94TH CONGRESS 2d Session } HOUSE OF REPRESENTATIVES { REPORT 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

---

[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 "raiding" 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 enforce-

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

ment 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.

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.

O