the 1962 Act did not appreciate this anomaly, complaints to the Department would have been fruitless. The forum for such complaints is the Congress, and the time to consider making a change in the law is now.

The third argument of the majority was that the information indefinitely retained was not likely to be "personal". We believe that the argument is incorrect and, if correct, irrelevant. It appears to us that the argument is a disguised statement of the "anomalous" position questioned by the Supreme Court. It suggests that the law should not be so much concerned with protecting privacy as with preventing embarrassment. But individuals who have nothing to hide have an equal claim to the law's protection. We do not find it a relevant distinction that the information retained be either personal or not personal. Nor can we understand why an individual's business affairs are less personal than his illegal affairs.

Moreover, it should not be forgotten that Sherman Act violations may justify criminal penalties. The information demanded by a CID may be incriminating. Certainly, such information is "personal". Yet under the Committee bill the Department may retain it forever.

We believe that individuals in all their affairs, including business affairs, have the right to be left alone with the exception that government for good reason may make a minimal, necessary intrusion for the purpose of executing its assigned functions. We believe that once the reason for the intrusion has ceased, the intrusion itself must likewise cease.

Therefore, once the Department no longer needs the information for current investigation or litigation, its reason for obtaining the information has run its course and the information—either originals or copies—should be returned.

ROBERT MCCLORY.
CHARLES E. WIGGINS.
EDWARD HUTCHINSON.
HAMILTON FISH, JR.
WILLIAM S. COHEN.
CARLOS J. MOORHEAD.
JOHN M. ASHBROOK.
HENRY J. HYDE.
THOMAS N. KINDNESS.

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Ninety-fourth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Monday, the nineteenth day of January, one thousand nine hundred and seventy-six

An Act

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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Hart-Scott-Rodino Antitrust Improvements Act of 1976".

TABLE OF CONTENTS

TITLE I—ANTITRUST CIVIL PROCESS ACT AMENDMENTS

DEFINITIONS

SEC. 101. Section 2 of the Antitrust Civil Process Act (15 U.S.C. 1311) is amended—

(1) in subsection (a)—

(A) by inserting "and" after the semicolon at the end of paragraph (1);

(B) by striking out paragraph (2) and redesignating paragraph (3) as paragraph (2); and

(C) by striking out "(A)" and ", or (B) any unfair trade practice in or affecting such commerce" in paragraph (2) (as redesignated by subparagraph (B)).

(2) by amending subsection (c) to read as follows:

"(c) The term 'antitrust investigation' means any inquiry conducted by any antitrust investigator for the purpose of ascertaining whether any person is or has been engaged in any antitrust violation or in any activities in preparation for a merger, acquisition, joint venture, or similar transaction, which, if consummated, may result in an antitrust violation;".

(3) by amending subsection (f) to read as follows:

"(f) The term 'person' means any natural person, partnership, corporation, association, or other legal entity, including any person acting under color or authority of State law;".

(4) by amending subsection (h) to read as follows:

"(h) The term 'custodian' means the custodian or any deputy custodian designated under section 4(a) of this Act.".

CIVIL INVESTIGATIVE DEMANDS

SEC. 102. Section 3 of the Antitrust Civil Process Act (15 U.S.C. 1312) is amended to read as follows:

"CIVIL INVESTIGATIVE DEMANDS

"SEC. 3. (a) Whenever the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, has reason to believe that any person may be in possession, custody, or control of any documentary material, or may have any information, relevant to a civil antitrust investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction, to answer in writing written interrogatories, to give oral testimony concerning documentary material or information, or to furnish any combination of such material, answers, or testimony.

"(b) Each such demand shall—

"(1) state the nature of—

"(A) the conduct constituting the alleged antitrust violation, or

"(B) the activities in preparation for a merger, acquisition, joint venture, or similar transaction, which, if consummated, may result in an antitrust violation,

which are under investigation and the provision of law applicable thereto;

"(2) if it is a demand for production of documentary material—

"(A) describe the class or classes of documentary material to be produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

"(B) prescribe a return date or dates which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

"(C) identify the custodian to whom such material shall be made available; or

"(3) if it is a demand for answers to written interrogatories—

"(A) propound with definiteness and certainty the written interrogatories to be answered;

"(B) prescribe a date or dates at which time answers to written interrogatories shall be submitted; and

"(C) identify the custodian to whom such answers shall be submitted; or

"(4) if it is a demand for the giving of oral testimony—

"(A) prescribe a date, time, and place at which oral testimony shall be commenced; and

"(B) identify an antitrust investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted.

