MERGER OVERSIGHT AND H.R. 13131, PROVIDING PREMERGER NOTIFICATION AND STAY REQUIREMENTS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

SECOND SESSION

ON

MERGER OVERSIGHT AND H.R. 13131, PROVIDING PREMERGER NOTIFICATION AND STAY REQUIREMENTS

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MERGER OVERSIGHT AND H.R. 13131

WEDNESDAY, MARCH 10, 1976

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:45 a.m., in room 2141, Rayburn House Office Building, the Honorable Peter W. Rodino, Jr. [chairman of the committee] presiding.

Present: Representatives Rodino, Flowers, Seiberling, Mazzoli, Hughes, Hutchinson, and McClory.

Also present: Earl C. Dudley, Jr., general counsel: Alan A. Ransom, William L. Sippel, and James F. Falco, counsel; Franklin G. Polk and Kenneth G. Starling, associate counsel.

Chairman RODINO. The committee will come to order.

Before commencing this morning's hearings I would like to take the opportunity to announce that in this room this morning is my good friend, Prof. James Watson, from Rutgers University, along with a group of students from Rutgers University, which is my alma mater. I would like to welcome them here.

This morning the Subcommittee on Monopolies and Commercial Law begins its antitrust oversight hearings. Specifically, we begin oversight into the state of our merger law and its enforcement.

It is an appropriate time for this, as this year marks the 25th anniversary of the Celler-Kefauver amendments to the Clayton Act. That statute is an unquestioned milestone in our antitrust jurisprudence. Its purpose, quite simply, is to prevent anticompetitive aggregations of market power.

Today our two antitrust enforcement agencies will tell us how they have been enforcing that statute, and what they perceive their enforcement problems to be.

We have, in some cases in agonizing detail, a fairly good idea of what those problems are. Some of them have been with us since the dawn of merger legislation.

One of those problems is that of premerger notification. Both agencies can, and will, tell us what we have known for years—you can't unscramble an egg.

Premerger notification is an idea whose time has clearly come. Legislation, in one form or another, has come painfully close to passage a number of times.

In fact, in the 85th Congress I managed a premerger notification bill—it got as far as the House Calendar. It will be appropriate, therefore, on the anniversary of the Celler-Kefauver amendments, to give our antitrust enforcement agencies effective enforcement tools; and so, I shall shortly introduce such legislation again.

Our antitrust enforcers will also, I am sure, urge the expansion of the Clayton Act's "interstate commerce" clause to coincide with its Sherman Act reach, so that anticompetitive mergers now unreachable under the Supreme Court's recent *American Building Maintenance* decision can be prevented.

The Department of Justice, I know, will tell us of its need for improvements in the Antitrust Civil Process Act so that it may adequately investigate proposed mergers.

None of these ideas are new; but none have come to pass.

This hearing will be the groundwork for future oversight. We plan, now, to hear the basic concepts and problems of merger law. Later, we will examine specific problems and specific mergers in detail.

I am sure there are widely divergent points of view on these issues, and the subcommittee looks forward to hearing them.

With that, I should like to ask the gentleman from Michigan if he wishes to make any comments. Mr. Hutchinson?

Mr. HUTCHINSON. Thank you, Mr. Chairman.

I'm pleased to welcome the officials of the Antitrust Division and the Federal Trade Commission to testify on the effectiveness of their enforcement of the merger law.

Our fundamental economic policy is to encourage and preserve competition.

I'm sure that all of us agree that the Clayton Act and the Celler-Kefauver Act are valuable tools in preventing the unreasonable aggregation of industrial power and untimely elimination of viable competitors. The Clayton Act recognizes that some mergers are procompetitive. It allows courts to recognize that in some cases smaller firms need to join together in order to compete effectively with firms as large as some of our modern corporations.

While the merger law is probably the best-known antitrust law to most businessmen, it may be more difficult for them to gage their business activities against it than other antitrust laws. This is because the competitive impact of these mergers must be judged separately. The tests for mergers are judge-made tests, and each merger has a different impact on its market. Merger cases turn on the probability that competition will be lessened, or that a monopoly will be created. in each case the court is allowed to determine the reasonableness of the merger in the particular market.

Since the proper application of the legal standard escapes precise definition for particular cases, and yet is so important from an economic standpoint, these hearings are necessary so that we may evaluate how the law we wrote is being applied.

In recessionary times the absence of a great deal of merger litigation may be only a sign that there are few mergers, not that our merger laws are being eroded or circumvented. Likewise, in the period of economic upswing, the economic impact of any merger will have to be carefully considered. Beyond this, however, if the enforcers of the merger law are actually experiencing difficulties in their efforts to execute the policies of Clayton, section 7, then we should look carefully at ways to eliminate those difficulties. We welcome their recommendations.

Thank you, Mr. Chairman.

Chairman RODINO. Thank you very much, Mr. Hutchinson.

This morning we are pleased to welcome, once again, Mr. Kauper, the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice as our first witness, and following him will be the Acting Chairman of the Federal Trade Commission, Mr. Paul Rand Dixon.

We are pleased to have you here once again, Mr. Kauper. I know that in the past we have been calling upon you for the benefit of your information, and we await it eagerly.

[The prepared statement of Mr. Kauper follows:]

STATEMENT OF THOMAS E. KAUPER, ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Subcommittee:

I welcome the opportunity to testify on the Department's experience and enforcement policy under Section 7 of the Clayton Act. In addition, I would like to discuss three areas in which legislation could significantly improve antitrust enforcement efforts in the merger area.

At the outset, I wish to commend the Subcommittee for its plan to conduct extensive antitrust oversight hearings. As the Supreme Court has noted, "[s]ubject to narrow qualifications, it is surely the case that competition is our fundamental national economic policy, offering as it does the only alternative to the cartelization of governmental regimentation of large portions of the economy."[1] Since the antitrust laws are designed to insure that competition is allowed to serve this crucial purpose, the task of determining whether the antitrust laws are working properly is enormously important. I am confident that your hearings will serve as a foundation for improving both the antitrust laws and antitrust enforcement and thereby substantially benefit the interests of consumers throughout the country.

I

Enforcement of the antitrust prohibitions against anti-competitive mergers has, for many years, been an important part of our overall enforcement efforts. As an illustration, since fiscal year 1960, the Antitrust Division has conducted 6,716 investigations, about a third of which, I estimate, involved proposed mergers. During that period, 688 civil suits were filed, of which 238 involved mergers. I have attached as Appendix A to my statement a general breakdown of those cases by industry. Thus, the merger area has been an active one for us.

Of course, the amount of the Division's resources devoted to mergers varies with the amount of merger activity at any given time. That activity seems to vary with general economic conditions. Apparently because of depressed economic conditions, merger activity has been reduced in recent years. In 1969, for example, there were approximately 4,500 mergers, compared with approximately 1,750 mergers in 1974. The decline of merger activity in recent years has enabled us to devote substantial additional resources to other very important areas, primarily to criminal prosecutions of hard-core price fixing and activity to promote competition in the regulated industries.

The nuts and bolts of our merger enforcement process are rather difficult to define since each case varies, not only in substance and complexity, but also in the time we have available to seek meaningful relief. The Division always tries to decide whether to challenge a merger prior to its consummation—with its attendant scrambling of assets and perhaps irreversible lessening of competition—if any challenge is to be made.

We become aware of mergers in a variety of ways. We read the Wall Street Journal and Standard Corporation Records daily. We receive approximately 400 trade journals which generally report merger activity within their respective fields. Attorneys familiar with an industry frequently learn of a proposed transaction before it is reported publicly. Finally, individual citizens who, for

[1] *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963).

various reasons, know of a merger which has not been reported in the press sometimes notify the Antitrust Division.

Frequently, we become aware of a proposed merger only a short time before consummation is scheduled. This is particularly true where acquisition through a tender offer, friendly or unfriendly is planned. We do the best we can in the time we have, attempting as thorough an analysis as is possible in the circumstances. We generally utilize the following procedures, although time pressures occasionally demand abbreviation or by-pass of some of its steps.

After a brief initial examination by staff attorneys, a decision is made as to whether a more extensive inquiry is warranted. If so, a recommendation to open a preliminary inquiry is prepared by the staff, outlining the known facts and the reasons why a further investigation should be conducted. The matter is then forwarded to the Office of Operations for decision as to whether to authorize the necessary expenditure of resources. This decision is based on the size of the companies and markets involved, market data generally (including the structure of the market and the positions of the firms involved in the proposed merger), the probable validity of potentially applicable legal theories, and resource allocation factors, including the present availability of appropriate staff. Frequently, our Economic Policy Office is asked for its views and the matter may also be considered by others in the Division, including our Evaluation Section, one or more Deputy Assistant Attorneys General, and, on occasion the Assistant Attorney General. The basic responsibility for deciding whether or not to initiate a preliminary investigation, however, rests with the Operations Office. I should note, however, that doubts as to the wisdom of any proposed investigation are generally resolved in favor of proceeding further.

The FTC is, of course, contacted to determine whether any investigation would conflict with any of its activities. If such a conflict appears, further consultation occurs until an agreement is reached as to the appropriate agency to undertake the investigation.

If an investigation is authorized, the staff proceeds to gather and analyze the necessary information as rapidly as possible. Unfortunately, our ability to do a sound, professional analysis is influenced by factors over which we have little direct control. Most importantly, the scheduled date of consummation sometimes establishes, for all practical purposes, an outer time limit for a litigation decision if meaningful preliminary relief is to be sought. The parties will sometimes delay consummation at our request. Sometimes, however, they will not. Scheduled expirations of tender offers present particularly difficult problems in this respect. Thus, while we occasionally have several weeks (and sometimes longer) before a decision must be made, we sometimes have only a matter of days. In fact, there have been situations where we have had only a few hours notice, and the transaction, by necessity, must be dealt with after consummation.

Another important variable is the cooperation of persons and companies with relevant information. We currently can compel only documentary information, and then only from corporations under investigation. There is one reported decision denying the Division even this limited authority prior to the consummation of a merger.[3] As a practical matter, this often means that parties to a pending merger transaction have a considerable amount of control over our ability to rapidly and effectively analyze the transaction, and the history of the willingness of such interested parties to cooperate with the Justice Department is mixed at best.

Sound analysis of a pending merger requires assembly of reliable market data. We must formulate relevant product markets, taking into consideration cross elasticity of demand among functionally related products. We must define a section or sections of the country in which the measurement of competitive effects is appropriate. We need data not only from the parties to the pending merger but also from other competitors in order to construct a realistic universe in which effects on concentration may be measured. Published data is often unavailable or insufficient. Thus, we must depend on the cooperation of third parties to obtain this data, and here too, the record is mixed. Many times we get very good cooperation; many times we get none. In any event, we have no direct control over the process, since we currently have no authority to compel the production of any information by third parties.

Upon completion of an investigation, the staff forwards a memorandum setting forth in detail whatever pertinent facts it has compiled regarding the effects of

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[3] *United States v. Union Oil of California*, 343 F. 2d 29 (CA9 1965).

the pending merger and applicable legal theories. The staff also records its recommended course of action and, if suit is recommended, attaches a proposed complaint.

This material is then reviewed by our Operations Office. That office then makes its recommendation as to what action, if any, should be taken by the Division with respect to the pending merger, frequently after soliciting the views of other units within the Division, such as the Economic Policy Office and the Evaluation Section. Recommendations to file suit are reviewed by the Assistant Attorney General and at least one of his Deputies. In addition, recommendations not to challenge a merger are reviewed by the Assistant Attorney General when significant policy issues are involved. The ultimate decision to file suit, of course, is made by the Assistant Attorney General.

Where consummation of a merger has not yet occurred, a decision to file suit will almost always be accompanied by a decision to seek a preliminary injunction blocking consummation. Generally, only when the parties agree to postpone consummation, or when we feel we have had insufficient time or information to adequately present a case for a preliminary injunction, will we decline to attempt to block consummation. I believe quite strongly that divestiture is a wholly inadequate remedy in a merger case, and we seek to avoid that problem whenever we can.

This is an important point, and cannot be overemphasized. Our investigatory process is designed to obtain what is necessary to make a litigation decision before consummation. Experience clearly shows that divestiture very often does not, and frequently cannot, result in a return to the competitive status quo ante. There is almost always a change in circumstances caused by a consummated merger that can never be undone. As a practical matter, divestiture is slow and unwieldy, and experience proves what can be expected—a company that loses a Section 7 case after consummation has little incentive to assist in rapid divestiture. Horror stories abound, with the approximately 17-year history of the *El Paso Natural Gas* case one of the most visible. Unfortunately, the interminable problems and delay involved in obtaining divestiture are the rule, not the exception. There is every reason for the parties to delay an ordered divestiture, as both we and the FTC are only too painfully aware.[3]

In addition, our failure to obtain preliminary injunctive relief creates an incentive for defendants to delay rather than expedite the litigation. Our experience in bank merger cases, where there is an automatic statutory stay, is that those cases move significantly faster than merger cases challenging a consummated transaction. I am convinced that preliminary relief is necessary to expedite litigation and that, with preliminary relief, these matters can be disposed of fairly rapidly, as was the recent *Copper Range-Amax* case, which was disposed of in 60 days.

Aside from the influence of whether or not a preliminary injunction is in effect, the litigation process is roughly similar for all mergers, varying with factors unique to particular transactions. The time that elapses from our first awareness of a transaction to the beginning of litigation may be a few months or a few days; the litigation can take a few weeks, as in *Amax*, or several years.

At least three important conclusions can be drawn from this overview of our merger enforcement process. First, the more notice we have, the better job we will do. Second, expanded investigatory authority would enable us to do a better job and with greater speed. Third, whether we get a preliminary injunction can have a significant effect on the length of the litigation and the adequacy of available relief. These conclusions are extremely important to consideration of the effectiveness of the antitrust laws today.

II

The Subcommittee has requested a brief outline of my views on merger enforcement policy. Of course, merger policy must be derived from the purposes which led Congress to enact Section 7 of the Clayton Act, and to amend it in 1950 and the case law interpreting that statute.

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[3] In 1968, the FTC stated it intended to sue Papercraft Corp. seeking divestiture of CPS Industries, Inc. which Papercraft had acquired in 1967. A divestiture order was obtained by the FTC in July, 1971. For over four years, the FTC sought to enforce the divestiture decree without success. Since 1967, CPS contributed over $11 million to Papercraft's profits, more than double its acquisition price. See *Wall Street Journal*, December 2, 1975, p. 48.

Whatever one believes about the advantages or disadvantages flowing from existing concentration levels in the American economy, there are several persuasive reasons for preventing any further increase. The dominant theme pervading Congressional action in 1950 was a fear of what was perceived to be a rising tide of economic concentration.[4] Increased concentration may not only reduce competition, but threaten social or political values as well. Section 7 was designed to prevent such harm by outlawing probably anticompetitive mergers when the trend to a lessening of competition in a line of commerce is in its incipiency.

Our foremost concern is with horizontal mergers. A horizontal merger is one between companies that are competitors, such as manufacturers of the same or very similar products, or distributors selling competing products in the same market area. Such mergers eliminate a competitor and concentrate the power of two firms into one. The law with regard to horizontal mergers is relatively clear and well developed.

The Supreme Court established the general rule governing the legality of horizontal mergers in *United States* v. *Philadelphia National Bank:*[5]

"A merger which produces a firm controlling an undue percentage of the relevant market and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."

By use of this rule the Court dispensed with elaborate proof of market behavior or probable anticompetitive effects. Instead it fashioned a relatively simple test focusing on the level of concentration in relevant product and geographic markets, increases in such that would result from a proposed merger, and the percentage of the market which would be controlled by the resulting firm. In the *Philadelphia National Bank* case the rule was used to find presumptive illegality in a highly concentrated market in which the five leading banks had represented 80% of the business before the merger and in which the merger of the second and third largest banks created a company with a 30% market position.

In *United States* v. *Aluminum Company of America*[6] the Court recognized a variation of the *Philadelphia National Bank* rule: in a highly concentrated market the acquisition by a large company with a 28% market share of a company with a 1.3% market share was unlawful where the acquired company, though small, was an aggressive and viable competitor. Hence, two related rules emerge for highly concentrated industries. Mergers between substantial competitors which further increase concentration or mergers which absorb a small but important competitive factor in the market are probably unlawful.

In light of the case law governing horizontal mergers, it is difficult to articulate any meaningful enforcement policy that distinguishes between "big" and "small" mergers. The size of a merger can be judged by a variety of measurements, most importantly for our purposes by market shares. In addition, size is not the only factor to be considered in assessing the legality of a horizontal merger. The aggressiveness of a firm,[7] the trend toward concentration in the relevant product market,[8] and the history of a particular market[9] must also be considered. It is unlikely, however, that any significant horizontal merger will go unchallenged by the Justice Department or the Federal Trade Commission. In determining whether to challenge a horizontal merger, the 1968 Merger Guidelines, while not controlling, serve as a useful benchmark by which to assess its probable anticompetitive significance.

A vertical merger is one between businesses that have a customer-supplier relation to each other, such as a manufacturer acquiring a supplier of raw materials. The law regarding vertical mergers is not as well developed as that concerning horizontal mergers. The principal jurisprudence was established in the *Brown Shoe* and *duPont* cases.[10] The main concern raised by vertical mergers is

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[4] *Brown Shoe* v. *United States,* 370 U.S. 294 (1962).
[5] 374 U.S. 321 (1963).
[6] 377 U.S. 271 (1964).
[7] Id.
[8] *Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962).
[9] Id.
[10] *United States* v. *duPont,* 353 U.S. 586 (1957). There the Court held unlawful duPont's acquisition of a controlling share of General Motors' stock. DuPont supplied GM with automotive finishes and fabrics. In *Brown Shoe,* the Court held unlawful a merger between Kinney Co. and Brown Shoe. The merger had both horizontal and vertical aspects. Kinney and Brown both manufactured shoes and sold them at retail.

that barriers to entry or competition by other firms may be raised. For instance, if a manufacturer acquires a supplier of crucial raw materials for its product, other competitors or would-be entrants to the manufacturer's market may be denied access to these key resources.

