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INFORMATIONTHE WHITE HOUSE  
WASHINGTON

September 1, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: PHILIP BUCHEN *P.*SUBJECT: Senate Consideration of Omnibus Antitrust  
Legislation

The Senate is continuing to debate a compromise omnibus antitrust bill that essentially adopts the provisions in three separate antitrust bills that recently passed the House. A final vote is expected next Wednesday after the Senate returns from recess. If the sponsors of this compromise amendment are successful, it will be sent to the House for action without a conference. The current prognosis is that the House is likely to pass the compromise amendment.

The following is a brief summary of the key provisions of that amendment and the most important modifications that have been made in response to Administration concerns:

Title I - Antitrust Civil Process Act Amendments -  
authorizes the Department of Justice to issue civil investigative demands to all persons who may have information relevant to an antitrust investigation. The Justice Department views enactment of these amendments as a vital step designed to close a gap in their enforcement authority. Despite the inclusion of a variety of safeguards to protect against governmental overreaching, however, some business opposition to these amendments continues. All provisions which were objectionable to the Administration were deleted in the Senate amendment under consideration which is the same as the House passed bill.



Title II - Premerger Notification - requires that corporations with assets or sales in excess of \$100 million that plan to acquire corporations with assets or sales in excess of \$10 million give the federal enforcement authorities 30 days advance notice, subject to a 20 day extension.

In addition to a premerger notification provision, the Senate had earlier provided for an automatic injunction against the consummation of mergers and acquisitions that could be invoked by federal enforcement authorities. Due to strong opposition by the Administration and others, the Senate amendment would drop this provision and adopt the limited House premerger notice provision. There is little controversy surrounding this title.

Title III - Parens Patriae - authorizes state attorneys general to seek damages in federal courts as a result of federal antitrust violations. In a March 17, 1976, letter to Minority Leader Rhodes, you expressed serious reservations regarding the concept of parens patriae, as well as concern regarding specific provisions of the House legislation (see Attachment A). In response to these specific concerns, the House parens patriae provisions were narrowed. The Senate amendment generally adopts the House version by limiting the scope of parens patriae actions, in practical effect, to price fixing violations by allowing the statistical aggregation of damages only in cases of price-fixing agreements. The Senate amendment, however, is broader than the House passed bill in that it would provide for mandatory treble damage awards and some latitude for the courts to permit contingency fees on other than percentage fee bases.

In addition to these major changes in the three major titles, the Senate amendment deleted all other titles in the bill that had earlier passed the Senate (e.g., declaration of antitrust policy, Antitrust Review Commission, and a miscellaneous set of amendments to the antitrust laws).

The Senate has made arrangements to vote on Wednesday, September 8 whether to adopt the proposed compromise amendment or go to Conference on the original Senate bill. The best judgement of your advisers is that the Senate will vote to adopt the proposed compromise amendment and that it is likely also to pass the House. However, the compromise amendment has not been printed and can be submitted to the Senate with such modifications as



Senators Abourezk and Hruska may agree upon. Thus it is possible to work with these two Senators to secure some modifications to the proposed compromise amendment. The modifications which we would like to seek are:

- (a) To make the award of damages up to a maximum of three times actual damages in parens patriae cases discretionary with the court.
- (b) To allow no contingency fees in parens patriae cases.

My best judgement is the first such modification is possible if we can indicate that otherwise you will veto the legislation when it comes to you. However, I do not believe that the second modification is favorable under any circumstances, and it is certainly not as important as the first inasmuch as the only contingency fees allowable could not involve a percentage of recovery.

cc: Max Friedersdorf  
Stan Morris





THE WHITE HOUSE

TEXT OF A LETTER BY THE PRESIDENT  
TO REPRESENTATIVE JOHN J. RHODES

March 17, 1976

Dear John:

As I outlined to you on Tuesday, March 16, I support vigorous antitrust enforcement, but I have serious reservations concerning the parens patriae concept set forth in the present version of H.R. 8532.

I question whether federal legislation is desirable which authorizes a state attorney general to sue on behalf of the state's citizens to recover treble damages that result from violations of the federal antitrust laws. The states have the ability to amend their own antitrust laws to authorize parens patriae suits in their own courts. If a state legislature, acting for its own citizens, is not convinced the parens patriae concept is sound policy, the Administration questions whether the Congress should bypass the state legislatures and provide state attorneys general with access to the federal courts to enforce it.