"(c) No such demand shall require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony, if such material, answers, or testimony would be protected from disclosure under—

"(1) the standards applicable to subpenas or subpenas duces tecum issued by a court of the United States in aid of a grand jury investigation, or

"(2) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this Act.

"(d) (1) Any such demand may be served by any antitrust investigator, or by any United States marshal or deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

"(2) any such demand or any petition filed under section 5 of this Act may be served upon any person who is not to be found within the territorial jurisdiction of any court of the United States, in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this Act by such person that such court would have if such person were personally within the jurisdiction of such court.

"(e) (1) Service of any such demand or of any petition filed under section 5 of this Act may be made upon a partnership, corporation, association, or other legal entity by—

"(A) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

"(B) delivering a duly executed copy thereof to the principal office or place of business of the partnership, corporation, association, or entity to be served; or

"(C) depositing such copy in the United States mails, by registered or certified mail, return receipt requested, duly addressed to such partnership, corporation, association, or entity at its principal office or place of business.

"(2) Service of any such demand or of any petition filed under section 5 of this Act may be made upon any natural person by—

"(A) delivering a duly executed copy thereof to the person to be served; or

"(B) depositing such copy in the United States mails by registered or certified mail, return receipt requested, duly addressed to such person at his residence or principal office or place of business.

"(f) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

"(g) The production of documentary material in response to a demand served pursuant to this section shall be made under a sworn certificate, in such form as the demand designates, by the person, if a natural person, to whom the demand is directed or, if not a natural person, by a person or persons having knowledge of the facts and circumstances relating to such production, to the effect that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the custodian.

"(h) Each interrogatory in a demand served pursuant to this section shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for the objection shall be stated in lieu of an answer, and it shall be submitted under

a sworn certificate, in such form as the demand designates, by the person, if a natural person, to whom the demand is directed or, if not a natural person, by a person or persons responsible for answering each interrogatory, to the effect that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted.

"(i)(1) The examination of any person pursuant to a demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian.

"(2) The antitrust investigator or investigators conducting the examination shall exclude from the place where the examination is held all other persons except the person being examined, his counsel, the officer before whom the testimony is to be taken, and any stenographer taking such testimony. The provisions of the Act of March 3, 1913 (Ch. 114, 37 Stat. 731; 15 U.S.C. 30), shall not apply to such examinations.

"(3) The oral testimony of any person taken pursuant to a demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the antitrust investigator conducting the examination and such person.

"(4) When the testimony is fully transcribed, the antitrust investigator or the officer shall afford the witness (who may be accompanied by counsel) a reasonable opportunity to examine the transcript; and the transcript shall be read to or by the witness, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the antitrust investigator with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within thirty days of his being afforded a reasonable opportunity to examine it, the officer or the antitrust investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reason, if any, given therefor.

"(5) The officer shall certify on the transcript that the witness was duly sworn by him and that the transcript is a true record of the testimony given by the witness, and the officer or antitrust investigator shall promptly deliver it or send it by registered or certified mail to the custodian.

"(6) Upon payment of reasonable charges therefor, the antitrust investigator shall furnish a copy of the transcript to the witness only, except that the Assistant Attorney General in charge of the Antitrust Division may for good cause limit such witness to inspection of the official transcript of his testimony.

"(7)(A) Any person compelled to appear under a demand for oral testimony pursuant to this section may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence,

either upon the request of such person or upon counsel's own initiative, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may properly be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person shall not otherwise object to or refuse to answer any question, and shall not by himself or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, the antitrust investigator conducting the examination may petition the district court of the United States pursuant to section 5 of this Act for an order compelling such person to answer such question.

"(B) If such person refuses to answer any question on grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18, United States Code.

"(8) Any person appearing for oral examination pursuant to a demand served under this section shall be entitled to the same fees and mileage which are paid to witnesses in the district courts of the United States.".