Conglomerate mergers are generally defined to include all those which are neither horizontal or vertical.[11] The principal analytic framework used to assess the legality of such mergers is the potential competition doctrine. Under that doctrine, conglomerate mergers may be anticompetitive for three basic reasons. First, the acquiring firm may be eliminated as an actual new entrant into the relevant market under consideration, thereby depriving that market of increased future competition. Second, the acquiring firm may be eliminated as an existing procompetitive force on the edge of the market; while it is not actually doing business in the market, it spurs competition in the market because of its threat to enter if profits or controllable costs of actual market competitors rise. Third, the acquisition may operate to entrench the dominance of the acquired firm.

There is significant case law on the potential competition doctrine, from the first *Penn-Olin* case[12] through *Marine Bancorporation*.[13] Certain criteria for assessing the legality of a potential competition merger are well recognized, such as concentration levels in the relevant market and the capability and incentive of the acquiring firm to enter the market in other ways. Projections for successful prosecution, however, are problematical. We have found some courts reluctant to draw what we believe are reasonable inferences of probable anticompetitive effects of these mergers, but we remain convinced of the soundness of our theories.

Our recent challenge to the Inco-ESB merger rests upon the potential competition doctrine. We believe that Inco would have entered ESB's industrial battery market *de novo* in the absence of the merger.

Mergers in regulated industries present special problems. Where clear antitrust immunity exists, we must, of course, confine our activities to appearances before regulatory authorities with jurisdiction to approve such mergers, and to possible direct judicial review. However, even where challenges under the Clayton Act are possible, special factors may come into play in evaluating the probable anticompetitive consequences of a merger. For example, concentration ratios may have special significance in a line of commerce which can be entered only upon receipt of an officially authorized charter or certificate of entry. Regulation may itself limit the opportunities for competition. Where this is so, it is especially important that available opportunities for competition be preserved and encouraged.[14]

In addition, regulatory entry barriers may affect application of the potential competition doctrine. With regard to the banking industry, the Supreme Court has stated that in states which stringently limit the ability of banks to branch or otherwise to expand internally, "in the absence of a likelihood of entrenchment, the potential competition doctrine—grounded as it is on relative freedom of entry on the part of the acquiring firm—will seldom bar a geographic market extension merger by a commercial bank." *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602 (1974).

Finally, in some cases, Congress has provided for specific statutory defenses to a merger between regulated firms which would otherwise violate the antitrust laws.[15]

Thus, the existence of state and federal regulation may require the use of special standards in determining the legality of a merger involving regulated firms.

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[11] The term "conglomerate" is less frequently confined to describing mergers between companies with unrelated product lines. Under that definition, so-called market extension or product extension mergers would not be conglomerate. "Market extension" mergers are between concerns selling the same or similar products in different geographic markets. "Product extension" mergers involve firms selling noncompetitive products which are so functionally related that they may be easily produced, promoted or marketed together. An example would be a detergent manufacturer's acquisition of a household bleach producer. See *FTC* v. *Procter and Gamble Co.*, 386 U.S. 568 (1967).

[12] *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964).

[13] *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602 (1974).

[14] See *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963).

[15] For example, in the banking industry an otherwise anticompetitive merger is legal if its anticompetitive effects are clearly outweighed in the public interest by the probable effect of the merger in meeting the convenience and needs of the community to be served. 12 U.S.C. 1828(c).

III

Finally, you have requested my views on legislation which would contribute to a more effective and efficient merger enforcement program. In my judgment, three legislative reforms would provide much needed assistance.

The first would require substantial companies to provide pre-merger notification to the Department. Such notification would provide us with time to develop the information needed to ensure a thorough evaluation of whether the proposed merger should be challenged. It would thus provide us with a meaningful opportunity to seek a preliminary injunction before a questionable merger is consummated. This is of great practical importance because divestiture of stock or assets after an illegal merger is consummated is frequently an inadequate remedy for a variety of reasons.

Assets may be scrambled, making re-creation of the acquired firm impossible. Key employees may be lost. The goodwill of the acquired firm may be dissipated, making it a weaker competitive force after divestiture.

Moreover, divestiture is normally a painfully slow process, and in some cases might never occur. Locating an appropriate buyer willing to purchase at a reasonable price is frequently difficult. Firms under divestiture orders may deliberately delay to reap the benefits of the unlawful merger. During these delays, anticompetitive consequences grow.

Pre-merger notification will also advance the legitimate interests of the business community in planning and predictability. It will enable firms to make post-acquisition changes with much more confidence than they can at present.

Lastly, pre-merger notification will prevent the consummation of so-called "midnight" mergers designed to subvert the Department's authority to seek preliminary relief.

A second important proposal would extend the coverage of Section 7 of the Clayton Act to the limits of Congressional power under the Commerce Clause. Last year in *United States* v. *American Building Maintenance Industries*, 422 U.S. 271 (1975), the Court interpreted Section 7 more narrowly. It held that the phrase "engaged in commerce" in that section means "engaged in the flow of interstate commerce, and was not intended to reach all corporations engaged in activities subject to the federal commerce power." As a consequence of the *American Building* decision, many economically significant [16] mergers cannot be reached under Section 7 if one of the corporations involved conducts a wholly intrastate business: that is, the corporation is not "directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce." 422 U.S. at 283.

This decision leaves an undesirable gap in the coverage of Section 7 of the Clayton Act, which can be closed by simply conforming its jurisdictional scope to the federal commerce power. Last year, Congress granted the FTC authority over unfair methods of competition and unfair or deceptive acts or practices extending to constitutional limits.[17] The Sherman Act has that same reach.[18] Section 7 is a remedial statute designed to arrest the lessening of competition in its incipiency before it develops into restraints and monopolies prohibited by the Sherman Act. Its current restrictive application partially defeats that purpose.

A third reform relates generally to more effective antitrust enforcement but has special application to enforcement of the Clayton Act. Enactment of H.R. 39 would expand the Department's civil investigative demand (CID) authority. I testified in support of that bill before this Subcommittee last May.[19]

This is not the appropriate time to reiterate what I think are the compelling reasons justifying enactment of H.R. 39. It is, however, a very appropriate occasion to emphasize the particular importance of the use of the authority contained in H.R. 39 to merger enforcement efforts generally. H.R. 39, if approved by the Congress, would eliminate whatever uncertainty exists today about the use of CIDs in investigating proposed mergers and acquisitions. In addition, it would allow us to obtain information relevant to the analysis of such transactions, not only from the parties thereto, but from any person having such in-

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[16] The *American Building* case itself is illustrative. The relevant market was the sale of janitorial services in Southern California. In 1969, the acquiring company controlled 10 percent of that market with revenues of $10.9 million and the acquired companies controlled 7 percent of the market with sales of over $7.2 million.

[17] Pub. L. 93–637.

[18] *United States* v. *South-Eastern Underwriters*, 322 U.S. 533 (1944).

[19] See Hearings Before the House Judiciary Subcommittee on Monopolies and Commercial Law, 94th Cong., 1st Sess. (1975), pp. 22–69.

formation. This latter ability is particularly important in this area, since the crucial determinations of relevant product and geographical markets can frequently be made only by obtaining market data from competitors, trade associations, suppliers, or customers. These third parties are not subject to our present CID authority, and often refuse to provide information voluntarily. Enactment of H.R. 39 is thus central to any program of reform of merger law to enhance its efficacy in maintaining competition as the nation's primary economic policy.

APPENDIX

MERGER CASES FILED SINCE FISCAL YEAR 1960

1. Banking—64
2. Alcoholic Beverages—8
3. Oil & Petroleum Products—15
4. Paper & Paper Products—6
5. Newspapers—7
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8. Films—7
9. Chemicals & Chemicals Products—13
10. Automobiles—Parts & Accessories—6
11. Bedding—3
12. Food & Foodstuffs & Food Services—11
13. Pharmaceutical Products & Services—4
14. Vehicles and Heavy Equipment—13
15. Clothing and Accessories—5
16. Books, Magazines and Other Publications—3
17. Transportation—8
18. Energy Producing Units and Parts—10
19. Tools and Instruments—6
20. Service Industries—3
21. Construction and Construction Materials—5
22. Miscellaneous—22

TESTIMONY OF THOMAS E. KAUPER, ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. KAUPER. Thank you, Mr. Chairman.

I think the record should show that I'm accompanied today by Deputy Assistant Attorney General Joe Sims.

Chairman RODINO. Welcome, Mr. Sims.

Mr. KAUPER. I welcome today the opportunity to testify on the Department's experience and enforcement policy under section 7 of the Clayton Act. I will, in addition, discuss three areas in which legislation could significantly improve antitrust enforcement efforts in the merger area.

At the outset, I wish to commend the subcommittee for its plan to conduct extensive antitrust oversight hearings. As the Supreme Court has noted,

> Subject to narrow qualifications, it is surely the case that competition is our fundamental national economic policy, offering as it does the only alternative to the cartelization of governmental regimentation of large portions of the economy.

Since the antitrust laws are designed to insure that competition is allowed to serve this crucial purpose, the task of determining whether the antitrust laws are working properly is enormously important. I am confident that your hearings will serve as a foundation for improving both the antitrust laws and the enforcement, and thereby substantially benefit the interests of consumers throughout the country.

Enforcement of the antitrust prohibitions against anticompetitive mergers has, for many years, been an important part of our overall enforcement efforts. As an illustration, since fiscal year 1960, the Antitrust Division has conducted 6,716 investigations, about a third of which, I estimate, involved proposed mergers. During that period, 688 civil suits were filed, of which 238 involved mergers. I have attached as appendix A to my statement a general breakdown of those cases by industry. Thus, the merger area has been an active one for us.

Of course, the amount of the Division's resources devoted to mergers varies with the amount of merger activity at any given time. That activity seems to vary with general economic conditions. Apparently because of depressed economic conditions, merger activity has been reduced in recent years. In 1969, for example, there were approximately 4,500 mergers, compared with approximately 1,750 mergers in 1974. The decline of merger activity in recent years has enabled us to devote substantial additional resources to other very important areas, primarily to criminal prosecution of hardcore price fixing and activities to promote competition in the regulated industries.

The "nuts and bolts" of our merger enforcement process are rather difficult to define since each case varies, not only in substance and complexity, but also in the time we have available to seek meaningful relief. The Division always tries to decide whether to challenge a merger prior to consummation—with its attendant scrambling of assets and perhaps irreversible lessening of competition—if any challenge is to be made.

We become aware of mergers in a wide variety of ways. Obviously, we read the Wall Street Journal and Standard Corporation Records daily. We receive approximately 400 trade journals which generally report merger activity within their respective fields. Attorneys familiar with an industry frequently learn of a proposed transaction before it is reported publicly. Finally, individual citizens who, for various reasons, know of a merger which has not been reported in the press, sometimes notify the Antitrust Division.

Frequently, we become aware of a proposed merger only a short time before consummation is scheduled. This is particularly true where acquisition through a tender offer, friendly or unfriendly, is planned. We do the best we can in the time we have, attempting as thorough an analysis as is possible in the circumstances. We generally utilize the following procedures, although time pressures occasionally demand abbreviation or bypass of some of these steps.

And here, Mr. Chairman, I have in the statement set forth in part in response to your letter where you suggest a runthrough of the procedures used, a hypothetical kind of case. I think rather than reading that in the statement—it is part of what is included and if you have any questions we will be happy to answer them—but I thought in the interest of time I would proceed over to page 7 of the statement.

Chairman RODINO. I think that will be fine.

Mr. KAUPER. Where consummation of a merger has not yet occurred, a decision to file suit will almost always be accompanied by a decision to seek a preliminary injunction blocking consummation. Generally, only when the parties agree to postpone consummation, or when we feel we have had insufficient time or information to adequately present a case for a preliminary injunction, will we decline to attempt to block consummation. I believe, quite strongly, that divestiture is a wholly inadequate remedy in a merger case, and we seek to avoid that problem whenever we can.

This is an important point, and cannot be overemphasized. Our investigatory process is designed to obtain what is necessary to make a litigation decision before consummation. Experience clearly shows that divestiture very often does not, and frequently cannot, result in a return to the competitive status quo ante. There is almost always a change in circumstances caused by a consummated merger that can never be undone. As a practical matter, divestiture is slow and unwieldy, and experience proves what can be expected—a company that loses a section 7 case after consummation has little incentive to assist in rapid divestiture. Horror stories abound, with the approximately 17-year history of the *El Paso Natural Gas* case one of the most visible. Unfortunately, the interminable problems and delay involved in obtaining divestiture are the rule, not the exception. There is every reason for the parties to delay an ordered divestiture, as both we and the FTC are only too painfully aware.

In addition, our failure to obtain preliminary injunctive relief creates an incentive for defendants to delay, rather than expedite the litigation. Our experience in bank merger cases, where there is an automatic statutory stay, is that those cases move significantly faster than merger cases challenging a consummated transaction. I am convinced that preliminary relief is necessary to expedited litigation and that, with preliminary relief, these matters can be disposed of fairly rapidly, as was the recent *Copper Range-Amax* case, which was disposed of in 60 days.

At least three important conclusions can be drawn from this overview of our merger enforcement process. First, the more notice we have, the better job we will do. Second, expanded investigatory authority would enable us to do a better job and with greater speed. Third, whether we get a preliminary injunction can have a significant effect on the length of the litigation and the adequacy of available relief.

The subcommittee has requested a brief outline of my views on merger enforcement policy generally. Of course, merger policy must be derived from the purposes which led Congress to enact section 7 of the Clayton Act, and to amend it in 1950, as well as from the case law interpreting that statute.

Whatever one believes about the advantages or disadvantages flowing from existing concentration levels in the American economy, there are several persuasive reasons for preventing any further increase. The dominant theme pervading congressional action in 1950 was a fear of what was perceived to be a rising tide of economic concentration. Increased concentration may not only reduce competition, but threaten social or political values as well. Section 7 was designed to prevent such harm by outlawing probably anticompetitive mergers when the trend to a lessening of competition in a line of commerce is in its incipiency.

Our foremost concern is with horizontal mergers. A horizontal merger is simply one between companies that are competitors, such as manufacturers of the same or very similar products, or distributors selling competing products in the same market area. Such mergers eliminate a competitor and concentrate the power of two firms into one.

The law with regard to horizontal mergers is relatively clear and well developed.

And then, on page 11, I discuss two of the leading cases; and if I might thence skip over to page 12.

Hence, two related rules emerge for highly concentrated industries. Mergers between substantial competitors which further increase concentration or mergers which absorb a small but important competitive factor in the market are probably unlawful.

In light of the case law governing horizontal mergers, it is difficult to articulate any meaningful enforcement policy that distinguishes between "big" and "small" mergers. The size of a merger can be judged by a variety of measurements, most importantly for our purposes by market shares. In addition, size is not the only factor to be considered in assessing the legality of a horizontal merger. The aggressiveness of a firm, the trend toward concentration in the relevant product market, and the history of a particular market must also be considered. It is unlikely, however, that any significant horizontal merger will go unchallenged by the Justice Department or the Federal Trade Commission. In determining whether to challenge a horizontal merger, the 1968 merger guidelines, while not controlling, serve as a useful benchmark by which to assess its probable anticompetitive significance.

A vertical merger is one between businesses that have a customer-supplier relation to each other, such as a manufacturer acquiring a supplier of raw materials. The law regarding vertical mergers is not as well developed as that concerning horizontal mergers. The principal jurisprudence was established in the *Brown Shoe* and *DuPont* cases. The main concern raised by vertical mergers is that barriers to entry or competition by other firms may be raised. For instance, if a manufacturer acquires a supplier of crucial raw materials for its product, other competitors or would-be entrants to the manufacturer's market may be denied access to these key resources.

Conglomerate mergers are generally defined to include all those which are neither horizontal nor vertical,-sometimes putting everything in that's left over. The principal analytic framework used to assess the legality of such mergers is the potential competition doctrine. Under the doctrine, conglomerate mergers may be anticompetitive for three basic reasons.

First, the acquiring firm may be eliminated as an actual new entrant into the relevant market under consideration, thereby depriving that market of increased future competition.

Second, the acquiring firm may be eliminated as an existing procompetitive force on the edge of the market; while it is not actually doing business in the market, it spurs competition in the market because of its threat to enter if profits or controllable costs of actual market competitors rise.

Third, the acquisition may operate to entrench the dominance of the acquired firm.

There is significant case law on the potential competition doctrine, from the first *Penn-Olin* case through the *Marine Bancorporation* case. Certain criteria for assessing the legality of a potential competition merger are well recognized, such as concentration levels in the relevant market, and the capability and incentive of the acquiring firm to enter the market in other ways. Projections for successful prosecution, however, are problematical. We have found some courts reluctant to draw what we believe are reasonable inferences of probably anticompetitive effects of these mergers, but we remain convinced of the soundness of our theories.

Our recent challenge to the Inco-ESB merger rests upon the potential competition doctrine. We believe that Inco would have entered ESB's industrial battery market de novo in the absence of the merger.

You also inquired, Mr. Chairman, about mergers in regulated industries.

Mergers in regulated industries present special problems. Where clear antitrust immunity exists, we must, of course, confine our activities to appearances before regulatory authorities with jurisdiction to approve such mergers, and to seeking direct judicial review in some cases. However, even where challenges under the Clayton Act are possible, special factors may come into play in evaluating the probable anticompetitive consequences of a merger. For example, concentration ratios may have special significance in a line of commerce which can be entered only upon receipt of an officially authorized charter or certificate of entry. Regulation may itself limit the opportunities for competition. Where this is so, it is especially important that available opportunities for competition be preserved and encouraged.

In addition, regulatory entry barriers may affect application of the potential competition doctrine. With regard to the banking industry, the Supreme Court has stated that in States which stringently limit the ability of banks to branch or otherwise to expand internally, "in the absence of a likelihood of entrenchment, the potential competition doctrine—grounded as it is on relative freedom of entry on the part of the acquiring firm—will seldom bar a geographic market extension merger by a commercial bank." That's the key part in the holding of *United States* v. *Marine Bancorporation.*

Finally, in some cases, Congress has provided for specific statutory defenses to a merger between regulated firms which would otherwise violate the antitrust laws.

Thus, the existence of State and Federal regulation may require the use of special standards in determining the legality of a merger involving regulated firms.

Finally, you have requested my views on legislation which would contribute to a more effective and efficient merger enforcement program. In my judgment, three legislative reforms would provide much needed assistance.