In addition to my reservations about the principle of parens patriae, I am concerned about some specific provisions of the legislation developed by the House Judiciary Committee.

The present bill is too broad in its reach and should be narrowed to price fixing violations. This would concentrate the enforcement on the most important antitrust violations.

In addition, the Administration is opposed to mandatory treble damage awards in parens patriae suits, preferring instead a provision which would limit awards only to the damages that actually result from the violation. The view that federal penalties were inadequate, which has been used to justify mandatory treble damages in the past, is no longer justifiable given the substantial increases in these penalties in recent years.

The Administration opposes extension of the statistical aggregation of damages, beyond parens patriae legislation, to private class action suits because this is outside of the appropriate reach of this legislation.

Finally, the Administration prefers discretionary rather than mandatory award of attorney's fees, leaving such awards to the discretion of the courts.

During the last two years, the Administration has sought to improve federal enforcement efforts in the antitrust area and the resources devoted to antitrust enforcement have increased substantially. In December 1974, I signed the Antitrust Penalties and Procedures Act which increased maximum penalties from \$50,000 to \$1 million for corporations and \$100,000 for individuals. As I indicated above, I support vigorous antitrust enforcement, but I do not believe H.R. 8532 is a responsible way to enforce federal antitrust laws.

Sincerely,

/s/ Gerald R. Ford

The Honorable John J. Rhodes  
Minority Leader  
House of Representatives  
Washington, D.C. 20515





EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET

DATE: 9/1/76

TO: Phil Buchen

FROM: Stan Morris

Attached is the information memorandum on antitrust that I promised. I think there is enough detail here to bring the President up to date, however, Joe Sims and my staff have both done more detailed analyses which I can make available.

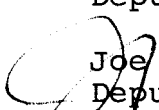


OMB FORM 38  
REV AUG 73

DEPARTMENT OF JUSTICE

August 27, 1976

To: Edward C. Schmults  
Deputy Counsel to the President

From:  Joe Sims  
Deputy Assistant Attorney General

Attached is our best knowledge of the substance of the substitute bill introduced in the Senate by Senator Byrd this afternoon.

We have been unable to obtain a copy of the bill, and we are informed that printed copies will not be available until Monday.

As we get more information I will let you know.

Attachment



COMPARISON OF ANTITRUST BILLS PASSED BY SENATE AND HOUSE

PROVISION	SENATE	HOUSE	8/27 SENATE SUBSTITUTE
<u>Declaration of Policy</u>	The purpose of H.R. 8532 is to improve antitrust enforcement; Congress finds that decline in competition could contribute to unemployment, inefficiency; reduction of anticompetitive practices can reduce prices.	No corresponding provisions.	No declaration of policy.
<u>Amendments to Antitrust Civil Process Act</u>	Title II authorizes the Department to issue CIDs to all persons who may have information relevant to a civil antitrust violation.	H.R. 13489 would confer similar powers.	Same.
	CID information would be exempt from the Freedom of Information Act.	Same	Same.
	A CID could not be issued to obtain information for use in a Federal administrative agency proceeding.	Same.	Same.
	Non-target recipients of CIDs would be reimbursed for all expenses, including search costs and attorneys' fees.	No corresponding provision.	Non-target recipients of CIDs would be reimbursed for mileage and witness costs.
<u>Access to Grand Jury Materials</u>	The FTC would generally have access to grand jury materials after the completion of any proceeding; private persons would have access to information supplied to a grand jury by a defendant who later pleaded guilty or nolo contendere.	No corresponding provisions.	No such provision.



Amendment to Clayton  
Act §7

The jurisdictional reach of the merger provision of the Clayton Act is extended to activities in or affecting commerce.

No corresponding provision.

No such provision.

Foreign Actions

The "sense of the Congress" is expressed that courts should "consider utilizing" the sanctions in Federal Rules of Civil Procedure 37 if parties refuse to comply with discovery orders on the basis of foreign statutes prohibiting compliance.

No corresponding provision.

No such provision.

Attorneys' fees

Private plaintiffs in actions for injunctive relief shall be awarded attorneys' fees if they substantially prevail.

Fees shall be awarded to a prevailing plaintiff.

Private plaintiffs in actions for injunctive relief shall be awarded attorneys' fees if they substantially prevail.

Parens patriae

-Scope

A state AG may bring suit if there has been a per se offense or fraudulent procurement of a patent.

A state AG may bring suit if there has been a violation of the Sherman Act.

A state AG may bring suit if there has been a violation of the Sherman Act.