CUSTODIAN OF DOCUMENTS, ANSWERS, AND TRANSCRIPTS

SEC. 103. Section 4 of such Act is amended to read as follows:

"CUSTODIAN OF DOCUMENTS, ANSWERS, AND TRANSCRIPTS

"SEC. 4. (a) The Assistant Attorney General in charge of the Antitrust Division of the Department of Justice shall designate an antitrust investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this Act, and such additional antitrust investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

"(b) Any person, upon whom any demand under section 3 of this Act for the production of documentary material has been duly served, shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person (or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to section 5(d) of this Act) on the return date specified in such demand (or on such later date as such custodian may prescribe in writing). Such person may upon written agreement between such person and the custodian substitute copies for originals of all or any part of such material.

"(c) (1) The custodian to whom any documentary material, answers to interrogatories, or transcripts of oral testimony are delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return of documentary material, pursuant to this Act.

"(2) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any duly authorized official or employee of the Department of Justice under regulations which shall be promulgated by the Attorney General. Notwith-

standing paragraph (3) of this subsection, such material, answers, and transcripts may be used by any such official or employee in connection with the taking of oral testimony pursuant to this Act.

"(3) Except as otherwise provided in this section, while in the possession of the custodian, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, so produced shall be available for examination, without the consent of the person who produced such material, answers, or transcripts, by any individual other than a duly authorized official or employee of the Department of Justice. Nothing in this section is intended to prevent disclosure to either body of the Congress or to any authorized committee or subcommittee thereof.

"(4) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe, (A) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by any duly authorized representative of such person, and (B) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or his counsel.

"(d) (1) Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal administrative or regulatory agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case, grand jury, or proceeding as such attorney determines to be required. Upon the completion of any such case, grand jury, or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through the introduction thereof into the record of such case or proceeding.

"(2) The custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony may deliver to the Federal Trade Commission, in response to a written request, copies of such material, answers, or transcripts for use in connection with an investigation or proceeding under the Commission's jurisdiction. Such material, answers, or transcripts may only be used by the Commission in such manner and subject to such conditions as apply to the Department of Justice under this Act.

"(e) If any documentary material has been produced in the course of any antitrust investigation by any person pursuant to a demand under this Act and—

"(1) any case or proceeding before any court or grand jury arising out of such investigation, or any proceeding before any Federal administrative or regulatory agency involving such material, has been completed, or

"(2) no case or proceeding, in which such material may be used, has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies thereof furnished to the custodian pursuant to subsection (b) of this section or made by the Department of Justice pursuant to subsection (c) of this section) which has not passed into the control of any court, grand jury, or agency through the introduction thereof into the record of such case or proceeding.

"(f) In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced under any demand issued pursuant to this Act, or the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Assistant Attorney General in charge of the Antitrust Division shall promptly (1) designate another antitrust investigator to serve as custodian of such material, answers, or transcripts, and (2) transmit in writing to the person who produced such material, answers, or testimony notice as to the identity and address of the successor so designated. Any successor designated under this subsection shall have with regard to such material, answers, or transcripts all duties and responsibilities imposed by this Act upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred prior to his designation.".

JUDICIAL PROCEEDINGS

SEC. 104. (a) Section 5(a) of such Act is amended by striking out ", except that if" and all that follows down through the end of the sentence and inserting in lieu thereof a period.

(b) The first sentence of subsection (b) of section 5 of such Act is amended to read as follows: "Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, or within such period exceeding twenty days after service or in excess of such return date as may be prescribed in writing, subsequent to service, by any antitrust investigator named in the demand, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such antitrust investigator a petition for an order of such court modifying or setting aside such demand.".

(c) The second sentence of subsection (b) of section 5 is amended by striking out the period at the end thereof and by inserting in lieu thereof: ", except that such person shall comply with any portions of the demand not sought to be modified or set aside.".

(d) Subsection (c) of section 5 is amended by striking out "delivered" and inserting in lieu thereof "or answers to interrogatories delivered, or transcripts of oral testimony given".

(e) Section 5 is further amended by adding at the end thereof the following:

"(f) Any documentary material, answers to written interrogatories, or transcripts of oral testimony provided pursuant to any demand issued under this Act shall be exempt from disclosure under section 552 of title 5, United States Code.".