The first would require substantial companies to provide premerger notification to the Department. Such notification would provide us with time to develop the information needed to insure a thorough evalution of whether the proposed merger should be challenged. It would thus provide us with a meaningful opportunity to seek a preliminary injunction before a questionable merger is consummated. This is of great practical importance because divestiture of stock or assets after an illegal merger is consummated is frequently an inadequate remedy for a variety of reasons.

Premerger notification will advance the legitimate interests of the business community in planning and predictability. It will enable firms to make postacquisition changes with much more confidence than they can at present.

Lastly, premerger notification will prevent the consummation of so-called "midnight" mergers designed to subvert the Department's authority to seek preliminary relief.

A second important proposal would extend the coverage of section 7 of the Clayton Act to the limits of congressional power under the commerce clause. Last year in *United States* v. *American Building Maintenance Industries*, the court interpreted section 7 more narrowly. It held that the phrase "engaged in commerce" in that section means, "engaged in the flow of interstate commerce, and was not intended to reach all corporations engaged in activities subject to the Federal commerce power."

As a consequence of the *American Building* decision, many economically significant mergers cannot be reached under section 7 if one of the corporations involved conducts a wholly intrastate business: That is, the corporation is not "directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce."

This decision leaves an undesirable gap in the coverage of section 7 of the Clayton Act, which can be closed by simply conforming its jurisdictional scope to the Federal commerce power. Last year, Congress granted the FTC authority over unfair methods of competition and unfair or deceptive acts or practices extending to constitutional limits. The Sherman Act has that same reach. Section 7 is a remedial statute designed to arrest the lessening of competition in its incipiency before it develops into restraints and monopolies prohibited by the Sherman Act. Its current restrictive application partially defeats that purpose.

A third reform relates generally to more effective antitrust enforcement but has special application to enforcement of the Clayton Act. Enactment of H.R. 39 would expand the Department's civil investigative demand authority. I testified in support of that bill before this subcommittee last May. This is not the appropriate time to reiterate what I think are the compelling reasons justifying enactment of H.R. 39. It is, however, a very appropriate occasion to emphasize the particular importance of the use of the authority contained in H.R. 39 to merger enforcement efforts generally.

H.R. 39, if approved by the Congress, would eliminate whatever uncertainty exists today about the use of CID's in investigating proposed mergers and acquisitions. In addition, it would allow us to obtain information relevant to the analysis of such transactions, not only from the parties thereto, but from any person having such information. This latter ability is particularly important in this area, since the crucial determination of relevant product and geographical markets can frequently be made only by obtaining market data from competitors, trade associations, suppliers, or customers. These third parties are not subject to our present CID authority, and often refuse to provide information voluntarily. Enactment of H.R. 39 is thus central to any program of reform of merger law to enhance its efficacy in maintaining competition as the Nation's primary economic policy.

This concludes my statement, Mr. Chairman. I will be glad to answer any questions you may have.

Chairman RODINO. Well, thank you very much, Mr. Kauper. We are glad to have you back here, and you are looking well again.

Mr. KAUPER. Thank you.

Chairman RODINO. Mr. Kauper, if I remember correctly, in testimony last spring before the Senate Antitrust Subcommittee, you stated your personal support, and later the administration's support for a mandatory stay of the merger if requested either by the Department of Justice, or the FTC, during a premerger investigation period.

Recently, the administration announced its opposition to the premerger stay provision. Let me ask you a couple of questions relative to that.

First, do you personally feel now, as you did last spring, that a premerger stay would improve antitrust enforcement; second, if you can, could you tell us why there has been a change in the administration's position?

Mr. KAUPER. Well, Mr. Chairman, let me distinguish two things first, if I might. There are really two concepts of "stay" within the provision presently contained in title V of S. 1284.

Within the premerger notification provision, there is in essence a stay by virtue of the requirement that we must be notified, and the parties must hold up for a period of time after that notification. This we view as part of the premerger notification provision of the bill. I testified in support of those provisions. So far as I'm aware, the administration's position on those provisions has not changed; that is, the premerger notification provision as such, that is, that notice must be given a certain number of days before consummation, is still, as far as I'm aware, supported by the administration.

The second provision, in essence, called for the issuance of an automatic preliminary injunction once a decision had been made to file suit. S. 1284, as originally drafted, in essence contained a totally automatic stay for the duration of litigation. I did testify on S. 1284 to the effect that I thought that was somewhat Draconian, that even though now I found myself leading a Government enforcement agency, I thought that was placing too much authority in the hands of Government enforcers; but I did indicate that we favored—and the administration favored—a provision which would in essence place such a stay, if there was allowance made under appropriate circumstances where the Government's case could be shown without merit, that the stay could be lifted upon petition of the parties. That was the position taken in general by the administration.

As you are aware, Deputy Attorney General Tyler notified Senator Hart several weeks ago that the administration no longer supported that second part of title V. That was the result, very simply, of a continuing debate within the administration. I could not honestly say, Mr. Chairman, that my own personal views have changed any, but I think as time went along a number of problems were raised, and there was a perfectly good faith disagreement over what the impact of that automatic preliminary injunction would be on such matters as the ability of firms to raise capital in the market, and so on; and hence the change in that provision.

Now, there was discussion within the administration of a variety of compromises in the form, primarily legislation which would grant an automatic temporary restraining order, not an automatic preliminary injunction, but a temporary restraining order, pending the outcome.

Chairman RODINO. In other words, the administration would support such a provision.

Mr. KAUPER. Well, let me summarize where we came out on that. There was considerable disagreement within the administration as to what an appropriate time period would be. The ultimate decision not to accept various compromises offered within the administration, and thus oppose title V, I would have to say was basically mine because I felt the various compromises we were discussing—and indeed, I think everybody finally agreed on that point—really would put us in a worse position than we are now. Hence, for that reason I felt that the better course was not to try to compromise by ending up with some kind of standard which would actually impede our ability to obtain preliminary injunctions.

But I think my own view, and that was your initial question, really remains pretty much what it has always been, personally.

Chairman RODINO. Do you feel that would be an effective way of bringing about the objective that you outlined in your statement?

Mr. KAUPER. Well, I think it is one way. Here again, let me emphasize that I think part of those objectives, a substantial part, can be met through the premerger notification provisions themselves, which the administration continues to support because that gives us the opportunity to learn of the merger and be better prepared to be in the courtroom, seeking a TRO, and ultimately the preliminary injunction. That is a very significant fact in and of itself.

The question of the use of an automatic TRO, I think, clearly could benefit us in some cases, I don't have any question about that. It's a question of how you balance that off, and this is where the argument came from the other side, against the impact of that on a transaction which might ultimately be held to be perfectly lawful.

One of the concerns was a combination of the time periods. There is, as you are aware, in S. 1284 a provision for a set time period in which premerger notice must be given, and then there is a holdup for that purpose; if you then add additional time in a given transaction, it is possible that you will impede the ability, for example, of certain firms to raise capital quickly which may be done, after all, in this way, for a relatively indefinite period of time.

Now, that was the concern on the other side. I guess I drew the line a little differently than the other people, but I think it is a perfectly legitimate concern, nevertheless because the automatic stay provision does operate, after all, when there has been no court judgment as to whether the transaction is lawful or not.

Chairman RODINO. Of course, with your experience, the experience you cite is such that it would seem that the automatic stay probably would work most effectively, despite the fact that you say there are counter-balancing factors.

Mr. KAUPER. Well, I think if you put it in terms of, parochially, what would help in terms of getting relief, it would; I don't think anybody really has denied that. I think the argument has been more on the other side, what are other kinds of countervailing concerns in the economy as a whole, recognizing, as I think we all must, that a certain number of mergers—indeed, I suspect a rather large number of mergers—are not only not unlawful, but maybe quite beneficial, and hence the question how do you balance off what impact that may have on certain mergers that you might want to in essence encourage in some way. That's, I think, where the major disagreement has been.

But in terms of, would it be of assistance to prevent a given merger which we think is unlawful, I don't think anybody could deny that.

Chairman RODINO. Mr. Kauper, in 1969, then Attorney General Mitchell stated that "The Antitrust Division would probably challenge any merger between the top 200 U.S. firms, or between a top-200 firm and a leading firm in another industry."

Does this still represent the policy of the Department toward conglomerate mergers?

Mr. KAUPER. Well, I think as a general proposition it certainly indicates where we are going to put our resources, and what kind of response is probably most likely. Now, you have to keep in mind, that's an awfully generalized statement. I would add a couple of caveats to it. First of all, at the time that statement was made we were prior to some decisions of the Supreme Court in terms of the potential competition doctrine, which have not helped us very much in the last 2 or 3 years. But, I suppose the major caveat that has to be added under the law is that you have to be assuming financially healthy companies. That is, if you have companies that are failing, or divisions perhaps that are failing, then under the law you may have really quite a different problem under the kind of defenses the Court recognized. But, I think generally is remains a pretty accurate statement.

Chairman RODINO. Let's put it this way, do you believe there is a social purpose to section 7, which would support a challenge between the merger of two large unrelated firms?

Mr. KAUPER. I don't think one can say that the purpose in and of itself is enough to carry the day in a courtroom. But I have very little question that there is a major social purpose behind section 7.

Chairman RODINO. You mean there is weight given to that factor?

Mr. KAUPER. I think that's quite right. The statute, after all, does talk in terms of a lessening of competition in relevant markets, and it is rather difficult to take a purely social, noneconomic, nonmarket concern and translate that into a court decision under that statutory criteria.

But, I think there is very little doubt that a court does in fact give some weight to that sort of concern, and certainly the judgments made with respect to enforcement have to take that kind of a concern into account. But I don't think one really could say that one could, for example, bring an action to challenge a large conglomerate merger by asserting, just hypothetically, for example, to take a social policy, that this would have certain employment consequences that we might view as undesirable. The statute does, after all, talk in terms of competition, which I think has been given a pretty well-defined meaning, at least insofar as it refers to an economic, market-type concept.

Chairman RODINO. Mr. Kauper, one final question, and then I will turn it over to Mr. Hutchinson. Why wouldn't the Federal Trade Commission's premerger notification program be adequate for your purposes?

Mr. KAUPER. Well, in the first place, as I understand the Commission's premerger notification concept, it may be that the ceiling ranges are somewhat high.

Second of all, there really is no concept, as I understand their provisions, which provides a premerger waiting period. To me that really is the crucial element of a concept of premerger notification. It does not, in terms of our concern, which is the availability of preliminary relief and our ability to get it, it is not of great assistance to us to know that a merger is about to occur in 3 days, or 4 days, or 5 days. Thus, the statutory requirement of a waiting period is really, I think, at the heart of the concept of premerger notification.

Chairman RODINO. You think the period of premerger waiting time is really the most important element, outside of the fact that there is notice?

Mr. KAUPER. My feeling, Mr. Chairman, is that with most significant mergers, we will probably learn of them in any event sometime——

Chairman RODINO. Well, "sometime" is too late.

Mr. KAUPER. That's my point. My point is to assure that we learn in sufficient time that it is possible for us to take some kind of court action. And hence the time period, I think, is really in my own judgment the major reason for that kind of legislation because without that, it's true, we would get notice, and in a few cases that might in effect advance how much time we have; but as a practical matter, in many cases we would only learn a few days earlier what we would know anyway, and it would still be too late.

Chairman RODINO. Thank you very much, Mr. Kauper. Mr. Hutchinson?

Mr. HUTCHINSON. Thank you, Mr. Chairman.

Mr. Kauper, how do you define a merger? Is the definition broad enough to include the sale by one corporation of part of its operations to another for cash?

Mr. KAUPER. There are really two different parts to that. I normally would define a merger as an acquisition of virtually all of the assets of a company; or, alternatively of acquisition of control, when you may be talking about a stock acquisition, after all.

The statute, however, does not really speak in terms of "merger," as that word is used. It talks in terms of "acquisitions of assets or stock." And thus, within the meaning of the statute, virtually any acquisition of assets, whatever they may be, I suppose, is technically covered within the jurisdictional reach of the statute. You obviously would have to go on and prove the anticompetitive effect. But, within the jurisdictional reach of the statute, acquisition of any part of the assets of one company by another is covered.

So, I think the answer to your question, in terms of the statutory language, is that the transaction would be covered by the statute, very clearly.

Mr. HUTCHINSON. That's what we are talking about in the type of legislation we are considering here the broad concept, everything within the statute.

Mr. KAUPER. Yes, if you talk about the provisions as they now appear within S. 1284, that premerger notification concept. That was one of the questions, Congressman, you may recall, I raised in the testimony on S. 1284, whether or not it shouldn't more clearly define the classes of acquisitions covered by the requirement. I think the latest version of S. 1284 does that.

Mr. HUTCHINSON. Now, if we are talking about a merger in the broad context of premerger notification, would that mean that every time that any corporation decided it wanted to sell, and another to acquire one of its divisions for example, it would have to notify the Government, even though it wasn't an absorption of one company by another. Of course, it might have that effect in some market because I suppose a single division might be a dominant force in the market, and so on; but that's what is contemplated, that any time one corporation wanted to sell some of its assets to another, it would have to notify the Government.

Mr. KAUPER. Well, first of all, it would have to meet the jurisdictional requirements, we are talking about S. 1284 as drafted, and those are, the first company would have to have sales or assets of $100 million, and the other assets of $10 million. So, number one, you would have to meet those requirements.

Second, there is in the bill a rather long list of types of transactions that are not covered, that is certain kinds of assets the sales of which are not covered. For example, sales between firms in certain kinds of regulated industries are not covered. There is a list pursuant to a number of questions I raised on precisely that issue, in testifying on S. 1284. But, if it is not within one of those exceptions, if the corporations are within that jurisdictional reach, then they must notify us.

Mr. HUTCHINSON. At what point must the notification be made? Certainly, the notification is not required until after an agreement has been made in its final form.

Mr. KAUPER. That's correct.

Mr. HUTCHINSON. And up until that time the Government wouldn't be brought into it.

Mr. KAUPER. That's right. The provision in S. 1284 would require them to notify us 30 days prior to consummation. Now, in the normal merger, the agreement, in principle, is usually in fact before that time period; in other kinds of transactions it might not be. The statute as now drafted says 30 days prior to the date on which they plan consummation. Or, to put it another way, they cannot consummate until 30 days have passed after notification.

Mr. HUTCHINSON. And "consummation" simply means sitting down and signing the papers.

Mr. KAUPER. That's correct. The final transfer of title, if you like.

Mr. HUTCHINSON. And so this then would accord your Division 30 days in which to look the thing over. That is plently of time, isn't it?

Mr. KAUPER. Well, the bill also provides that if certain information which we have requested has not been furnished: or if we feel there is a need for additional information, we can request an additional—the bill, as I now understand it, says 45 days—but the understanding, I think, in terms of the committee in the Senate is that that will come down to an additional 20 days following receipt of that information. But, that would require us to say, "There is certain information you have not yet given us", and there is a rather tight limit on that.

Again, this was an issue I discussed in my S. 1284 testimony because I originally felt that the bill was too open-ended in terms of our ability to extend that time period.

Mr. HUTCHINSON. Do you think that the record would show that the Federal Trade Commission with its broader investigatory powers is more successful in section 7 cases than your Division?

Mr. KAUPER. Oh, I don't know that I would draw any kind of comparison there. They certainly do have somewhat different investigative authority than we do, broader investigative authority; on the other hand, they have operated for some time under a quite different set of procedures. So, I don't know that one could say any particular factor leads to a higher success rate, or not, based on that.

I think the overall record of both agencies in terms of success is probably pretty comparable, as far as I know.

Mr. HUTCHINSON. Well, as I recall it, in the argument on the CID bill, the point was made that they had broader powers than you did; I got the impression that they are probably more successful because of that.

Mr. KAUPER. Well, whether that could be isolated down that way or not, I'm not sure. Our concern in part here is in terms of our ability to obtain preliminary relief. The Commission really has not had that kind of authority with respect to explicitly going to court and getting preliminary relief until recently. So, I think there are some different factors that have to be judged there.

I suspect it is true—in fact, I'm reasonably sure it is true—that the Commission has the ability to obtain more information than we have been able to obtain. That has become particularly difficult for us in the past year or two, and I'm now talking primarily about information from third parties, very frankly, because many third parties are now concerned that anything which they might give us on a voluntary basis we cannot protect under the Freedom of Information Act.

Mr. HUTCHINSON. Now, you mentioned in your statement that a second important proposal would be one which would embrace the entire commerce powers within section 7, rather than to be actually engaged in commerce between the States.

What you are suggesting is that section 7 be broadened to include all activities "affecting" commerce; is that the word, "affecting"?

Mr. KAUPER. In essence, yes. There is language in S. 1284 which is designed to do this, and I believe that appears as part of title VIII of S. 1284. The basic concept, as you are, I'm sure, aware, is that section 7 as presently drafted requires that corporations—both the acquiring corporation and the acquired corporation—be directly engaged in commerce. The court, in the American Building Maintenance case, interpreted that to mean that each company itself had to be, in essence, in the flow of commerce.

What we have suggested is a test which says the act applies if a corporation is engaged in activities which "affect" commerce, which is essentially the jurisdiction of the Congress, as I understand it.

Mr. HUTCHINSON. Now, yesterday, as I understand the bill, the House passed a bill that goes even further on that, and attempts to write into the statute a conclusive presumption that it is commerce. In other words, take away from the courts, entirely, the power to make any determination as to whether commerce is actually affected. We simply write it right into the statute that it is.

Do you think the Congress can go so far as that?

Mr. KAUPER. I'm afraid, Mr. Hutchinson, I'm not a constitutional expert. What we suggested is simply use of "affecting."

Mr. HUTCHINSON. The word "affecting" is common. But this thing goes to the point of a conclusive presumption.

Mr. KAUPER. I suppose it is simply a question—and I'm shooting a little off the top of my head here because I have not really thought about that question—whether there is a sufficient showing that any American corporation can be viewed as being in commerce enough to create a presumption. I guess in constitutional terms I wouldn't be too sure about that. I think the "affecting commerce" test is certainly the traditional test, basically and, at least as I perceive it, would take care of the immediate problems which we confronted. Our major concern has been simply to get to that kind of a standard. I think that would meet the kind of circumstance that was involved in the *American Building* case, and in the kind of situation where I think we ought to have some role.

Mr. HUTCHINSON. All right. Thank you, Mr. Kauper.