-Aggregation

Statistical aggregation methods of computing damages may be used for price fixing or non-technical patent fraud.

Statistical aggregation methods of computing damages may be used for willful price fixing.

Statistical aggregation methods of computing damages may be used for price fixing.

-Damages

Treble damages shall be awarded.

Treble damages shall be awarded except that if the defendant acted in good faith then actual damages shall be awarded, if aggregation methods were used to calculate damages.

Treble damages shall be awarded.



PROVISION

SENATE

HOUSE

-Attorneys' fees

Fees may be awarded to a defendant if plaintiff acted in bad faith or vexatiously.

Same.

Same.

-Contingent fees

A state may retain outside counsel but may not retain "any person employed or retained on a contingency fee based on a percentage of the monetary relief awarded under this section," and a court must determine plaintiffs' attorneys' fees.

A state may not retain "any person employed or retained on a contingency fee basis."

A state may retain outside counsel but may not retain a person (1) employed on a contingency fee based on a percentage of the monetary relief awarded or (2) employed on any other contingency fee basis unless the amount of reasonable attorneys' fees is Same. determined by a court.

-Application of aggregation provision to private class actions.

Aggregation provision does not apply to private class action.

Same.

Pre-merger notice

Corporations with assets or sales in excess of \$100 million that plan to acquire corporations with assets or sales in excess of \$10 million must give DOJ and FTC 30 days advance notice, subject to a 20 day extension

H.R. 14580 is substantially identical.

After acquisition, company must hold 15% of the stock of assets, or \$15 million of stock or assets of acquired company. (This is in addition to Senate threshold tests.)

Automatic stay deleted.

Automatic stay deleted.

Automatic stay deleted.

-Expedited treatment

Motions for preliminary injunctions shall be treated on an expedited basis.

Same.

Same.

Antitrust Commission

An Antitrust Review and Revision Commission is established to study the antitrust laws and submit a report within two years.

No corresponding provision.

No such provision.



THE WHITE HOUSE  
WASHINGTON

DATE: 9-

TO: Ed Schmultz

FROM: Max L. Friedersdorf

Please handle \_\_\_\_\_

Please see me \_\_\_\_\_

For your information ✓

Other

Here is the new  
Byrd anti-trust  
bill, hot off the  
press.



Motion to concur in House Amendment to Senate  
Amendment to the bill (H.R. 8532) ~~to amend the~~  
~~Clayton Act to permit State attorneys general to bring~~  
~~certain antitrust actions, and for other~~  
~~purposes~~, with an amendment *in the nature of a substitute*

I move that the Senate concur in the House Amendment  
to the Senate Amendment to H.R. 8532, with an amendment  
as follows:





Maste

1—GRAM Bills  
[COMMITTEE PRINT]

AUGUST 27, 1976

INSECT  
ATTACHED

That this Act may be cited as the "Hart-Scott-Rodino Anti-trust Improvements Act of 1976".

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 activi-

J. 75-759



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ties 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 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, to answer in writing written interrogatories, to give



### 3—GRAM Bills

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; 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—



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“(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 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 subpoenas or subpoenas duces tecum issues 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.





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“(d) (1) Any such demand may be served by any anti-trust 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;



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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 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

*(in such form as the demand designates)*





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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



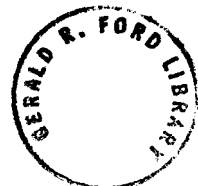
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transmit a copy of the transcript of the testimony to the custodian.

“(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 in the presence of the officer or antitrust investigator; 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



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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



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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



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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



Nothing in this section is intended to prevent disclosure to either body of the Congress or to any authorized committee or subcommittee thereof.

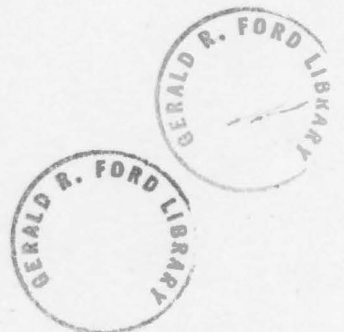
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required for official use by any duly authorized official or employee of the Department of Justice under regulations which shall be promulgated by the Attorney General. Notwithstanding paragraph (3) of this subsection, such material, answers, and transcripts 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.

“(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



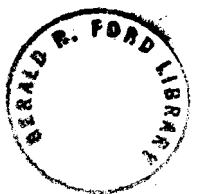
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in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case, 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.