CRIMINAL PENALTY

SEC. 105. The third paragraph of section 1505 of title 18, United States Code, is amended to read as follows:

"Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or".

EFFECTIVE DATE

SEC. 106. The amendments to the Antitrust Civil Process Act and to section 1505 of title 18, United States Code, made by this title shall take effect on the date of enactment of this Act, except section 3(i)(8) of the Antitrust Civil Process Act (as amended by this Act) shall take effect on the later of (1) the date of enactment of this Act, or (2) October 1, 1976. Any such amendment which provides for the production of documentary material, answers to interrogatories, or oral testimony shall apply to any act or practice without regard to the date on which it occurred.

TITLE II—PREMERGER NOTIFICATION

NOTIFICATION AND WAITING PERIOD

SEC. 201. The Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting immediately after section 7 of such Act the following new section:

"SEC. 7A. (a) Except as exempted pursuant to subsection (c), no person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification pursuant to rules under subsection (d)(1) and the waiting period described in subsection (b)(1) has expired, if—

"(1) the acquiring person, or the person whose voting securities or assets are being acquired, is engaged in commerce or in any activity affecting commerce;

"(2)(A) any voting securities or assets of a person engaged in manufacturing which has annual net sales or total assets of $10,000,000 or more are being acquired by any person which has total assets or annual net sales of $100,000,000 or more;

"(B) any voting securities or assets of a person not engaged in manufacturing which has total assets of $10,000,000 or more are being acquired by any person which has total assets or annual net sales of $100,000,000 or more; or

"(C) any voting securities or assets of a person with annual net sales or total assets of $100,000,000 or more are being acquired by any person with total assets or annual net sales of $10,000,000 or more; and

"(3) as a result of such acquisition, the acquiring person would hold—

"(A) 15 per centum or more of the voting securities or assets of the acquired person, or

"(B) an aggregate total amount of the voting securities and assets of the acquired person in excess of $15,000,000.

In the case of a tender offer, the person whose voting securities are sought to be acquired by a person required to file notification under this subsection shall file notification pursuant to rules under subsection (d).

"(b)(1) The waiting period required under subsection (a) shall—

"(A) begin on the date of the receipt by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (hereinafter referred to in this section as the 'Assistant Attorney General') of—

"(i) the completed notification required under subsection (a), or

"(ii) if such notification is not completed, the notification to the extent completed and a statement of the reasons for such noncompliance,

from both persons, or, in the case of a tender offer, the acquiring person; and

"(B) end on the thirtieth day after the date of such receipt (or in the case of a cash tender offer, the fifteenth day), or on such later date as may be set under subsection (e)(2) or (g)(2).

"(2) The Federal Trade Commission and the Assistant Attorney General may, in individual cases, terminate the waiting period specified in paragraph (1) and allow any person to proceed with any acquisition subject to this section, and promptly shall cause to be published in the Federal Register a notice that neither intends to take any action within such period with respect to such acquisition.

"(3) As used in this section—

"(A) The term 'voting securities' means any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer or, with respect to unincorporated issuers, persons exercising similar functions.

"(B) The amount or percentage of voting securities or assets of a person which are acquired or held by another person shall be determined by aggregating the amount or percentage of such voting securities or assets held or acquired by such other person and each affiliate thereof.

"(c) The following classes of transactions are exempt from the requirements of this section—

"(1) acquisitions of goods or realty transferred in the ordinary course of business;

"(2) acquisitions of bonds, mortgages, deeds of trust, or other obligations which are not voting securities;

"(3) acquisitions of voting securities of an issuer at least 50 per centum of the voting securities of which are owned by the acquiring person prior to such acquisition;

"(4) transfers to or from a Federal agency or a State or political subdivision thereof;

"(5) transactions specifically exempted from the antitrust laws by Federal statute;

"(6) transactions specifically exempted from the antitrust laws by Federal statute if approved by a Federal agency, if copies of all information and documentary material filed with such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General;

"(7) transactions which require agency approval under section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828(c)), or section 3 of the Bank Holding Company Act of 1956 (12 U.S.C. 1842);