Mr. FLOWERS. Mr. Kauper, I think you've indirectly been talking around this: Have you given us any exact definition of what would be a substantial company, or do you have one, does the Department have one?

Mr. KAUPER. Well, I think that is not really a concept we use, particularly. The statute talks in terms of competition and talks in terms of economic markets, so a firm which may to you and me in some abstract basis seem to be relatively small, may in that market be very substantial, indeed. So, it is a relative kind of standard, and a standard which is really a market-oriented sort of standard. One of the——

Mr. FLOWERS. Go right ahead, sir.

Mr. KAUPER. I was going to comment: One of the questions, or one of the issues stated in Mr. Rodino's letter to me was what distinction we drew, for enforcement purposes, between big and small mergers. That is not really a very meaningful distinction, it is the same problem we have with the phase "substantial" as an identification of a firm. What's a very small merger today could be in an industry that 10 years from now is going to be enormous.

Mr. FLOWERS. The whole determination must be subjective to some extent, you don't just put all the figures in a computer and out pops one and another stays in.

Mr. KAUPER. That's right; what we have attempted to do, if you look back at the old 1968 guidelines, for example, which we still follow, the concept of substantiality—and indeed, this is within the statute—is there a "substantial lessening" of competition.

Now, in making that judgment, obviously you have to make judgments of, what does the elimination of a firm of this size in this market mean? That is usually done in market share terms. The guidelines attempt to set forth, for at least some edification, the levels of market shares where we think you are beginning to have a significant problem. And those market shares, if you are in a highly concentrated market, you are talking about a merger of two competitors, are by most standards, I would suppose, quite low.

Mr. FLOWERS. All right.

Mr. KAUPER. That is, a firm with 3 or 4 percent of the market may be viewed as a substantial competitor in that sort of case.

Mr. FLOWERS. In your Department, Mr. Kauper, do you have a merger section?

Mr. KAUPER. No; the merger activity, or I should say merger investigations and cases are spread among our litigation sections. The responsibilities of those sections are essentially divided by commodity and industry. So, if for example you have a merger in industry X, that will be investigated by the same section within the Division that would look at the issue of price fixing, or any other form of behavior within that same industry.

Mr. FLOWERS. Well, does this information only come to your Department through the formal channels, or are they gleaning the Wall Street Journal for proposals in advance? Also, is there sufficient liaison with FTC? What I'm trying to get at, as a practical matter, is just how is that handled in the Antitrust Division of the Justice Department?

Mr. KAUPER. We have tried in the statement to set out that procedure, and I did not go through that part of the statement orally; but I think it does describe the mechanical way we do things. But normally, that is one of the reasons for keeping merger enforcement in the section which has responsibility for that industry. We thus can enable those attorneys to stay readily abreast of what is happening in that industry generally.

Now, we all read the Wall Street Journal, I don't know how many people every day in the Division do—many do; and a variety of other trade journals, and a lot of information is picked up in that way. Other times simply because an attorney knows the industry; he may be looking at another problem in the industry, and he may start tripping over the fact that two firms are talking to each other.

So, there are a variety of ways in which one learns this. There is not a regularized single pattern through which we get this information today.

Mr. FLOWERS. Do you have a close liaison with FTC on notification procedures, and what not?

Mr. KAUPER. The information that the FTC obtains through its premerger notification program is available to us if we seek it; we do not normally get it on a routine basis. But, we have, I think, pretty good working relations with the Commission in terms of information they may have, or indeed we may have. The normal procedure, if we learn of a proposed transaction, merger transaction, however we learn of it, before we undertake a formal investigation of that, there is a notification to the Federal Trade Commission, what we refer to as the "clearance process." At that point obviously both of us know of the proposed transaction, and then a judgment is made as to which agency is best equipped to handle that particular transaction.

Mr. FLOWERS. Do you feel within your Department now you have resource limitations? By that I mean, are you limited in your pursuit of those activities because of your limitations of personnel; or do you feel adequate in this regard?

Mr. KAUPER. Well, I think if you look back over a period of time, back into the sixty's, we had from 30 to 40 percent of our personnel and other resources in merger activities. That percentage is now much lower than that. If there were to be a significant, rapid increase in merger activity, we would be short of resources.

Mr. FLOWERS. If you got to the late sixty's level of merger activity, you would come up short.

Mr. KAUPER. Yes; in the sense that we would undoubtedly have to take people off some other things. Now, you asked the question, I think, specifically in terms of merger enforcement. I don't think I would say we would be short of resources there largely because if that activity picked up, that is virtually No. 1 priority in the Division. You would probably come up short in the areas you would take people off of, to handle merger investigations. I mean, we tend to view merger enforcement activity as one of the uncontrollables in the Division, an activity that has to go on.

Mr. FLOWERS. Sort of like social security, something like that.

Mr. KAUPER. Yes.

Mr. FLOWERS. Thank you, Mr. Kauper, Mr. McClory?

Mr. MCCLORY. Thank you very much.

We had some interesting hearings about a year ago with regard to food costs, trying to determine to what extent anticompetitive practices were contributing to food costs. I am sure the objectives of many of those who testified were to find some conspiracy among the large retail outlets or the food processing companies. But, as I recall the testimony, as far as monopolies or anticompetitive practices were concerned, we dealt primarily with the Teamsters Union, which had a monopoly on transporting food and which was noncompetitive, contributing artificial increase in prices that didn't seem to involve the antitrust laws.

Then we had some discussions with some of the farm co-operatives who were operating in a noncompetitive way that also seemed to be contributing to food costs.

Now, these escape the entire impact of our antitrust laws.

The thing that occurred to me, though, in the course of those hearings was the intense interest there was in getting into the operations of the large corporations and the amounts of profits they were making in different food lines, and how much they were spending on TV advertising.

Now, the question that I have is with respect to this premerger investigatory authority that you seek is this: Not only would that make available to you—and hopefully it would be retained by you—this kind of detailed information which the anticorporate groups are seeking, but it seems to me it could give a misunderstood impression which could be very harmful to the corporate enterprise system.

Are you not fearful of that? I notice in your testimony that you not only want to get this kind of detailed information from corporations that are involved in the merger, but others that are in related activities.

Mr. KAUPER. Let me respond to that by pointing out, first of all, what we think the CID bill would do for us—and, keep in mind, the CID bill is not something that would authorize us to conduct economic studies for the purpose of putting out public reports, or whatever; it is an enforcement tool.

One of the conditions, I think, we have been very insistent upon in connection with the CID bill, is that it must be made clear that the information which is obtained is not public. That is, it seems to me as a law enforcement agency, we view this as an enforcement tool, and we don't want it made public.

Mr. MCCLORY. I have served as the ranking member on the House Committee on Intelligence, and induced our President and intelligence agencies to deliver tens of thousands of secret documents on the promise that these would not be made public. I just thought I'd throw that out.

Mr. KAUPER. I'm aware of that. I must say, however, I can't think of any circumstance while I've been here—and I'm getting to be an old man in this job now—where we have disclosed CID information. I think it is generally understood, and indeed the Congress has understood the need for keeping that information confidential.

I do think it is important that if this authority is given to us, that it is understood that it is to be so kept because I don't think the Division, as part of the Justice Department, has as its major mission compiling studies, reports, or whatever. We are basically a law enforcement agency. I don't want us to get in the position of being a report-issuing kind of body. That detracts from our mission.

We view this as purely an enforcement tool, to gain information which we would use only for litigation purposes, and indeed, the statute does provide for return of information.

Mr. MCCLORY. I think that's the only question I have. Thank you very much. I yield back the balance of my time.

Mr. FLOWERS. The gentleman from Kentucky.

Mr. MAZZOLI. Thank you very much, Mr. Chairman.

Mr. Kauper, I was wondering if I could refer back to page 9 of your statement in which you talk about your belief that your failure to obtain preliminary injunctive relief sometimes is an incentive for further delay, rather than for swifter conclusion of the whole process; and you point to bank merger cases.

If I'm correct, bank merger cases are automatically stayed until you make your reports.

Mr. KAUPER. That is correct.

Mr. MAZZOLI. And yet, you feel that there should be no automatic stay with regard to these nonbank, free market mergers. I wonder if you could tell me a little bit about that.

Mr. KAUPER. Well, the judgment which is made with respect to the automatic stay provision, which, as I think everybody now knows is contrary to my original testimony, that the administration's position, I think, has been that the possible harm which can be caused by the issuance of the automatic stay, first of all, in a particular case where there has been no judgment at all with respect to the competitive issue, may in that case work a considerable hardship.

But I think, more important than that, that to the firm which is planning a merger and thus has no concept as to when it may be able to consummate that merger, this provision in itself becomes a deterring factor. And if one recognizes—as I think we all do in varying degrees—that some mergers are highly desirable both because they are procompetitive, and in any free-market system you must preserve the ability of firms not only to enter the market, but to exit the market, that that deterrent effect, balanced against the number of cases in which this procedure would be utilized, was enough to tip the balance.

Now, in the bank merger case you have a little different circumstance in that the way the bank merger statutes are structured, you will already have had in the bank regulatory agency a relatively full hearing, and relatively full presentation of factual data. That is, our suit would be brought only after the regulatory agency has concluded its procedure. Plus, I think there was a feeling that, first of all, we had both parties more prepared to go to litigation, and thus the prospect of that long a delay was perhaps not as real there as in the other kind of circumstance.

Mr. MAZZOLI. Mr. Kauper, I appreciate that. Now, your three recommendations at the end of your statement, then, for the CID bill, and for the premerger notification bill, and for the extension, or the elimination of the interstate commerce impediment—if they were granted by this Congress, would they give you the tools you needed, even though you would not have an automatic stay?

Mr. KAUPER. I don't think anyone can say that in a given case it gives us everything that could be utilized, but it certainly goes an awful long way in that direction. I think the premerger notification requirement does give us a far better opportunity to get in the court and seek a preliminary injunction.

Mr. MAZZOLI. Perhaps you might inform me, is there any time period that you prefer for prenotification?

Mr. KAUPER. I think the position we have taken is that the initial 30-day period is fine. Our concern has been with the extension authority, and I think the judgment that was made—and indeed, I think that is reflected in the letter which Judge Tyler sent to the Senate committee—was a 20-day extension if we asked for information, requiring them to hold up for 20 days thereafter. That is, an extension for 20 days after we get the information, was thought sufficient.

Mr. MAZZOLI. That would be a total of 50 days, is that correct?

Mr. KAUPER. Yes.

Mr. MAZZOLI. Thirty-day notification, and they are entitled to request one 20-day extension.

Mr. KAUPER. Yes.

Mr. MAZZOLI. And if I'm correct—I'm new to this subject—during that period of time you have to make your judgment based upon the evidence and investigation of whether or not to seek a preliminary injunction; is that correct?

Mr. KAUPER. That's correct.

Mr. MAZZOLI. And if you fail to seek it and the merger goes through, as you mentioned before, to then unscramble eggs is an impossible task for the most part.

Mr. KAUPER. Yes.

Mr. MAZZOLI. Now, is there any way to estimate for this committee what the percentage of success would be if you had these three additional tools, in the number of mergers that you would want to try to unscramble, as against the ones you now would have?

Mr. KAUPER. Well, I don't have much doubt that there would be more cases in which we would effectively get preliminary relief. Now, as to how many, that is pretty hard to say. I don't know how to quantify that number, but I think we would be more able to get it.

The problem in getting preliminary relief is frequently a time problem. You have to be prepared to be in court, and you not only have to make the decision, but you have to have your data in a form in which it is in fact presentable to a Federal district court, and that takes some time.

Mr. MAZZOLI. Mr. Kauper, you talk about a substantial company as being one that would give premerger notification. Would you be able to tell us what you mean by "substantial"? Perhaps you have already mentioned it this morning.

Mr. KAUPER. The attempt is made in premerger provisions in title V of S. 1284 to do that in terms—and now I'm only talking about what companies would have to report—in terms of the dollars, either assets or sales. I believe the figure now in the bill is $100 million in the acquiring company, and $10 million in the acquired company; or, if you can conceive of the pygmy swallowing the elephant, the other way around.

I think that is probably as good a way to try to define the circumstances where this would be particularly helpful, and where there might really be a major economic impact.

Mr. MAZZOLI. Would you have any idea about how many that would be? You said that in the period from 1960 there have been 6,716 investigations.

Mr. KAUPER. We have run a check on those jurisdictional limits over the past 3 years; it would have gone slightly under 60 in each year.

Mr. MAZZOLI. Under 60, slightly under 60 in each year?

Mr. KAUPER. Yes.

Mr. MAZZOLI. And then, for any companies that don't fit within those guidelines, you would glean this information from reading the journals?

Mr. KAUPER. Presumably, as we normally do; yes.

Mr. MAZZOLI. And you feel if you had that authority, that would solve the problem, or at least help you?

Mr. KAUPER. It would certainly go a considerable way. One of the things you have to keep in mind, that it is the bigger mergers that tend, in terms of analysis, to be the more complex, and require more by way of analysis. The smaller merger may be a significant merger, that is, there may be significant mergers well under those guidelines, for example, in a rapidly developing industry, firms may still be of a relatively small size; but looking down the road, you can see that this is going to become a major industry.

But, I think in terms of analysis—and that is one of the reasons we are talking in terms of a time period—it's the bigger mergers that are more complex, take more time, more resources, may involve a good many more markets, and an analysis has to be made. So, I think by focusing on the larger mergers does mean that kind of problem.

Mr. MAZZOLI. Those are the ones you direct most of your resources to, anyway, I would imagine.

Mr. KAUPER. Oh, I think that's certainly true. Now, we do file occasionally against some smaller mergers, but in terms of our own resources, they are probably commensurate with the size of the merger.

Mr. MAZZOLI. I would like to ask one last question, and that deals with the kind of cooperation that you get from companies. As I understand the situation, now a days, where you have a limitation on time, since a lot of times your notice comes via these indirect sources, do you generally get reasonable cooperation from most companies, to give you the data that you need to develop a judgment on whether or not to proceed with a suit?

Mr. KAUPER. Well, I don't know that I would put it one way or the other in terms of "most." We certainly do get cooperation from a number of companies. There are companies which as a matter of policy would inform us at the time of any kind of agreement, perhaps even before that. Others would probably go out of their way not to. Some companies, if we feel that we do not have sufficient information and we request them simply to delay consummation, may do so. Others clearly would not do so. Those that do so, I suspect, simply do so—and indeed, if I were on the other side, I don't know what I would do—but I suspect because of the fear that we might make a judgment based on limited information, and that would not be in their own interest.

Mr. MAZZOLI. Thank you very much, Mr. Kauper, and Mr. Chairman.

Mr. FLOWERS. Thank you, Mr. Mazzoli. Mr. Hughes?

Mr. HUGHES. Thank you, Mr. Chairman.

Mr. Kauper, in the area of divestiture, one of the arguments that I have seen often used by companies after the fact is that, "They are now prejudiced, and that you should have warned them before the merger took place."

Can you tell us whether or not this particular defense is advanced in many of the divestiture cases you have dealt with?

Mr. KAUPER. No; I don't think that's a very common kind of argument. That's an argument that is sometimes made to me in my office by counsel, as to why we should not now file suit.

Frequently, I must say, in cases where they have not advised us in advance that they were merging, that is the argument, but I don't think it is very commonly made in court. It may be made in the setting of what is to be divested, that is, if a merger occurred, let us suppose, 2 years ago, and I file suit today and win on the substantive part of the complaint, there may be some argument as to what assets should be divested; should we, for example, obtain the benefit of improvements they may have made; should we now be seeking to divest what existed at the time we filed the complaint, as opposed to when the merger took place, that kind of argument may be made. But I think in the broader sense in which you made it, no.

Mr. HUGHES. So that when prejudice is argued, that is not commonly one of the aspects of prejudice that's either briefed or argued.

Mr. KAUPER. No; I don't think so.

Mr. HUGHES. You have made three recommendations in your testimony, and I wonder if you have given any thought to what additional staff, if any, would be required to implement the discovery powers, and other authority contemplated by this legislation.

Mr. KAUPER. We discussed some of those questions in the hearing here last week, on the authorization bill which has been proposed for the Antitrust Division.

I think insofar as the specific items which we have recommended in this testimony, with the possible exception of the commerce requirement amendment, I see nothing there that should require additional resources in these proposals. Indeed, it would be my hope that the opposite would occur, that is, if we had more effective tools, we would be able to utilize less by way of manpower resources.

Now, it is possible that if there were to be expansions in the interstate commerce requirement, that that would get us into some kinds of mergers which today just pass by the board, and thus might require some additional resources. But I think the other provisions would not.

Mr. HUGHES. Obviously, you have a great deal of difficulty in getting the information that's required in sufficient time to make the kind of value judgment that you have to make, either to file for preliminary injunction, or whether to take any position.

I wonder how much assistance you receive from the other regulatory agencies that do collect data with reference to mergers?

Mr. KAUPER. Well, let me distinguish two things. First, where we are involved before one of the economic regulatory agencies, that is that agency, for example, let's take airlines, if you like, will collect a great deal of data over a period of many years that is useful. But, the form in which we would be involved in that regulated industry would be the CAB to begin with, that's where we would be litigating by virtue of the fact that they have immunity granting authority. So, while we could perhaps get the information from the CAB, it would be in connection with their own proceedings. There are not that many agencies that collect specific market data, outside the economic regulatory area, where we would probably not be in district court anyway.

Now, in some circumstances, for example, there may be data we might want in connection with certain kinds of food acquisitions, and some of that we may be able to obtain from the Agriculture Department, from a variety of places. But in making a judgment in connection with a merger where you need really very specific market data, in most American industries that data is not collected by any other government agency.

Mr. HUGHES. Let me just single out the area of bank mergers and bank holding company acquisitions. Aren't those reports available, usually, much in advance of the 30 days?

Mr. KAUPER. Sure, in fact, we will go through the entire regulatory process before that 30-day judgment has to be made.

Mr. HUGHES. One of the things that S. 1284 addresses is the problem of probable illegality, and under present law, as I understand it, the Government has to establish that there is probable illegality, that there will be success on the merits, and second of all, that there would not be irreparable harm.

It has been very easy, as I understand it, for companies just to establish that they would have a monetary loss to defeat the application. First of all, is my understanding correct, of the existing law?

Mr. KAUPER. Well, there may be a little disparity between what the existing law is in terms of its written standards, and the way it is in fact applied.