“(c) 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



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“(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





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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.”.



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(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

title) SEC. 106. The amendments to the Antitrust Civil Process Act made by this Act shall take effect on the date of enactment of this Act, except section 3(i)(8) of the Antitrust

and to section 1505 of title 18, United States Code;



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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



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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 shall file notification pursuant to rules under subsection (d) (1).

“(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 (hereafter referred to in this section as the ‘Assistant Attorney General’) of—

✓ (i) the completed notification required under subsection (a) or



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✓(ii) if such notification is not completed, the notification to the extent completed and a statement of the reasons for any ~~failure to complete~~ such notification, 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) 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, presently or upon conversion, entitling 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

*such non compliance*

*unincorporated*





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held or acquired by such other person and each affiliate

thereof. For purposes of this paragraph, the term 'affiliate' of a person means any other person who controls, is controlled by, or is under common control with such person.

“(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



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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; and

“(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 )



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"(12) acquisitions of voting securities by any bank trust department or trust company, if such department or trust company 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) "(13) 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





## 23—GRAM Bills

section, classes of persons, acquisitions, transfers, or transactions which are not likely to violate the anti-trust 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 cash tenders offers, the 15-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 person subject to this section, from such person 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 cash tender offers, 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 cash tender offers, 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



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request is not fully complied with, the information and documentary material submitted and 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).

“(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



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“(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 to substantially 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), 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) 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



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basis of a failure by the person whose stock is sought to be acquired to substantially comply 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 required in any administrative or judicial action or proceeding.

“(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.

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, ~~to other officials or employees~~



Ch. 5.C.

PARENS PATRIAE ACTIONS BY STATE ATTORNEYS GENERAL

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“(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

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 (to their property) sustained by such natural persons <sup>by</sup> reason of any violation of the Sherman Act. The court shall exclude from the amount of monetary relief awarded in such ~~an~~ action any amount of monetary





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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 under subsection (a) (1), 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.

"(2) Any person on whose behalf an action is brought under subsection (a) (1) may elect to exclude himself from adjudication in such action 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 arising from the alleged violation of the Sherman Act of any potential claimant in such action who fails to give such notice within the period specified in the notice given pursuant to paragraph (1) of this subsection unless he shows good cause for his failure to file such notice.

from adjudication the portion of the State claim for monetary relief attributable to him

under section 4 of this Act by any person on behalf of whom such action is brought and



denial of process of law

subsection

"(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 by publication only would be manifestly unjust as to any person or persons, the court may direct further notice to such person or persons according to the circumstances of the case.

under section of this Act by any person on behalf of whom such action

*compromised*

*attorney's*

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*any* (c) An action under subsection (a) (1) 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.

(d) In any action under subsection (a)—

(1) the amount of the plaintiffs' attorneys' fees, if any, shall be determined by the court; and

*prevailing* (2) the court may in its discretion award a reasonable attorney's fee to a defendant upon a finding ~~that the action is frivolous or~~ that the State attorney general has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *1*

## "MEASUREMENT OF DAMAGES

*Monetary relief* "SEC. 4D. In any action under section 4C (a) (1), in which there has been a determination that ~~the~~ defendant agreed to fix prices in ~~the~~ 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. *a* *reasonable*

## "DISTRIBUTION OF DAMAGES

"SEC. 4E. ~~Damages~~ recovered in an action under section 4C (a) (1) shall—





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"(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 damages ~~awarded less unrecovered costs of litigation and administration.~~

*net  
monetary  
relief ①*

"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:



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(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, 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 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, and 4G shall apply in any State, unless such State provides by law for its non-applicability 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 (15 U.S.C. 16), 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

INSERT  
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i



[2]

"(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 <sup>includes</sup> ~~shall include~~ the Corporation Counsel of the District of Columbia, except that such term does not include any person

employed or retained on ~~as~~  $\frac{1}{m}$

[4]

"(A) <sup>a</sup> contingency fee based on a percentage of the monetary

relief awarded under this section; or

"(B) any other contingency fee, unless <sup>basis</sup> award of a reasonable attorney's fee, ~~the amount of such fee is~~ <sup>to a prevailing plaintiff is</sup> determined by the court under

section 4  $\frac{c}{=}$  (d)(1) 0

Amount  
of  
the



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which the plaintiff substantially prevails, the court shall award the cost of suit, including reasonable attorney's fees, 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 multi-district 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—



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(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 and 74 of this Act may be cited as the 'Wilson Tariff Act'."

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