"(8) transactions which require agency approval under section 4 of the Bank Holding Company Act of 1956 (12 U.S.C. 1843), section 403 or 408(e) of the National Housing Act (12 U.S.C. 1726 and 1730a), or section 5 of the Home Owners' Loan Act of 1933 (12 U.S.C. 1464), if copies of all information and documentary material filed with any such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General at least 30 days prior to consummation of the proposed transaction;

"(9) acquisitions, solely for the purpose of investment, of voting securities, if, as a result of such acquisition, the securities

acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer;

"(10) acquisitions of voting securities, if, as a result of such acquisition, the voting securities acquired do not increase, directly or indirectly, the acquiring person's per centum share of outstanding voting securities of the issuer;

"(11) acquisitions, solely for the purpose of investment, by any bank, banking association, trust company, investment company, or insurance company, of (A) voting securities pursuant to a plan of reorganization or dissolution; or (B) assets in the ordinary course of its business; and

"(12) such other acquisitions, transfers, or transactions, as may be exempted under subsection (d)(2)(B).

"(d) The Federal Trade Commission, with the concurrence of the Assistant Attorney General and by rule in accordance with section 553 of title 5, United States Code, consistent with the purposes of this section—

"(1) shall require that the notification required under subsection (a) be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws; and

"(2) may—

"(A) define the terms used in this section;

"(B) exempt, from the requirements of this section, classes of persons, acquisitions, transfers, or transactions which are not likely to violate the antitrust laws; and

"(C) prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section.

"(e)(1) The Federal Trade Commission or the Assistant Attorney General may, prior to the expiration of the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period) specified in subsection (b)(1) of this section, require the submission of additional information or documentary material relevant to the proposed acquisition, from a person required to file notification with respect to such acquisition under subsection (a) of this section prior to the expiration of the waiting period specified in subsection (b)(1) of this section, or from any officer, director, partner, agent, or employee of such person.

"(2) The Federal Trade Commission or the Assistant Attorney General, in its or his discretion, may extend the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period) specified in subsection (b)(1) of this section for an additional period of not more than 20 days (or in the case of a cash tender offer, 10 days) after the date on which the Federal Trade Commission or the Assistant Attorney General, as the case may be, receives from any person to whom a request is made under paragraph (1), or in the case of tender offers, the acquiring person, (A) all the information and documentary material required to be submitted pursuant to such a request, or (B) if such request is not fully complied with, the information and documentary material submitted and a statement of the reasons for such noncompliance. Such additional period may be further extended only by the United States district court, upon an application by the Federal Trade Commission or the Assistant Attorney General pursuant to subsection (g)(2).

"(f) If a proceeding is instituted or an action is filed by the Federal Trade Commission, alleging that a proposed acquisition violates section 7 of this Act or section 5 of the Federal Trade Commission Act, or an action is filed by the United States, alleging that a proposed acquisition violates such section 7 or section 1 or 2 of the Sherman Act, and the Federal Trade Commission or the Assistant Attorney General (1) files a motion for a preliminary injunction against consummation of such acquisition pendente lite, and (2) certifies to the United States district court for the judicial district within which the respondent resides or carries on business, or in which the action is brought, that it or he believes that the public interest requires relief pendente lite pursuant to this subsection—

"(A) upon the filing of such motion and certification, the chief judge of such district court shall immediately notify the chief judge of the United States court of appeals for the circuit in which such district court is located, who shall designate a United States district judge to whom such action shall be assigned for all purposes; and

"(B) the motion for a preliminary injunction shall be set down for hearing by the district judge so designated at the earliest practicable time, shall take precedence over all matters except older matters of the same character and trials pursuant to section 3161 of title 18, United States Code, and shall be in every way expedited.

"(g) (1) Any person, or any officer, director, or partner thereof, who fails to comply with any provision of this section shall be liable to the United States for a civil penalty of not more than $10,000 for each day during which such person is in violation of this section. Such penalty may be recovered in a civil action brought by the United States.