Mr. HUGHES. In the courts?

Mr. KAUPER. Yes. I think that the weight which is given in some cases to possible financial loss, you don't very often find set out in the standard which is commonly utilized. I think it is true that courts have—some courts—have tended to put rather heavy emphasis on financial loss, and that is really of two kinds: One, the general condition of the company, and two, more specifically, the fact that there may be a financial loss if this particular transaction doesn't go ahead, that they are anticipating some fruits from the transaction.

Mr. HUGHES. Of course, the effect is the same, isn't it, whether a law reads that way, or whether the court just interprets it that way, we still have the same net effect.

Mr. KAUPER. That's true.

Mr. HUGHES. The question is, does the Department have a position with regard to that burden? Should we not be changing the burden?

Mr. KAUPER. You are carrying me back to the administration position on S. 1284. I think our feeling had been that a standard which tended to minimize the financial side of the inquiry would be to our general benefit. However, I think that the position as we evolved it—and there are a lot of compromises that were worked through—we were ending up with a stand by way of compromises within the administration that I just didn't see would gain us anything; hence, we really dropped the endeavor to work that kind of compromise out.

Mr. HUGHES. I have just one final question. In any of your efforts to acquire premerger information, do you often meet the argument that it is confidential, proprietary, or otherwise secret information?

Mr. KAUPER. Yes; commonly. I think we tend to meet it both sometimes simply as a "It's none of your business" response; second, and perhaps more significantly today, we meet it in terms of an argument that says, "We would be perfectly willing to give this to you, but you cannot protect it; and for that reason we will not give it to you."

I think, probably, we encounter that latter one somewhat more often.

Mr. HUGHES. Have you had any situations where information that was allegedly secret, that could be very damaging, was furnished to the Department?

Mr. KAUPER. Yes, if by that you mean—I don't know what you mean by "damaging." But, if you mean by that traditional business-secret type of information, the kind of information, in other words, that you would not normally share with a competitor, we hope, yes, some companies will give it to us. Others will not. Now, of course we can normally get it in any circumstance where we are authorized to issue a civil investigative demand. But, I took your question to mean voluntarily.

Mr. HUGHES. Yes.

Mr. KAUPER. Yes; there are companies that will give it to us.

Mr. HUGHES. Has it been your own personal judgment that the information is of such caliber, that it was so highly confidential that it could be damaging if leaked to a competitor?

Mr. KAUPER. Yes: I think we have obtained such information.

Mr. HUGHES. Have you had any difficulty with that information being leaked to competitors?

Mr. KAUPER. Not from within the Division. Now, if you come back to me 2 years from now and say, "Has there been any circumstance in which you have been compelled to disclose that information under the Freedom of Information Act," I'm not sure what the answer would be.

That's the major concern. I don't think there is a major concern that people within the Division have some habit of leaking this information. I think the fear is compulsory disclosure, not some whimsical act of a Division employee. That's a problem that, in my experience, we just really haven't had.

Mr. HUGHES. I thank you. Thank you, Mr. Chairman.

Mr. FLOWERS. Counsel suggested that I ask you if you required any additional appropriation to get rid of the mice. Sort of like an in-house proposition.

Mr. KAUPER. No, what we need to do is figure out a way to have the mice attack the roaches. [Laughter.]

Mr. FLOWERS. We've got the same problem in my office. So, you have one vote, in case you want to start a movement.

Are there any further questions of the Assistant Attorney General? Thank you, Mr. Kauper, for being with us, very much.

Mr. KAUPER. Thank you.

Mr. FLOWERS. Our next witnesses will be Mr. Paul Rand Dixon, Acting Chairman of the Federal Trade Commission, joined by Mr. Owen Johnson, Director, Bureau of Competition, FTC, and Dr. Frederic Scherer, Director, Bureau of Economics of the FTC. Gentleman, we welcome you to the subcommittee. Mr. Dixon, why don't you proceed as you see fit?

[The prepared statement of Paul Rand Dixon follows:]

STATEMENT OF PAUL RAND DIXON, ACTING CHAIRMAN, FEDERAL TRADE COMMISSION

Mr. Chairman and distinguished members of the Committee, it is always a pleasure and a privilege to appear before you. I understand that you are planning broad oversight hearings into the effectiveness of the antitrust laws, but that your initial focus is on Section 7 of the Clayton Act. Therefore, I will confine my remarks to the merger area of FTC antitrust enforcement.

Your subject is a timely one, both because this year marks the 25th anniversary of the Celler-Kefauver Amendments and because merger activity appears to be picking up from its depressed level of the past few years. As you know, merger activity runs in waves, the last of which crested in the late 1960's and early 1970's. If a new wave is on the horizon it is none too early to prepare for it.

I should make it clear that I am most emphatically *not* an opponent of mergers in general. Mergers can play an important and efficient role in allocating capital and economic resources. Many mergers are not anti-competitive and are not opposed by the antitrust agencies. However, there are mergers which hinder competition and we must be prepared to stop them.

From the beginning, the United States antitrust laws have tried to grapple with those mergers which hamper competition and tend toward monopoly. The Sherman Act itself was a response to a great wave of corporate consolidations in the late 19th Century. It is generally agreed that the Sherman Act had little impact on the merger movement in succeeding years. Section 7 of the Clayton Act, enacted in 1914, was designed to meet what the public saw as a flaw in the Sherman Act.

Unfortunately, the relentless attacks of corporate respondents opened up loopholes that soon made the Clayton Act totally ineffective. The Federal Trade Commission, the major enforcer of the Clayton Act, brought only 31 complaints in the 1927–1950 period and only four of those resulted in orders. No Commission orders were issued in the 16 years following the 1934 *Arrow-Hart and Hegeman* case, which ruled that the FTC had no authority to order divestiture of assets.[1] One scholar summed up his examination of this dreary period as follows:

It is clear from this review of the formal complaints issued from 1927 through 1950 that the Commission's administration of Section 7 of the Clayton Act in that period did not prevent or dissolve any mergers, though it may have affected the form in which some combinations were organized.[2]

This sorry record, combined with a change of political climate spurred on by the Temporary National Economic Committee's findings, led to the passage of the Celler-Kefauver Amendments in 1950. The importance of those amendments cannot be overemphasized. For the first time antitrust enforcers had a workable tool. That tool was quickly picked up and utilized, as a 1967 FTC report, published by your Committee shows. From 1950 to 1967, 206 Government Section 7 cases were filed involving a total of 801 acquisitions which, in turn, involved almost $8 billion in commerce. Most of these actions were brought against large companies; 71 percent involved the largest 500 companies. The effect of this government campaign can be demonstrated statistically. In 1951–4, 37 percent of all

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[1] *Arrow-Hart & Hegeman Electric Company v. Federal Trade Commission*, 291 U.S. 587 (1934).

[2] David Dale Martin, "Mergers and the Clayton Act," University of California Press (Berkeley: 1957), pp. 162–63.

corporate acquisitions of greater than $10 million were horizontal; in 1963–6 the horizontal proportion had dropped to 15 percent. And most dramatically, the percentage of greater than $10 million acquisitions, by large companies, which were horizontal, declined from 62 percent in 1951–4 to 25 percent in 1963–6.[3] As that study concluded:

. . . the simple fact is that the merger enforcement program since 1950 represents a unique event in American antitrust history. And when measured by its effects, it has had a fundamental and widespread precompetitive impact on the organization and performance of our economy.[4]

I agreed with that analysis then[5] and my judgment is, if anything, reinforced now, nearly ten years later. In that space of time the Commission has brought and either won or negotiated divestitures in a series of merger cases against many of the nation's leading companies, including Allied Chemical Corp., Eaton, Yale and Towne, ARA Services, Inc., Kennecott, Rockwell Inernational, Pepsico, Anaconda Co., Bendix Corp., Standard Oil Company (Indiana), Amerada Hess Corp., Heublein, Inc., Georgia-Pacific Corp. and Borg-Warner Corp. to name just a few. Currently cases are pending at one stage or another against Warner-Lambert Pharmaceutical Co., Fruehauf Corp., American General Insurance Co., Jim Walter Corp., RSR Corporation, Gifford-Hill & Co., Inc., Coca-Cola Bottling Co. of N.Y., SKF Industries, Nestle Alimentana S.A., and the Brunswick Corp. to give a partial listing. A number of investigations are also currently underway at the Commission. And, of course, the Antitrust Division of the Department of Justice is also extremely active in the merger area.

Despite this very considerable record of success, I feel that there are further amendments to Section 7 which could make it an even more useful tool in preventing anticompetitive mergers. I will go into these later, but first I will attempt to answer some of the specific questions raised in Chairman Rodino's letter. Because some of the responses are voluminous and highly statistical in nature, I will only give a brief summary and submit the material for the record.

The Commission initiated 661 merger investigations between 1960 and 1975. The yearly totals have ranged from 77 and 68 in Fiscal 1967 and 1968 respectively to only 9 in Fiscal 1975. The sharp differences in these figures illustrate very clearly the tendency of mergers to move in a pattern of waves and troughs.

Between 1970 and 1975, the Commission investigated 80 horizontal, 42 vertical and 72 conglomerate mergers.[6] These investigations occurred in 39 industrial groups. Leading the list were food and dairy products (32), building materials (22), beverages and concentrates (14), automotive parts (12), metals and metal products (8) and service industries (8).

There are five areas in which FTC merger guidelines have been issued. In 1967, enforcement policies were issued concerning vertical mergers in the cement industry and mergers in the food distribution industry. In 1968, enforcement policies were issued regarding the textile mill products industry[7] and product extension mergers in grocery products manufacturing. The fifth enforcement policy, with respect to mergers in the diary industry, was issued in 1973.

I have submitted to the Committee a copy of each guideline issued and a description of Commission action taken pursuant to each guideline. I should point out that it is not quite accurate to speak of mergers which "violated" the guidelines because the guidelines are not proscriptive; rather, they constitute a type of early warning system. They are useful to both Commission staff and the industry involved as a means of identifying those acquisitions which will be scrutinized most carefully. The Commission never meant to prohibit every acquisition which exceeded the bounds of the guidelines, any more than it meant to validate every acquisition which fell below the limits set forth in the guides. A look at some of the food distribution mergers which exceeded the bounds of the guidelines demonstrates the reason for this policy. For instance, in 1973 there were two acquisitions of failing companies, six market extensions into remote rather than contiguous areas, and six acquisitions of stores which had been closed or were being shut down. A description

[3] Dr. Willard F. Mueller, "The Celler-Kefauver Act: Sixteen Years of Enforcement," staff report to the Antitrust Subcommittee of the House Judiciary Committee (1967), pp. 3-12.

[4] Ibid., p. 87.

[5] At the time I authorized its publication during my previous tenure as Chairman of this agency, in a letter to Chairman Celler, I called it an "excellent and informative analysis."

[6] Of a total of 158. The author adds up to more than 158 because some were of more than one type.

[7] Rescinded by the Commission on May 12, 1975 because special treatment for the textile industry no longer seemed warranted.

of the circumstances surrounding each acquisition in the years following promulgation of the Commission's food distribution enforcement policy is included in the materials which I am submitting.

Mr. Chairman, you also asked me to describe the workings of the Commission's merger screening process. The best way to do so might be by following the course of a hypothetical merger, let us say, between Colossal Industries and Leviathan Corporation, both makers of widgets. Knowledge of this merger would most likely be picked-up either through our Pre-Merger Notification Program, if large in size, or through public sources such as the Wall Street Journal, Journal of Commerce or trade publications within an industry.

Once the Colossal-Leviathan merger became known, it would be considered by the Merger Screening Committee, which meets once a week. The Committee is composed of representatives from both the Bureaus of Competition and Economics. Most mergers are immediately eliminated as potential targets for investigation, usually on a basis of small size and an apparent lack of competitive effect. The remaining mergers, such as Colossal-Leviathan's, are more carefully analyzed as to factors such as size, product lines involved, concentration, potential foreclosure, profits, and the state of entry barriers. If a member of the Merger Screening Committee is familiar with Colossal and Leviathan or the widget industry, he may make an oral analysis from which the Committee can make a decision. Or a staff member may be called on to make a quick investigation and report back to the Committee.

A third technique, which would be used if contact with Colossal or Leviathan was necessary, is to open a formal preliminary investigation assigned to an attorney. Before a preliminary is opened, clearance is sought from the Department of Justice's Antitrust Division.

Through one of these techniques the Merger Screening Committee will decide whether to recommend to the Director of the Bureau of Competition that he authorize a formal seven-digit investigation of the Colossal-Leviathan merger.

In addition, if there is a difference of opinion within the Merger Screening Committee as to whether a merger merits an investigation, the matter is brought to the Bureau Director's attention for resolution. The final decision as to whether or not to authorize a seven-digit investigation is in the hands of the Director in both instances. Once the Bureau Director assigns a seven-digit number to the Colossal-Leviathan merger, the screening process is over and a full-fledged investigation begins.

Of course, while the Commission has delegated to the Director of the Bureau of Competition authority to open or refuse to open a 7-digit investigation, the Commission retains at all times the authority to review and reverse any decision which the Director makes. To ensure that the Commission's option in this regard is a meaningful one, the Commission has recently instructed the Bureau of Competition to provide the offices of individual Commissioners with all minutes of the Merger Screening Committee and a record of all determinations by the Director to initiate 7-digit investigations. In this fashion, all Commissioners will be informed promptly of those mergers which are being investigated and of those mergers which, after preliminary consideration, staff has determined not to pursue.

Mr. Chairman, you asked for a brief outline of my views in two areas which you plan to take up in more detail in later testimony: enforcement against "small" as opposed to "big" mergers and merger policy in the regulated industries.

Size does not necessarily determine our attitude toward a merger. In analyzing the legality of a merger our focus is on its competitive effects and the consumer benefit from an action to block a merger. A merger's effect on competition is a product of many variables: the market share of the acquiring and acquired companies, concentration in the industry, the state of entry barriers, profitability, and whether the two firms were in actual or potential competition, to name some of the most important. While a large merger in a large industry is likely to create anti-competitive effects more often than a small merger in a small industry, such is not always the case. For instance, recently the Anaconda Company was sued by the Commission [8] for its acquisition for $3 million of Systems Wire and Cable, Inc., a coaxial cable manufacturer. The total sales of the semiflexible coaxible

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[8] Docket No. 8994.

cable industry involved were, at the time of the acquisition, only $28 million. However, because a rapid growth in cable television is expected, the coaxial cable industry is expected to expand dramatically and the acquisition removed a small but aggressive competitor from the fledging industry. As a result, despite its small size, the acquisition was challenged by the Commission. Post-complaint negotiations resulted in an agreement by Anaconda to divest the assets of Systems Wire and Cable.

There have been a number of cases brought in the regulated industry area, by both the Justice Department and the Federal Trade Commission, which have established the right of the antitrust enforcement agencies to examine mergers in such industries. Our Bureau of Competition does not hesitate to bring such cases. I fully support the Bureau's efforts to extend the enforcement of the Clayton Act as broadly as possible. Of course, specific statutory exemptions do limit our activities to a certain extent.

I would now like to turn to two areas of potential merger legislation which your committee might consider. First, legislation should be passed to deal with the *American Building Maintenance*[9] decision. As you are aware, that decision held that Section 7 of the Clayton Act applied only to acquisitions "in commerce", not to those "affecting commerce." The court ruled that although it was clear that Congress could have constitutionally reached acquisitions affecting commerce, it had not chosen to do so. By way of contrast, the courts have held that in the Sherman Act, Congress "wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements,"[10] and that Act has been applied to intrastate activities which substantially affect interstate commerce.[11]

It is true that the *American Building Maintenance* decision left open the possibility that Section 5 of the Federal Trade Commission Act could be used to reach intrastate acquisitions. The argument would run that Section 5 now applies to activities affecting interstate commerce and has previously been held to reach transactions which violate the standards of the Clayton Act; therefore, one could reason, Section 5 forbids intrastate acquisitions affecting, but not "in", interstate commerce. The *American Building Maintenance* court explicitly noted that it was not deciding that question.[12]

Rather than await a Court clarification of this point it seems preferable to me for Congress to make it clear that Section 7 is similar to the Sherman Act in that it is intended to reach as far as the Constitution permits. Because merger enforcement is our first line of defense against monopoly, it is just as important for Section 7 to have a broad reach as it is for the Sherman Act to do so. Further, even if the courts eventually rule that Section 5 does reach intrastate mergers, that will do little good to my brethren at the Antitrust Division.

The other areas of potential legislation in which I would like to stimulate interest today are (1) pre-merger notification and information gathering, and (2) standards for enjoining mergers. The Commission has previously told the Senate Antitrust Subcommittee that there is a need for a waiting period in regard to large mergers to permit the enforcement agencies to determine whether a particular acquisition should be opposed in advance of its consummation. I would like to reiterate that view.

Such legislation would help cure two banes on the lives of antitrust enforcement officials. First, foot-dragging and resistence to government information requests is, traditionally, the stock in trade of corporate attorneys. A law that specified that requested information must be supplied after notification and before a merger is consummated, would place the shoe on the other foot. The result should be an enormous drop in the time required to investigate and to determine whether to challenge a Section 7 matter.

Second, the legal standards for enjoining mergers should be liberalized. While antitrust enforcers have an impressive record of winning cases, they have not been so successful at winning meaningful divestiture. According to a former FTC Chief Economist: "In very few of the cases where the Government ultimately prevailed has there been completely successful divestiture of the acquired unit."[13]

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[9] *United States v. American Building Maintenance Industries*, 422 U.S. 271 (175).
[10] *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 558 (1944).
[11] See, *e.g. Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1947) ; *United States v. Employing Plasterers Assn.*, 347 U.S. 186 (1954).
[12] *United States v. American Building Maintenance*, 422 U.S. 271, 279 (1975).
[13] Statement of Professor Willard F. Mueller, before Senate Subcommittee on Antitrust and Monopoly, June 4, 1975.

A landmark study of 39 mergers by Professor Kenneth Elzinga supports this view.[14] Of the 39 cases which the government "won", in only 6 did he find the relief ordered to be successful. In 21, the government was completely unsuccessful, resulting in either no divestiture or an unsatisfactory divestiture, such as of non-viable or de minimis assets, or a divestiture to a significant competitor.