"(2) If any person, or any officer, director, partner, agent, or employee thereof, fails substantially to comply with the notification requirement under subsection (a) or any request for the submission of additional information or documentary material under subsection (e) (1) of this section within the waiting period specified in subsection (b) (1) and as may be extended under subsection (e) (2), the United States district court—

"(A) may order compliance;

"(B) shall extend the waiting period specified in subsection (b) (1) and as may have been extended under subsection (e) (2) until there has been substantial compliance, except that, in the case of a tender offer, the court may not extend such waiting period on the basis of a failure, by the person whose stock is sought to be acquired, to comply substantially with such notification requirement or any such request; and

"(C) may grant such other equitable relief as the court in its discretion determines necessary or appropriate,

upon application of the Federal Trade Commission or the Assistant Attorney General.

"(h) Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of title 5, United States Code, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this section is intended to prevent disclosure to either body of Congress or to any duly authorized committee or subcommittee of the Congress.

"(i) (1) Any action taken by the Federal Trade Commission or the Assistant Attorney General or any failure of the Federal Trade Commission or the Assistant Attorney General to take any action under this section shall not bar any proceeding or any action with respect to such acquisition at any time under any other section of this Act or any other provision of law.

"(2) Nothing contained in this section shall limit the authority of the Assistant Attorney General or the Federal Trade Commission to secure at any time from any person documentary material, oral testimony, or other information under the Antitrust Civil Process Act, the Federal Trade Commission Act, or any other provision of law.

"(j) Beginning not later than January 1, 1978, the Federal Trade Commission, with the concurrence of the Assistant Attorney General, shall annually report to the Congress on the operation of this section. Such report shall include an assessment of the effects of this section, of the effects, purpose, and need for any rules promulgated pursuant thereto, and any recommendations for revisions of this section.".

EFFECTIVE DATES

SEC. 202. (a) The amendment made by section 201 of this Act shall take effect 150 days after the date of enactment of this Act, except that subsection (d) of section 7A of the Clayton Act (as added by section 201 of this Act) shall take effect on the date of enactment of this Act.

TITLE III—PARENS PATRIAE

PARENS PATRIAE ACTIONS BY STATE ATTORNEYS GENERAL

SEC. 301. The Clayton Act is amended by inserting immediately following section 4B the following new sections:

"ACTIONS BY STATE ATTORNEYS GENERAL

"SEC. 4C. (a) (1) Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of the Sherman Act. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to (i) natural persons who have excluded their claims pursuant to subsection (b) (2) of this section, and (ii) any business entity.

"(2) The court shall award the State as monetary relief threefold the total damage sustained as described in paragraph (1) of this subsection, and the cost of suit, including a reasonable attorney's fee.

"(b) (1) In any action brought under subsection (a) (1) of this section, the State attorney general shall, at such times, in such manner, and with such content as the court may direct, cause notice thereof to be given by publication. If the court finds that notice given solely by publication would deny due process of law to any person or persons, the court may direct further notice to such person or persons according to the circumstances of the case.

"(2) Any person on whose behalf an action is brought under subsection (a)(1) may elect to exclude from adjudication the portion of the State claim for monetary relief attributable to him by filing notice of such election with the court within such time as specified in the notice given pursuant to paragraph (1) of this subsection.

"(3) The final judgment in an action under subsection (a)(1) shall be res judicata as to any claim under section 4 of this Act by any person on behalf of whom such action was brought and who fails to give such notice within the period specified in the notice given pursuant to paragraph (1) of this subsection.

"(c) An action under subsection (a)(1) shall not be dismissed or compromised without the approval of the court, and notice of any proposed dismissal or compromise shall be given in such manner as the court directs.

"(d) In any action under subsection (a)—

"(1) the amount of the plaintiffs' attorney's fee, if any, shall be determined by the court; and

"(2) the court may, in its discretion, award a reasonable attorney's fee to a prevailing defendant upon a finding that the State attorney general has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

"MEASUREMENT OF DAMAGES

"SEC. 4D. In any action under section 4C(a)(1), in which there has been a determination that a defendant agreed to fix prices in violation of the Sherman Act, damages may be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was brought.

"DISTRIBUTION OF DAMAGES

"SEC. 4E. Monetary relief recovered in an action under section 4C(a)(1) shall—

"(1) be distributed in such manner as the district court in its discretion may authorize; or

"(2) be deemed a civil penalty by the court and deposited with the State as general revenues;

subject in either case to the requirement that any distribution procedure adopted afford each person a reasonable opportunity to secure his appropriate portion of the net monetary relief.

"ACTIONS BY ATTORNEY GENERAL OF THE UNITED STATES

"SEC. 4F. (a) Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action under this Act based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to such State attorney general.

"(b) To assist a State attorney general in evaluating the notice or in bringing any action under this Act, the Attorney General of the United States shall, upon request by such State attorney general, make

available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under this Act.

"DEFINITIONS

"SEC. 4G. For the purposes of sections 4C, 4D, 4E, and 4F of this Act:

"(1) The term 'State attorney general' means the chief legal officer of a State, or any other person authorized by State law to bring actions under section 4C of this Act, and includes the Corporation Counsel of the District of Columbia, except that such term does not include any person employed or retained on—

"(A) a contingency fee based on a percentage of the monetary relief awarded under this section; or

"(B) any other contingency fee basis, unless the amount of the award of a reasonable attorney's fee to a prevailing plaintiff is determined by the court under section 4C(d)(1).

"(2) The term 'State' means a State, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States.

"(3) The term 'natural persons' does not include proprietorships or partnerships.

"APPLICABILITY OF PARENS PATRIAE ACTIONS

"SEC. 4H. Sections 4C, 4D, 4E, 4F, and 4G shall apply in any State, unless such State provides by law for its nonapplicability in such State.".

CONFORMING AMENDMENTS

SEC. 302. The Clayton Act (15 U.S.C. 12 et seq.), is amended—

(1) in section 4B (15 U.S.C. 15b), by striking out "sections 4 or 4A" and inserting in lieu thereof "section 4, 4A, or 4C";

(2) in section 5(i) (15 U.S.C. 16(i)), by striking out "private right of action" and inserting in lieu thereof "private or State right of action"; and by striking out "section 4" and inserting in lieu thereof "section 4 or 4C"; and

(3) by adding at the end of section 16 (15 U.S.C. 26) the following: "In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.".

CONSOLIDATION

SEC. 303. Section 1407 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"(h) Notwithstanding the provisions of section 1404 or subsection (f) of this section, the judicial panel on multidistrict litigation may consolidate and transfer with or without the consent of the parties, for both pretrial purposes and for trial, any action brought under section 4C of the Clayton Act.

EFFECTIVE DATE

SEC. 304. The amendments to the Clayton Act made by section 301 of this Act shall not apply to any injury sustained prior to the date of enactment of this Act.

SHORT TITLES FOR CERTAIN ANTITRUST LAWS

SEC. 305. (a) The Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890 (15 U.S.C. 1 et seq.), is amended by adding immediately after the enacting clause the following: "That this Act may be cited as the 'Sherman Act'.".

(b) The Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 12 et seq.), is amended by—

(1) inserting "(a)" after "That" in the first section; and

(2) adding at the end of the first section the following new subsection:

"(b) This Act may be cited as the 'Clayton Act'.".

(c) The Act entitled "An Act to promote export trade, and for other purposes", approved April 10, 1918 (40 Stat. 516; 15 U.S.C. 61 et seq.) is amended by adding at the end thereof the following new section:

"SEC. 6. This Act may be cited as the 'Webb-Pomerene Act'.".

(d) The Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", approved August 27, 1894 (28 Stat. 509; 15 U.S.C. 8 et seq.), is amended by adding at the end thereof the following new section:

"SEC. 78. Sections 73, 74, 75, 76, and 77 of this Act may be cited as the 'Wilson Tariff Act'.".

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.

FOR IMMEDIATE RELEASE September 30, 1976

Office of the White House Press Secretary

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THE WHITE HOUSE

FACT SHEET

HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976 (H.R. 8532)

President Ford signed the Hart-Scott-Rodino Antitrust Improvements Act of 1976 today. He noted that this legislation will contribute to the Administration's overall competition policy of vigorous antitrust enforcement and regulatory reform.

This Act:

-- Broadens powers of the Department of Justice in conducting antitrust investigations.

-- Requires advance notice to the Justice Department and the Federal Trade Commission of major corporate mergers and acquisitions.

-- Authorizes state attorneys general to file suits to recover damages to citizens of the states resulting from certain antitrust violations.