Typical of these 21 cases is the Commission's "victory" in the *Farm Journal* case.[15] The leading agricultural magazine acquired its chief rival, Country Gentleman, closed it down, and successfully solicited most of the latter's subscribers for subscriptions to the *Farm Journal*. The Hearing Examiner ordered divestiture, but noted that:

. . . as a practical matter divestiture of the subscribers' list now will accomplish nothing. Respondent has, by now, extracted all the juice from that fruit as well as from the list of current Country Gentleman advertisers.

. . . Country Gentleman is dead and the "assets" which it turned over to respondent are now without value to any newcomer or, indeed to any farm publication now in the field. When his corn is taken from him and the horse dies, it is the height of vanity to strew the bare corncobs over his grave. All that can be accomplished then, is simple divestiture of the 2 trade names and the 2 lists, although . . . this at most may only disturb, but will not diffuse the coalescence which has taken place.

Even where a divestiture is more successful than in the *Farm Journal* case, it still takes inordinately long—so long that it may pay a firm to make an illegal acquisition and profit from its fruits, knowing full well that disgorgement will not occur for many years. Elzinga found that the average time from an acquisition to a divestiture was five and one-half years. Many cases drag on much longer despite continued Commission efforts to streamline trial procedures.

I have noticed that contrary views on the need for premerger notification have recently been expressed by the editors of the Wall Street Journal. On January 30, 1976 the Journal warned that the result of premerger notification legislation would be that "A handful of young Harvard grads and an efficient secretarial pool could prevent them [mergers] with ridiculous ease." The Journal thinks this would be a bad thing because it likes mergers. The main reason the editors advance as to why mergers are desirable is that when a firm with tax liabilities merges with one with tax credits, there is a big tax saving. And for corporations to pay less taxes is good because otherwise the money would go to Uncle Sam who would waste it.

Now, I'm not anxious to be known as the defender of young Harvard grads or government waste, but this editorial strikes me as plainly silly. If the best argument the Wall Street Journal can think up against a premerger notification bill is that such a bill prevents firms from avoiding taxes, I think such a bill should be passed today. This is particularly so because there are many reasons why such a bill is needed, as I discussed above: (1) To enable antitrust enforcers to quickly gain information they can only obtain from the merging companies, (2) to stop the plague of interminable delay by corporate counsel in merger cases, and (3) to avoid the problems of obtaining meaningful divestiture, which can result even when the government ultimately wins its case.

Mr. Chairman, this ends my prepared statement. I will be glad to answer any questions which the Committee may have.

TESTIMONY OF PAUL RAND DIXON, ACTING CHAIRMAN, FEDERAL TRADE COMMISSION

Mr. DIXON. Thank you, Mr. Chairman, and distinguished members to the committee. It is always a pleasure to appear before you.

I understand that you are planning broad oversight hearings into the effectiveness of the antitrust laws, but that your initial focus is on section 7 of the Clayton Act. Therefore, I will confine my remarks to the merger area of FTC antitrust enforcement.

In my opinion your subject is a timely one, both because this year marks the 25th anniversary of the Celler-Kefauver amendments and

[14] Kenneth Elzinga, "The Antimerger Law: Pyrrhic Victories," Journal of Law and Economics, Vol. XII (1), April 1969. See, too, Comment, "'Preliminary Preliminary' Relief Against Anticompetitive Mergers" (1972), 82 Yale Law Journal 1557.

[15] *In the Matter of Farm Journal, Inc.*, 53 F.T.C. 26, 50–51 (1956).

because merger activity appears to be picking up from its depressed level of the past few years. As you know, merger activity runs in waves, the last of which crested in the late 1960's and early 1970's. If a new wave is on the horizon, it is none to early to prepare for it.

As an aside, Mr. Chairman, one of Dr. Scherer's predecessors, Dr. Willard Mueller, made a little study for us once in the 1960's, and each of these waves of mergers seems to be related to the economic fortunes of the country. So, when we have a merger problem the country is doing well. When we have a period of recession, we don't have too much of a merger problem.

I should make it clear that I am most emphatically not an opponent of mergers in general. Mergers can play an important and efficient role in allocating capital and economic resources. Many mergers are not anticompetitive and are not opposed by the antitrust agencies. However, there are mergers which hinder competition and we must be prepared to stop them.

From the beginning, the United States antitrust laws have tried to grapple with those mergers which hamper competition and tend toward monopoly. The Sherman Act itself was a response to a great wave of corporate consolidations in the late 19th century. It is generally agreed that the Sherman Act had little impact on the merger movement in succeeding years. Section 7 of the Clayton Act, enacted in 1914, was designed to meet what the public saw as a flaw in the Sherman Act.

Unfortunately, the relentless attacks of corporate respondents opened up loopholes that soon made the Clayton Act totally ineffective. The Federal Trade Commission, the major enforcer of the Clayton Act, brought only 31 complaints in the 1927–50 period and only four of those resulted in orders. No Commission orders were issued in the 16 years following the 1934 *Arrow-Hart & Hegeman* case, which ruled that the FTC had no authority to order divestiture of assets. One scholar summed up his examination of this dreary period as follows:

> It is clear from this review of the formal complaints issued from 1927 through 1950 that the Commission's administration of section 7 of the Clayton Act in that peirod did not prevent or dissolve any mergers, though it may have affected the form in which some combinations were organized.

This sorry record, combined with a change of political climate spurred on by the Temporary National Economic Committee's findings, led ultimately to the passage of the Celler-Kefauver Amendments in 1950. The importance of those amendments cannot be overemphasized. For the first time antitrust enforcers had a workable tool. That tool was quickly picked up and utilized, as a 1967 FTC report published by your committee shows. From 1950 to 1967, 206 Government section 7 cases were filed involving a total of 801 acquisitions which, in turn, involved almost $8 billion in commerce. Most of these actions were brought against large companies; 71 percent involved the largest 500 companies. The effect of this Government campaign can be demonstrated statistically. In 1951–54, 37 percent of all corporate acquisitions of greater than $10 million were horizontal; in 1963–66 the horizontal proportion had dropped to 15 percent. And most dramatically, the percentage of greater than $10 million acquisitions, by large companies, which were horizontal, declined from 62 percent in 1951–54 to 25 percent in 1963–66. As that study concluded:

> The simple fact is that the merger enforcement program since 1950 represents a unique event in American antitrust history. And when measured by its effects, it has had a fundamental and widespread procompetitive impact on the organization and performance of our economy.

I agreed with that analysis then, and my judgment is, if anything, reinforced now, nearly 10 years later. In that space of time the Commission has brought and either won or negotiated divestitures in a series of merger cases against many of the Nation's leading companies, including Allied Chemical Corp., Eaton, Yale, and Towne, ARA Services, Kennecott, Rockwell International, Pepsico, Anaconda Co., Bendix Corp., Heublein, Inc., Georgia-Pacific Corp., and Borg-Warner Corp., to name just a few.

Currently cases are pending at one stage or another against Warner-Lambert Pharmaceutical Co., Fruehauf Corp., American General Insurance Co., Jim Walter Corp., RSR Corp., Gifford-Hill & Co., Coca-Cola Bottling Co. of New York, SKF Industries, Nestle Alimentana S.A., and the Brunswick Corp., to give a partial listing. A number of investigations are also currently underway at the Commission. And, of course, as you are aware, the Antitrust Division of the Department of Justice is also extremely active in the merger area.

Despite this very considerable record of success, I feel that there are further amendments to section 7 which could make it an even more useful tool in preventing anticompetitive mergers. I will go into these later, but, first, I will attempt to answer some of the specific questions raised in Chairman Rodino's letter. Because some of the responses are voluminous and highly statistical in nature, I will only give a brief summary and submit the material for the record.

The Commission initiated 661 merger investigations between 1960 and 1975. The yearly totals have ranged from 77 and 68 in fiscal 1967 and 1968, respectively, to only 9 in fiscal 1975. The sharp differences in these figures illustrate very clearly the tendency of mergers to move in a pattern of waves and troughs.

Between 1970 and 1975, the Commission investigated 80 horizontal, 42 vertical, and 72 conglomerate mergers. These investigations occurred in 39 industrial groups. Leading the list were food and dairy products, 32; building materials, 22; beverages and concentrates, 14; automotive parts, 12; metals and metal products, 8; and service industries, 8.

There are five areas in which FTC merger guidelines have been issued. In 1967, enforcement policies were issued concerning vertical mergers in the cement industry and mergers in the food distribution industry. In 1968, enforcement policies were issued regarding the textile mill products industry and product extension mergers in grocery products manufacturing. The fifth enforcement policy, with respect to mergers in the dairy industry, was issued in 1973.

I have submitted to the committee a copy of each guideline issued and a description of Commission action taken pursuant to each guideline. I should point out that it is not quite accurate to speak of mergers which "violated" the guidelines because the guidelines are not proscriptive; rather, they constitute a type of early warning system. They are useful to both Commission staff and the industry involved as a means of identifying those acquisitions which will be scrutinized most carefully. The Commission never meant to prohibit every acquisition which exceeded the bounds of the guidelines, any more than it meant to validate every acquisition which fell below the limits set forth in the guides. A look at some of the food distribution mergers which exceeded the bounds of the guidelines demonstrates the reason for this policy. For instance, in 1973 there were two acquisitions of failing companies, six market extensions into remote rather than contiguous areas, and six acquisitions of stores which had been closed or were being shut down. A description of the circumstances surrounding each acquisition in the years following promulgation of the Commission's food distribution enforcement policy is included in the materials which I am submitting.

Mr. Chairman, you also asked me to describe the workings of the Commission's merger screening process. The best way to do so might be by following the course of a hypothetical merger, let us say, between Colossal Industries and Leviathan Corp., both makers of widgets. Knowledge of this merger would most likely be picked up either through our premerger notification program, if large in size, or through public sources such as the Wall Street Journal, Journal of Commerce, or trade publications within an industry.

Once the Colossal-Leviathan merger became known, it would be considered by the Merger Screening Committee, which meets once a week. The committee is composed of representatives from both the Bureaus of Competition and Economics. Most mergers are immediately eliminated as potential targets for investigation, usually on a basis of small size and an apparent lack of competitive effect. The remaining mergers, such as Colossal-Leviathan's, are more carefully analyzed as to factors such as size, product lines involved, concentration, potential foreclosure, profits, and the state of entry barriers. If a member of the Merger Screening Committee is familiar with Colossal and Leviathan or the widget industry, he may make an oral analysis from which the committee can make a decision. Or a staff member may be called on to make a quick investigation and report back to the committee.

A third technique, which would be used if contact with Colossal or Leviathan was necessary, is to open a formal preliminary investigation assigned to an attorney. Before a preliminary is opened, clearance is sought from the Department of Justice's Antitrust Division.

Through one of these techniques the Merger Screening Committee will decide whether to recommend to the Director of the Bureau of Competition that he authorize a formal seven-digit investigation of the Colossal-Leviathan merger. In addition, if there is a difference of opinion within the Merger Screening Committee as to whether a merger merits an investigation, the matter is brought to the Bureau Director's attention for resolution. The final decision as to whether or not to authorize a seven-digit investigation is in the hands of the Director in both instances. We did that, as I told you the last time I was here, under a reorganization plan 4 delegation. Once the Bureau Director assigns a seven-digit number to the Colossal-Leviathan merger, the screening process is over and a full-fledged investigation begins.

Of course, while the Commission has delegated to the Director of the Bureau of Competition authority to open or refuse to open a seven-digit investigation, it now retains at all times the authority to review and reverse any decision which the Director makes. To insure that the

Commission's option in this regard is a meaningful one, the Commission has recently instructed the Bureau of Competition to provide the offices of individual Commissioners with all minutes of the Merger Screening Committee and a record of all determinations by the Director to initiate seven-digit investigations. In this fashion, all Commissioners will be informed promptly of those mergers which are being investigated and of those mergers which, after preliminary consideration, staff has determined not to pursue.

Mr. Chairman, you asked for a brief outline of my views in two areas which you plan to take up in more detail in later testimony, enforcement against "small" as opposed to "big" mergers and merger policy in the regulated industries.

Size does not necessarily determine our attitude toward a merger. In analyzing the legality of a merger our focus is on its competitive effects and the consumer benefit from an action to block the merger. A merger's effect on competition is a product of many variables. The market share of the acquiring and acquired companies, concentration in the industry, the state of entry barriers, profitability, and whether the two firms were in actual or potential competition, are some of the most important. While a large merger in a large industry is likely to create anticompetitive effects more often than a smaller merger in a small industry, such is not always the case. For instance, recently the Anaconda Co. was sued by the Commission for its acquisition for $3 million of Systems Wire & Cable, Inc., a coaxial cable manufacturer. The total sales of the semiflexible coaxial cable industry involved were, at the time of the acquisition, only $28 million. However, because a rapid growth in cable television is expected, the coaxial cable industry is expected to expand dramatically and the acquisition removed a small but aggressive competitor from the fledgling industry. As a result, despite its small size, the acquisition was challenged by the Commission. Postcomplaint negotiations resulted in an agreement by Anaconda to divest the assets of Systems Wire & Cable.

There have been a number of cases brought in the regulated industry area, by both the Justice Department and the Federal Trade Commission, which have established the right of the antitrust enforcement agencies to examine mergers in such industries. Our Bureau of Competition does not hesitate to bring such cases. I fully support the Bureau's efforts to extend the enforcement of the Clayton Act as broadly as possible. Of course, specific statutory exemptions do limit our activities to a certain extent.

I would now like to turn to two areas of potential merger legislation which your committee might consider. First, legislation should be passed to deal with the American Building Maintenance decision. As you are aware, that decision held that section 7 of the Clayton Act applied only to acquisitions "in commerce," not to those "affecting commerce." The court ruled that although it was clear that Congress could have constitutionally reached acquisitions affecting commerce, it had not chosen to do so. By way of contrast, the courts have held that in the Sherman Act, Congress "wanted to go to the utmost extent of its constitutional power in restraining trust and monopoly agreements," and that act has been applied to intrastate activities which substantially affect interstate commerce.

It is true that the American Building Maintenance decision left open the possibility that section 5 of the Federal Trade Commission Act could be used to reach intrastate acquisitions. The argument would run that section 5 now applies to activities affecting interstate commerce and has previously been held to reach transactions which violate the standards of the Clayton Act; therefore, one could reason, section 5 forbids intrastate acquisitions "affecting" but not "in" interstate commerce. The American Building Maintenance court explicitly noted that it was not deciding that question.

Rather than await a court clarification of this point, it seems preferable to me for Congress to make it clear that section 7 is similar to the Sherman Act in that it is intended to reach as far as the Constitution permits. Because merger enforcement is our first line of defense against monopoly, it is just as important for section 7 to have a broad reach as it is for the Sherman Act to do so. Further, even if the courts eventually rule that section 5 does reach intrastate mergers, that will do little good for my brethren over at the Antitrust Division.

The other areas of potential legislation in which I would like to stimulate interest today are—

1. Premerger notification and information gathering, and
2. Standards for enjoining mergers.

The Commission has previously told the Senate Antitrust Committee that there is a need for a waiting period in regard to large mergers to permit the enforcement agencies to determine whether a particular acquisition should be opposed in advance of its consummation. I would like to reiterate that view.

Such legislation would help cure two banes on the lives of antitrust enforcement officials. First, foot dragging and resistance to government information requests is, traditionally, the stock in trade of corporate attorneys. It has been my experience, Mr. Chairman, that these antitrust attorneys apparently give advice to corporations to merge, and they obviously get paid for it. Then, if we challenge them, they get paid for defending the merger. I want to tell you—and this obviously is not a new thought—the first time I ran into the proposed legislation was in the late 1950's when Mr. Celler and Senator Kefauver took the lead in that respect in the Senate, and bills were put in, in both Houses, in the late 1950's. As counsel I participated in these hearings. Well, about as far as we got it was up to the point of reporting it to the Full Committee, and there it ended.

I have learned very much from prior experience, trying this type of case, and sitting over there, the important thing, as I see it in this premerger notification is that notice has to be given in advance, and there is some period of time during which a corporation must supply information on the merger; and if it doesn't, then the merger cannot occur. That's what's important in this premerger notification. If the enforcement agencies have to have information, and a merging company has to give them the notice of its intent, and there is some period, whether it's 30 plus 45, or 30 plus 25, whatever it is, so that time would not start running until the company delivered what the government asked them for. And I mean not one letter a week, like we usually get; but instead, we should be able to say, "You can shorten the hold-up time on your merger as much as you want, Mr. Outside

Lawyer, by bringing that information in here quickly"; I think it would be a great advantage.

A law that specified that requested information must be supplied after notification and before a merger is consummated, would place the shoe on the other foot. The result should be an enormous drop in the time required to investigate and to determine whether to challenge a section 7 matter.

I heard the discussion that the committee had with Mr. Kauper about CID's. I remember when the CID bill was passed by Congress, and I think it was about the early sixties, when that happened. But, I have always accepted the fact that the chief antitrust enforcer in this country was the Attorney General and his deputies. And we, at the Federal Trade Commission have had, since the very creation of the Federal Trade Commission in 1914 and 1915, when it was organized, the right to use section 6 to get information, and also sections 9 and 10, to have investigations to get information. The Attorney General doesn't have this right, unless he goes criminal, unless he goes down and asks for the creation of a grand jury, then he can play it both ways. He can parade witnesses through the grand jury and find out where all this information is, and then promptly get it. I don't have any doubt that he needs this power, and it should be given. We cooperate with the Department of Justice, and today I want to remind this committee that with respect to the exchange of information, it's nearly a one-way street. We give them everything we've got, and they don't give us much of anything. They can't give us anything they get under a CID, or grand jury, and therefore it's still a one-way street. I think we should exchange information across the board because our joint effort, as well as I think we have done, can be improved.

I think Congress is on the right track because if we don't stop these mergers and this movement toward more concentration and monopoly, you are all going to have to address yourselves to it as a political question, that's all there is to it.

Second, the legal standards for enjoining mergers should be liberalized. While antitrust enforcers have an impressive record of winning cases, they have not been so successful at winning meaningful divestiture. According to a former FTC chief economist, "In very few of the cases where the Government ultimately prevailed has there been completely successful divestiture of the acquired unit."

A landmark study of 39 mergers by Prof. Kenneth Elzinga supports this view. Of the 39 cases which the Government "won," in only 6 did he find the relief ordered to be successful. In 21, the Government was completely unsuccessful, resulting in either no divestiture or an unsatisfactory one, such as of nonviable or de minimis assets, or a divestiture to a significant competitor.