MAJOR PROVISIONS

Title I. Antitrust Civil Process Act Amendments

This title adopts Administration-sponsored legislation to amend the Antitrust Civil Process Act of 1962. It authorizes the Department of Justice to issue a pre-complaint subpoena--called a Civil Investigative Demand ("CID") -- not only on targets of the investigation, as permitted under current law, but also to third parties (e.g., suppliers and customers) who have information relevant to an investigation. The bill would also allow the Department to obtain, not only documentary evidence as under current law, but also answers to oral and written questions from recipients of such a CID. These amendments also provide safeguards, including right to counsel by the recipient of the CID, to assure that these powers are not abused.

Title II. Premerger Notification

H.R. 8532 requires companies with assets or sales in excess of $100 million to notify the Department of Justice and the Federal Trade Commission in advance of the acquisition of, or merger with, any company with assets or sales in excess of $10 million. This will allow the antitrust enforcement agencies sufficient time to investigate the competitive consequences of major mergers and acquisitions and, if necessary, to obtain injunctive relief before steps have been taken toward consolidation of the operations.

(more)

Title III. Parens Patriae

H.R. 8532 would authorize state attorneys general to bring suits in Federal district court on behalf of state residents for violations of the antitrust provisions of the Sherman Act.

Mandatory treble damages would be awarded in successful suits and would either be distributed to individuals in a manner approved by the court or deposited with the state as general revenues. In price-fixing cases, damages could be proved in the aggregate by using statistical sampling or other measures without the necessity of proving damages to each individual on whose behalf the suit was brought.

The bill prohibits state attorneys general from hiring outside lawyers on a contingency fee based on a percentage of the award. However, it would allow private attorneys to bring suit on behalf of the state and their fees would be determined by the court.

SUMMARY

In his signing statement, the President noted that the first two titles of the bill--the Antitrust Civil Process Act amendments and premerger notification--were desirable. In addition, the President reiterated his concerns with the potential for abuse of the parens patriae title and said that its implementation would be carefully reviewed to assure that it was responsibly enforced.

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FOR IMMEDIATE RELEASE September 30, 1976

Office of the White House Press Secretary

THE WHITE HOUSE

STATEMENT BY THE PRESIDENT

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

COMPETITION AND ANTITRUST POLICIES

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

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

The Federal Government must play two important roles in protecting and advancing the cause of free competition.

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

Second, my Administration has been the first one in forty years to recognize an additional way the Federal Government vitally affects the environment for business competition. Not only must the Federal Government seek to restrain private anti-competitive conduct, but our Government must also see to it that its own actions do not impede free and open competition. All too often in the past, the Government has itself been a major source of unnecessary restraints on competition.

I believe that far too many important managerial decisions are made today not by the marketplace responding to the forces of supply and demand but by the bureaucrat. Government regulation is not an effective substitute for vigorous competition in the American marketplace.

In some instances government regulation may well protect and advance the public interest. But many existing regulatory controls were imposed during uniquely transitory economic conditions. We must repeal or modify those controls that suppress rather than support fair and healthy competition.

During my Administration, important progress has been made both in strengthening antitrust enforcement and in reforming government economic regulation.

more

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

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

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

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

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

On the second front of reducing regulatory actions that inhibit competition, I have signed the Securities Act Amendments of 1975 and the Railroad Revitalization and Regulatory Reform Act, which will inject strong doses of competition into industries that long rested comfortably in the shade of federal economic regulation.

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

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

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

HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976

I believe the record of this Administration stands as a measure of its commitment to competition. While I continue to have serious reservations about the "parens patriae" title of this bill, on balance, the action I am taking today should further strengthen competition and antitrust enforcement.

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

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

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

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

As I have said before, the states have authority to amend their own antitrust laws to authorize such suits in state courts. If a state legislature, representing the citizens of the state, believes that such a concept is sound policy, it ought to allow it. I questioned whether the Congress should bypass the state legislatures in this instance. To meet in part my objection, Congress wisely incorporated a proviso which permits a state to prevent the applicability of this title.

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

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

In partial response to my concerns, Congress has narrowed this title in order to limit the possibility of significant abuses. In its present form, this title, if responsibly enforced, can contribute to deterring price-fixing violations, thereby protecting consumers. I will carefully review the implementation of the powers provided by this title to assure that they are not abused.

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

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