Typical of these 21 cases is the Commission's "victory" in the *Farm Journal* case. The leading agricultural magazine acquired its chief rival, Country Gentleman, closed it down, and successfully solicited most of the latter's subscribers for subscriptions to the Farm Journal. The hearing examiner ordered divestiture, but noted that:

> As a practical matter divestiture of the subscribers' list now will accomplish nothing. Respondent has, by now, extracted all the juice from that fruit as well as from the list of current Country Gentleman advertisers.

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Even where a divestiture is more successful than in the *Farm Journal* case, it still takes inordinately long—so long that it may pay a firm to make an illegal acquisition and profit from its fruits, knowing full well that disgorgement will not occur for many years. Elzinga found that the average time from an acquisition to a divestiture was 5½ years. I would point out, Mr. Chairman, that's still a pretty good record, compared to the new section 2 Sherman Act cases, because the unvarnished truth is, in my lifetime, I haven't seen any monopolies broken up. Many cases drag on much longer, despite continued Commission efforts to streamline trial procedures.

I have noticed that contrary views on the need for premerger notification have recently been expressed by the editors of the Wall Street Journal. On January 30, 1976, the Journal warned that the result of premerger notification legislation would be that, "A handful of young Harvard grads and efficient secretarial pool could prevent them with ridiculous ease."

The Journal thinks this would be a bad thing because it likes mergers. The main reason the editors advance as to why mergers are desirable is that when a firm with tax liabilities merges with one with tax credits, there is a big tax saving. And for corporations to pay less taxes is good because otherwise the money would go to Uncle Sam who would waste it. Some might agree with that, but I don't fall in that classification. I would thank them for that remark, though, because I should think you would read it with interest.

Now, I'm not anxious to be known as a defender of young Harvard grads or Government waste, but this editorial strikes me as plain silly. If the best argument the Wall Street Journal can think up against a premerger notification bill is that such a bill prevents firms from avoiding taxes, I think such a bill should be passed today. This is particularly so, because there are many reasons why such a bill is needed, as I discussed above: (1) to enable antitrust enforcers to quickly gain information they can only obtain from the merging companies, (2) to stop the plague of interminable delay by corporate counsel in merger cases, and (3) to avoid the problem of obtaining meaningful divestiture which can result even when the Government ultimately wins its case.

Mr. Chairman, this is the end of my statement, and I will be glad to answer any questions.

Chairman RODINO. Thank you very much, Mr. Dixon. Let me ask you a few questions. First of all, I understand that the Federal Trade Commission currently has in effect a premerger notification program, is that correct?

Mr. DIXON. Under our broad section 6 powers we promulgated a notice to all industries in the late 1960's, requiring notification. I might say, sir, it has worked much better than I thought it would, then.

Chairman RODINO. Well, let me ask you, if you say it's worked much better, do the firms provide you with the information concerning merger in a reasonable length of time before the consummation of the merger?

Mr. DIXON. No, sir.

Chairman RODINO. What has been your experience?

Mr. DIXON. I think our general experience would be that we need that kind of an advance notice requirement in the law, so that we will be sure that we have all the information before we challenge. And, as I tried to highlight, I think it is most important that, whatever time is in the bill—if you pass such a bill—that that time doesn't start running until we get the information requested because today the lawyers that have advised the companies to merge are going to be the lawyers defending them; and, in my experience, they'll "spoonfeed" you one letter, or one piece of information a week.

Chairman RODINO. I have heard of so-called "midnight mergers." What is a so-called "midnight merger"?

Mr. DIXON. I don't know what a "midnight merger" is, other than that somebody sits down 1 minute before 12 o'clock and signs a contract to merge.

Chairman RODINO. Have there been such things?

Mr. DIXON. We have a lot of mergers that are obviously consummated in the highest degree of secrecy, and then announced with no prior notice—boom. Anyone who advises a large corporation, in a horizontal context, to do that is just asking for a challenge under section 7, is what he's asking for. We have had some beauties in our day.

Mr. SEIBERLING. Would the chairman yield?

Chairman RODINO. I yield to the gentleman from Ohio.

Mr. SEIBERLING. Do you recall, in 1965, the merger, or the acquisition by Firestone of Seiberling Rubber Co.? [Laughter.]

Mr. DIXON. Yes; I do.

Mr. SEIBERLING. Do you call that a "midnight merger"?

Mr. DIXON. I don't think I would, we knew all about that—both agencies. We wrestled around with it, and wrestled around with it, and we both waived on it.

Mr. SEIBERLING. But, while you were wrestling with it, they all of a sudden announced they had done it.

Mr. DIXON. Yes.

Chairman RODINO. I think the gentleman from Ohio speaks with some authority about that. [Laughter.]

Mr. SEIBERLING. They got memorandums from me on both sides of the issue.

Mr. DIXON. I have some direct recollection of that problem.

Chairman RODINO. Mr. Dixon, in your opinion, which is a better remedy for a section 7 violation, divestiture after consummation of a merger, or a preliminary injunction before the merger is consummated?

Mr. DIXON. A preliminary injunction, whether it is the type of injunction that would occur that is in this bill before the Senate, 1284; or whether it is an injunction that would have to be sought before a judge; or whether it is an involuntary agreement to hold as is, pending litigation.

The point is, when you get through, after an injunction ruling has been made, and it has been reviewed, even by the Supreme Court, you're not faced with a jumble of assets to unscramble.

Chairman RODINO. In other words, if it's a divestiture afterward, you've got a lot of difficulty unscrambling it.

Mr. DIXON. One of our very important cases was the challenge of Proctor and Gamble's acquisition of Clorox. I remember some of the numbers involved in that, that would illustrate it. I think they paid about $20 million for the assets. We challenged the merger, but before it was finally resolved, during that period of time, I think, profits had amounted to about $60 million on the operation of Clorox, by the acquiring company. And then, I recall, Procter & Gamble sold it, they spun it off, so to speak, and created a new company. I think they got something like $300 or $400 million.

I remember telling the principal officer of that company that I have a great deal of respect for, he must have been laughing all the way to the bank. But nevertheless, they very much desired not to have to divest themselves of that acquisition—but it was a long, hard fight.

Chairman RODINO. Mr. Dixon, in the *Dean's Food* case and the Alaska pipeline statute, both those instances gave the FTC power to obtain preliminary relief in that merger case. Now, how many times since the *Dean's Food* case has the FTC exercised preliminary injunction powers?

Mr. DIXON. Only one time, sir. That was after *Dean*, but not after the *Pipeline* case.

Chairman RODINO. Sir?

Mr. DIXON. It was after the *Dean* case that we sought one.

Chairman RODINO. What was the reason for that?

Mr. DIXON. I speak for myself now, my experience teaches me, principally from observing the efforts of the Department of Justice. The Department of Justice has had that right under their empowering section that whenever they had reason to believe the law was about to be violated, they would go into court. We couldn't do that, but we took the "All Writs" approach and went into court, and we won. Since the Alaskan pipeline bill, we were put on the same legal footing as Justice, with authority to seek the aid of the court on a TRO.

But here is what's wrong with that. You go down and file such a petition with the district judge, and you put yourself in his little tender hands. I think the Federal Trade Commission is as much an expert, or a better expert than any district judge in the United States, but I have never been able to sell that to the Congress, even though that's how it was meant in the beginning. Do you realize that in 1950—and I don't know what measures Congress used when they delineated it, but they paid district judges $5,000. I guess Congressmen got $7,500; and you paid the Trade Commissioners $10,000. Well, that was overcome pretty quickly. But nevertheless, I think that's the kind of expertise that's supposed to be on the Commission.

Now, if we have to send our staff off, under legal authority, into a given district court, different judges impose different burdens upon you. I believe that a district judge is about as near to the "Almighty" himself as anybody in this country can be. He imposes certainly a heavy burden of showing him that there is a probability of illegality.

He can make you prove your case right in front of him by affidavits and/or hearings, if he wishes to do it.

Now, if he disagrees with you, what are you going to do? Now, the Department of Justice had no other choice, if they use the section that they've got, but to come right back to that same judge and file a complaint, and try a case on the record in front of that same judge that may very well have already gone through the evidence to his satisfaction, and then he says, "You didn't carry your case again." and then they have to pick it up. So, they go back to the district court just building a record for review. They used to use the expediting statute and went to the Supreme Court and now they do just like we do, they come up through the appellate courts.

Chairman RODINO. Well, let me ask you this, Mr. Dixon—and this is my last question—I value your opinion. I believe that Mr. Engman, the previous chairman of the Federal Trade Commission, testified that he felt that the Government should be required to show some minimal standard for premerger relief. And under S. 1284 the filing of a complaint is in effect an automatic stay.

Mr. DIXON. I prefer your proposal, I prefer it; because, wrong or right, there is no standard that holds those judges in line, they can impose whatever standard they wish. Under your proposal, the only way that the defendant could overcome the injunction would be by showing what we have done was frivolous.

Chairman RODINO. Thank you, Mr. Dixon. Mr. Hutchinson?

Mr. HUTCHINSON. Mr. Dixon, the Justice Department and the Trade Commission seem to be doing the same thing in regard to merger cases and everything else. Why should we have two agencies? Why shouldn't we just have one or the other?

Mr. DIXON. Well, I spent the early part of my life, in competition, physical competition. I think competition is even good in Government; there is a kind of low-level competition between us. But we follow the administrative way, and they are truly an executive branch of the Government.

Now, we are not wasting any of the money you give us, we are working hand in hand daily in liaison; and, for God's sake, we've got more targets than both of us can take care of now. You could say, well, let's just take all the moneys and give them to one agency, or the other. If you did that and asked me which one to give it to, I would suggest you give it to the Federal Trade Commission.

Mr. HUTCHINSON. I can understand that, yes, sir.

Mr. DIXON. I could make a pretty good case for it.

Mr. HUTCHINSON. Well, I'm not asking you to make that kind of case right here. I know it's awfully easy to say, now, look, here is unnecessary duplication because you've got both these agencies; and you say they have a low-key competition with each other, and that's good. But, on the other hand, I don't think the public generally thinks the Government should be competing with itself.

Mr. DIXON. Well, I think you could make a good strong argument that if you've got people doing the same thing, that's wrong. But, let's take the Clayton Act. The Clayton Act has four basic sections in it that have to be enforced: Section 2 deals with discrimination, both in price and services; section 3 deals with exclusive dealing and time contracts; section 7 with mergers; and section 8 with interlocking directors.

The empowering section for administrative agencies is in section 11 of the statute where, after exempting many of the other agencies everything is left that the Federal Trade Commission will enforce. In section 15 the law doesn't say "you might," or "maybe," it says the Attorney General "shall" enforce section so-and-so.

Well, historically the Federal Trade Commission undertook to enforce section 2 as amended by the Robinson-Patman Act. I spent a whole day up here recently explaining our view of that law and the work we had done, and what was wrong with us now. There hasn't been a case brought by the Department of Justice under Robinson-Patman because they simply don't believe in the law that the Congress wrote.

Now, I think that anybody who gets appointed to one of these jobs ought to have to hold his hand up and swear—and they ought to take a good picture of him while he's asked: "Are you going down there to enforce the law as it's written, or the way you think it should have been written?" I recommend that to anybody.

Now, I tell you, I like to be free and independent. And remember this, it's the responsibility of the Congress to regulate commerce. We are an arm, an extension of this Congress, of the Congress as a vital part, a coequal part of this Government. We are independent, as independent, I guess, as anybody could expect to be, or should be in present day life, as we live in. It's very difficult for somebody to tell me that I shouldn't come up here and tell you what I honestly think, if you ask me to come up here.

Mr. HUTCHINSON. Well, I'll ask you the same thing that I asked Mr. Kauper. Do you think that the record would show that the Federal Trade Commission with its broader investigative powers is more successful in section 7 cases than the Department of Justice?

Mr. DIXON. Well, I think we'd have a difficult time deciding this because we start off being sure that we are utilizing the accumulated expertise in whatever industry we are in, and by dividing authority and yielding to the one with the greatest expertise when a case is brought. So, if we waive or defer to justice and let them take a case forward, I think they can be about as successful as we would have been.

I might say, in the early days, in the early 1960's I used to get a little "browned off" because through our liaison, when a horizontal case came up and we got to talking about which one of us would take it, they demanded it because they could do something we couldn't. They could go to court and seek a stay order, and we had to send these cases over. So, this kind of left us with what I consider tougher cases to bring. We were out, trying to find the outer limits of what the law really meant in conglomerate market extensions and product extension mergers; yet we have been just as successful as they.

But the main thing I wanted to leave with you is that I think it took the combined efforts of both to really dent the merger movement.

Mr. HUTCHINSON. Before you start in on a case in any form, do you get together with the Justice Department to decide which one of you is going to take it on?

Mr. DIXON. Well, as a practical matter, the way it works is either as a result of our rule, requiring notification of corporations under our $250 million and $10 million test, if they give us that notice, we may get it before we read it in the paper, or we may not; but we may have it. Well, some of them are on their face important enough so that we should have more information, and we start at this stage.

Now, when we start, we will ask the Department of Justice—we have a liaison officer and they have one—that we intend to investigate this matter thoroughly, and do they have any comments or objections to it. And, within 24 hours, the agreement says, we have to be told. If they waive, then we go ahead, and once we start, we stay with it.

Mr. HUTCHINSON. Well, how about actions on their part? Do they send over and ask you for a waiver?

Mr. DIXON. They do the same thing.

Now, if on the operational level—Mr. Johnson here is our expert in the Bureau of Competition level—if he says, "Well, we've got expertise, we'd like to have the case that Justice has got." Well, if Mr. Kauper doesn't agree with him, then they start up the line to try to work out an agreement. But only on very rare occasions does it get to the point of the Attorney General and the Commission having a fight on which is the most expert.

Mr. HUTCHINSON. And, of course, if they can't agree, then what happens?

Mr. DIXON. If they wouldn't agree then, it would be some mess; I've never reached that.

Mr. HUTCHINSON. You never got that far.

Mr. DIXON. I never got that far. My interest has always been that the matter should be challenged and it's going to be challenged. There is plenty for us both to do with the amount of money and personnel we have; it isn't necessary to have such a fight.

Mr. HUTCHINSON. Thank you, Mr. Dixon.

Chairman RODINO. Mr. Seiberling?

Mr. SEIBERLING. Thank you, Mr. Chairman.

Mr. Dixon, in connection with the testimony of Mr. Kauper a question was raised about the use of the words "affecting commerce," in overruling legislatively the American Building and Maintenance case, which you recommend we do, and which I happen to think would be a good move.

But, the point was raised as to whether this created a presumption against any merger "affecting commerce," and I would like to get your views as to whether this creates any presumption, or merely extends Congress' power to its constitutional limits, as is the case with the Sherman Act.

Mr. DIXON. I don't think that it creates any presumption. I just think it puts it right in the same ball park with the Sherman Act, so to speak. And the Federal Trade Commission Act was recently amended in the same way. Our limitation had always been "in commerce," up until the law was changed. Now we can deal under section 5 with practices "affecting commerce."

Mr. SEIBERLING. Right.

Mr. DIXON. I think it would be well that you carry this thought through for Clayton section 7 by legislation.

Mr. SEIBERLING. Well, I think it would make for a more consistent pattern of enforcement across the board.

Doesn't the fact that the FTC and the Department of Justice both have jurisdiction in section 7 cases sometimes lead to confusion which merging parties take advantage of?

Mr. DIXON. Well, I'll put it this way, we both have premerger clearances. If anybody wishes to get clearance, he can come down to one agency or another. He may sometimes play one against the other because if he went over to the Department of Justice to get clearance, and they gave him such a clearance, I'll assure you, I'll never vote for the same matter over here even though some people would argue we could. I think we have to have that kind of consistency.

I think, as Mr. Hutchinson asked me, when we have this liaison, we must respect each other's actions, and not try to cover the same ground.

Mr. SEIBERLING. Aren't there situations sometimes where originally FTC, or Justice, took an interest in a particular merger, and then the other agency asked to have it referred to them for consideration; and while the thing was sitting between the chairs, so to speak, the merging parties went ahead and pulled off their merger and presented everybody with a fait accompli?

Mr. DIXON. Well, the only time I remember this happening was with Consolidated Coal, which had been waived on. But when Congress asked us to make some energy studies, and the staff asked us to ask Justice to refer the matter over to us, and they did it with no caveats. But I tell you one thing, as a member of the Federal Trade Commission, if either one of these fellows comes up to me now and asks me to institute a suit going back to that merger, I'm not going to vote for it because the Department of Justice has the same degree of responsibility. If they made a mistake, they made it, and I think the businessman is entitled to rely on one agency or the other.

Mr. SEIBERLING. Well, I'm thinking about the situation where there wasn't any approval by either agency.

Mr. DIXON. Then it's still open.

Mr. SEIBERLING. But, let's say, FTC started to investigate a merger, and at that point Justice said it was interested and asked FTC to send the file over to Justice, so it could look at it; and while Justice was looking at it, the parties could go ahead and move ahead. Wouldn't that create sort of——

Mr. DIXON. If they told us they were interested we would say, "Send your attorney over here, and we'll let him look at the file." That doesn't mean we'll quit.

Mr. SEIBERLING. But if Justice said it was interested, wouldn't you sort of suspend?

Mr. DIXON. If they said, "We wish you would waive the matter over here," then we'd decide why they would wish us to get out, and look into the reasons why they think they could do a better job than we would.

Mr. SEIBERLING. Now, you mentioned how corporate counsel drag their feet in trying to avoid giving information you want, and I'm sure that's the case sometimes. Isn't it also true that corporate counsel block a lot of mergers?

Mr. DIXON. I would hope so, sir; I think they can read the law as well as Government lawyers can. I dare say they may be doing a very good job on the whole because God knows how many thousands they have advised against.

Mr. SEIBERLING. Well, I know I have personally blocked some mergers that my clients wanted very much to carry through, and I simply pointed out to them that on the basis of the cases they would just assure themselves of action against the merger; and they took my advice and didn't go through with it. In fact, I can't recall a single time when, as a corporate lawyer, I told my clients they couldn't go ahead with a merger without violating the law, or taking the risk of it, that they went ahead with the merger.

Mr. DIXON. But if your client went out shopping for a lawyer that would say yes, they could find one.

Mr. SEIBERLING. My client was perhaps a little smarter than some.

Mr. DIXON. I congratulate you, having that influence.

Mr. SEIBERLING. Now, what I'm getting at is whether or not, without some clear guidelines and the fact that corporate lawyers are advising their clients, the FTC and Justice Department could possibly ride herd on all of the mergers that are taking place.

Mr. DIXON. Well, you know, I have tried to answer that question before. When the figures were put out—and we are largely responsible for them—there were 3,000 this year, and 2,700 that year, and they would go up and down. I think mistakes may have been made in putting those figures out because if we had 2,500 mergers in the past year, I would estimate that of that number, only 150, or 200 at the most would deserve real attention under section 7.

Now, that's what's taking place in our screening. We will look at maybe 300, really cases of moment: and out of those we keep active maybe a hundred. The staffs work very closely together. Here arises the necessity to marry a lawyer and an economist, when you get into this field. It took me 10 years to get them to speak to each other, but they get along pretty well now. But you paint with gray brushes when you talk about evidence in a merger case, not just black and white. My God, Congress put a subjective test in sections 2, 3, 7, and then they changed it to 8, and it's the same test: "may substantially lessen competition and tend to create a monopoly." Well, a citizen could say "What in God's name did Congress have in mind, they must have been able to define that test a little better than that." But it's a very good test. We now have beginning in 1915, all kinds of factual situations to which you can look for guidance. So, I think it's easier now for a practicing lawyer to give a client advice as to whether or not he is going to be challenged if he buys company A, or B, or something.

Mr. SEIBERLING. Now, wouldn't premerger notification with a mandatory waiting period block most mergers because of the fact, if the competitors of the acquiring company find out about it, why, then you've got a thing that tends to fall apart.

Mr. DIXON. You know, in 1958, when this was being considered by the Senate Antitrust and Monopoly Subcommittee, one of the problems I had was, what dollar limitation; and they got into an agreement whereby they put it up to $5 million. One way or the other "in commerce" was going to be all right, but the acquiring company had to have $5 million before it was important.

Now, you've got some limitations in this bill that have been mentioned here today, namely, $100 million and $10 million. Now, when you say there are 3,000 mergers, that would eliminate all but several hundred, at the most.

Congress has always maintained—and I think wisely—that all mergers were not intended to be questioned, there are some very wise mergers that make things more competitive, and they were always protected when the Celler-Kefauver amendment was passed. They blocked that business about stock. You can make a stock acquisition now, and it can be converted to an investment, and it's perfectly legal. There are many corporations which are willing to build up a portfolio like that and they can do that. They can convert the stock, even though it may be enough to take the company over, they can convert that amount of stock to nonvoting stock and there isn't anything illegal about that.

Mr. SEIBERLING. Well, what you are saying is, if it is above a certain size, there should be a public opportunity to look at it on the part of the FTC, and if confidentiality is so important that with publicity the thing would fail, that that's a risk society should take. Is that what you think?

Mr. DIXON. In my lifetime, I think the biggest problem facing this country today is, what are we going to do about increased concentration, multinational corporations, and what have you. What is the Congress going to do; are you going to have to manage them?

The one thing that stands between us and the dangers of monopoly are the antitrust laws. Now, our antitrust laws haven't worked very well with respect to monopolies; that's my judgment.

Of course, I fortunately spent my life in a career at the Federal Trade Commission, which was created to go after violations in their incipient stage; that's what our FTC Act and our enforcement of the Clayton Act are primarily aimed at, to halt practices before they reach a full-scale monopoly problem.

Mr. SEIBERLING. Well, let me just ask one other question, and that relates to what you just said. We had hearings here on the effect of joint ventures in the oil industry, and we had some pretty strong testimony that the whole pattern of the oil industry, even though the number of firms in the industry would not indicate that it is an oligopolistic situation, that nevertheless, because of the pattern of joint activity and interrelationship, that the industry is far less competitive than the number of firms would indicate.

What I'm wondering is, whether under section 7 you really have an opportunity, and if you do, whether you take the opportunity, to analyze the structure of an entire industry and determine that the joint venture patterns, for example, have produced a very substantial lessening of competition. And if so, what can you do about it?

Mr. DIXON. I think I'd better not attempt to answer that because the Federal Trade Commission of which I'm a member, sued the big eight oil companies. You all did go into that. We sent the staff up to answer for us sometimes because in the past, when I said even, "Yes, we have a complaint against a certain company," darned if the outside lawyers didn't have me disqualified three times from participating in the case.

Mr. SEIBERLING. Well, that is not a section 7 case.

Mr. DIXON. This is a section 5 case. And section 5 is just about the greatest dream that Congress ever produced, in my opinion.

Mr. SEIBERLING. Well, my question is, and maybe you can answer this. Does section 7 give you an effective remedy in this type of situation?

Mr. DIXON. A joint venture is another way that someone might describe a section 7 case—it's a marriage.

Mr. SEIBERLING. I think it is, but the trouble is, if you just look at that particular joint venture, maybe you don't see any problem;

but if you look at the whole pattern of joint venturing throughout an entire industry, maybe the pattern is bad.

What I'm trying to find out is whether section 7 is an effective remedy when you find yourself confronted with the whole pattern of joint ventures, even though individually they don't have any substantial effect.

Mr. DIXON I hope you'll forgive me. If I open my mouth one more time, I'm out. [Laughter.]

Mr. SEIBERLING. Well, OK, I can understand that. Let me ask just one further question, then. In testimony before the Senate, Professor Brodley examined the current FTC merger notification program. Currently, of course, only firms with $250 million in assets or sales have to report their acquisitions. And, under those standards the FTC would have detected only 38 percent of the mergers the FTC actually challenged.

Have you examined your merger notification program to see whether it would be wise to expand its coverage? For example, how do you learn about mergers of firms with assets of less than $250 million?

Mr. DIXON. I think the evaluation was probably about right. But, that experiment has worked very well, and we had pretty good success with it. It isn't nearly as effective as the premerger notification bill you are talking about here today. But, it has been helpful, sir.

Mr. SEIBERLING. Well, for mergers that are picked up by your merger notification program, which you spot, but decide not to prosecute, do you inform the Justice Department of these, so they can review them?

Mr. DIXON. When they ask us, or we ask for clearance to go investigate, we do inform them. As a practical matter, they have substantial access to what we have.

Mr. SEIBERLING. But the question is whether you automatically inform them.

Mr. DIXON. Now, we have to go back, if it's smaller than that size, as Mr. Kauper said, we may have more economists reading the trade papers, and all, and we'll come across it. It's pretty hard to keep a thing like that of any size quiet because of SEC demands. They've got problems when they tinker around like that. So, we'll find out about it, and then we have to go out and start an investigation, and then we'll get the information.

Mr. SEIBERLING. But when you initiate an investigation, do you still inform Justice?

Mr. DIXON. We still tell them we propose to do it.

Mr. SEIBERLING. And if you don't propose to do it, do you tell them that you are not proposing to do it?

Mr. DIXON. Oh, no. If we don't propose to do it, we don't propose to do it, and we have no assumption that they propose to do it.

Mr. SEIBERLING. In other words, it's up to them to go through the same procedure.

Mr. DIXON. The same process. You know, since 1961, now nearly 15 years, I think that Justice and the Federal Trade Commission can look with pride upon what we have accomplished through our respective premerger efforts. I think we've done very well. Now, I think we could do better if we were assured that there was going to be a stay of some description, or a tool of some kind that we would have.

Mr. SEIBERLING. Well, I would agree, you have done an outstanding job.

Mr. DIXON. We've lost some good ones, and I'm sure we missed some, nobody can be perfect, here. But I'm sure if you would call the antitrust section of the American Bar Association up here and put them on the line and ask them, I think they'd pretty well think our job has been fairly well done.

Mr. SEIBERLING. And, as your testimony indicates, the tool that you have been given is the Celler-Kefauver Act, without which you wouldn't have been able to do the job.

Mr. DIXON. We would have just been on dead center if all you'd have to do was buy the assets of the company to avoid being sued. They were trying to plug that loophole for 15 years. And then they did it in 1950 after a lot of hearings, and the great question in the merger field now is, what in the world can we do about conglomerate mergers, true conglomerate mergers. A steel producer buys a ribbon company—now, that is as far removed as you could get activities—but if the largest steel producer had the cash flow and bought the largest ribbon manufacturers, what are you going to do about that?

Mr. SEIBERLING. Well, having read some opinions that have been issued over the years, I would say that you would probably say, "Well, if they make steel ribbons, that's a horizontal merger, and therefore it's illegal."

Mr. DIXON. If we would find in the investigation that they had a survey made as to going into that area because they wanted to make a ribbon and put a little strength in it, putting a little steel in it; and they were thinking about going into it themselves, but took a shortcut and went over and bought that ribbon guy instead, we would call that a product extension merger that eliminated potential competition.

That's old stuff; we already developed that. I'm talking about one where you just couldn't dream up that kind of thing.

I had the question put to me one time, sir, I had it put to me real strong by a major biscuit company—I don't know, maybe $1 billion in sales—proposed to merge with one of the major detergents. And I said, "You've reached my breaking point, though I'm only one Commissioner. If you do it, I'm going to recommend that we challenge you, and you can get the best lawyers you can hire and say we are crazy because we can't prove a violation, but we'll try." I knew Mr. Celler real well, and I knew Mr. Kefauver, I worked with him; and I used to tell them it would have been much better if they put explicit prohibitions on large conglomerate mergers in a statute instead of talking about them.

Mr. SEIBERLING. Well, I thought the *Kennecott-Peabody* case came about as close to a conglomerate situation in reality as I've seen.

Mr. DIXON. You read that?

Mr. SEIBERLING. It was just unlucky that they also happened to have a little coal mine, or you fellows——

Mr. DIXON. They might have been home free without that, you see. But the point is, as we issued that complaint, I wouldn't have voted for that complaint unless we had those facts. That wasn't the one; the case where I thought we were going to get the law clarified was the ITT case, but it was settled.

Mr. SEIBERLING. I think this committee had some familiarity with that.

Mr. DIXON. Well, I think both enforcement agencies would like to know what the outer parameter of section 7 is. The only way we'll ever know is to bring sometime perhaps a foolish case, just on size, or something, and have the court tell us we've got to go back and read the statute, or something. But until this is done—and I think we have been progressing in an orderly way, challenging different types of mergers so that we now have a body of law, so that the practitioner that reads his case book can give his client a pretty danged good understanding. Maybe that's the reason some of our success is standing out, and so we don't see horizontal mergers very often any more.

Mr. SEIBERLING. Well, I think that's true, and as a practicing lawyer in the past, that made a big difference.

Mr. DIXON. No matter how horizontal they are, there is a "failing company" doctrine in here, and you can run right nose-to-nose with it.

Mr. SEIBERLING. I agree, that's one of the really tough areas.

Well, does staff have any questions?

Well, Mr. Dixon, it was a real pleasure to hear you, as it always is. Usually I'm down in the audience and you are up there on the stand, but it's nice either way. So, thanks very much for coming and giving us your illuminating views.

Mr. DIXON. We always like to come and give as much help as we can.

Mr. SEIBERLING. Thank you.

[Whereupon, at 12:25 p.m., the subcommittee adjourned, subject to the call of the Chair.]

MERGER OVERSIGHT AND H.R. 13131

THURSDAY, MAY 6, 1976

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:46 a.m. in room 2141, Rayburn House Office Building, Hon. Walter Flowers presiding.

Present: Representatives Flowers, Seiberling, Mazzoli, Hughes, and McClory.

Also present: Earl C. Dudley, Jr., general counsel; Thomas S. Runge, Alan A. Ransom, counsel; Franklin G. Polk, and Kenneth G. Starling, associate counsel.

Mr. FLOWERS. We will call the subcommittee meeting to order. This morning we open hearings on H.R. 13131. The bill would establish premerger notification and stay agreements for large mergers, thereby strengthening enforcement of the antimerger law. The problem this bill seeks to cure is not a new one. The Congress has been considering bills very much like this one for 20 years and in fact the House passed a bill similar to this one in 1957 by a unanimous vote. President Eisenhower urged the bill's passage for 5 successive years as did Attorney General Herbert Brownell. Former Chairman Celler of this committee sponsored bills like this one many times.

[A copy of H.R. 13131 follows:]

[H.R. 13131, 94th Cong., 2d sess.]

A BILL To amend the Act commonly called the Clayton Act to provide for premerger notification and stay agreements

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 730; 15 U.S.C. 12), is amended by inserting immediately after section 6 a new section 7A to read as follows:

"SEC. 7A. (a) Notwithstanding any other provision of law, except as exempted pursuant to subsection (b)(4) of this section, until expiration of the notification and waiting period specified in subsection (b)(1) of this section, no person or persons shall acquire, directly or indirectly, the whole or any part of the stock or other share capital or of the assets of another person or persons, if the acquiring person or persons, or the person or persons the stock or assets of which are being acquired, or both, are engaged in commerce or in any activity affecting commerce, and—

"(1) stock or assets of a manufacturing company with annual net sales or total assets of $10,000,000 or more is or are being acquired by a person or persons with total assets or annual net sales of $100,000,000 or more;

"(2) stock or assets of a nonmanufacturing company with total assets of $10,000,000 or more is or are being acquired by a person or persons with total assets or annual net sales of $100,000,000 or more; or

"(3) stock or assets of a person or persons with annual net sales or total assets of $100,000,000 or more is or are being acquired by a person or persons with total assets or annual net sales of $10,000,000 or more.

"(b)(1) The notification and waiting period required by this section shall expire thirty days after the persons subject to subsection (a) of this section each file with 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') duplicate originals of the notification specified in paragraph (3) of this subsection, or until expiration of any extension of such period pursuant to subsection (c)(2) of this section, whichever is later, except as the Federal Trade Commission and the Assistant Attorney General may otherwise authorize pursuant to subsection (c)(4) of this section.

"(2) Notwithstanding any other provision of law or the applicability of subsection (a) of this section, except as exempted pursuant to subsection (b)(4) of this section, no person or persons shall, within thirty days following the filing of a notification (specified pursuant to paragraph (3) of this subsection), or until the Federal Trade Commission and the Assistant Attorney General may otherwise authorize pursuant to subsection (c)(4) of this section, whichever occurs first, acquire, directly or indirectly, the whole or any part of the stock or other share capital or of the assets of another person or persons, if—

"(A) the acquiring person or persons, or the person or persons the stock or assets of which are being acquired, or both, are engaged in commerce or in any activity affecting commerce; and

"(B) with the concurrence of the Assistant Attorney General, the Federal Trade Commission by general regulation requires, after notice and submission of views, pursuant to section 553 of title 5, United States Code, that such person or persons, or any class or category thereof, shall not do so until the expiration of the period specified by this paragraph.

"(3) The notification required by this section shall be in such form and contain such information and documentary material as the Federal Trade Commission, with the concurrence of the Assistant Attorney General, shall by general regulation prescribe, after notice and submission of views, pursuant to section 553 of title 5, United States Code.

"(4)(A) The Federal Trade Commission, with the concurrence of the Assistant Attorney General, is authorized and directed to define the terms used in this section, to prescribe the content and form of reports, by general regulations to except classes of persons and transactions from the notification requirements thereunder, and to promulgate rules of general or special applicability as may be necessary or proper to the administration of this section, insofar as such action is not inconsistent with the purposes of this section, after notice and submission of views, pursuant to section 553 of title 5, United States Code.

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

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

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

"(iii) interests in a corporation at least 50 per centum of the stock of which is already owned by the acquiring person or a wholly owned subsidiary thereof;

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

"(v) transactions exempted from collateral attack under section 7 of this Act if approved by a Federal administrative or regulatory agency: *Provided*, That duplicate originals of the information and documentary material filed with such agency shall be contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General;

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

"(vii) transactions which require agency approval under section 4 of the Bank Holding Company Act of 1956 (12 U.S.C. 1843), as amended, section

403 or 408(e) of the National Housing Act (12 U.S.C. 1726 and 1730a), as amended, or section 5 of the Home Owners' Loan Act of 1933 (12 U.S.C. 1464), as amended: *Provided*, That duplicate originals of the information and documentary material filed with such agencies shall be contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General at least thirty days prior to consummation of the proposed transaction;

"(viii) acquisitions, solely for the purpose of investment, of voting securities, if at the time of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the insurer;

"(ix) acquisitions of voting securities if, at the time of such acquisition, securities acquired do not increase, directly or indirectly, the acquiring person's share of outstanding voting securities of the issuer;

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

"(C) For the purpose of subsection (b)(4)(B) of this section, 'voting security' means any security presently entitling the owner or holder thereof to vote for the election or directors of a company or, with respect to unincorporated issuers, persons exercising similar functions.

"(c)(1) The Federal Trade Commission or the Assistant Attorney General may, prior to the expiration of the periods specified in subsection (b)(1) of this section, require the submission of additional information and documentary material relating to the acquisition by any person or persons subject to the provisions of this section, or by any officer, director, or partner of such person or persons.

"(2) The Federal Trade Commission or the Assistant Attorney General may, in its or his discretion, extend the periods specified in subsection (b)(1) of this section for an additional period of up to twenty days after receipt of the information and documentary material submitted pursuant to subsection(c)(1) of this section.

"(3) No provisions of this section shall limit the power of the Federal Trade Commission or the Assistant Attorney General to secure, at any time, information or documentary material from any person, including third parties, pursuant to the Federal Trade Commission Act or the Antitrust Civil Process Act.

"(4) The Federal Trade Commission and the Assistant Attorney General may waive the waiting periods provided in this section or the remaining portions thereof, in particular cases, by publishing in the Federal Register a notice that neither intends to take any action within such periods in respect of the acquisition.

"(d) If a proceeding is instituted by the Federal Trade Commission or an action is filed by the United States, alleging that a proposed acquisition or merger violates section 7 of this Act, or section 1 or 2 of the Sherman Act (15 U.S.C. 1–2), and the Commission or the Assistant Attorney General (i) files a motion for a preliminary injunction against consummation of such acquisition or merger pendente lite, and (ii) 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—

"(1) upon the filing of such certification the chief judge of such district court shall enter an order temporarily restraining consummation of such proposed acquisition or merger until final disposition of the motion for a preliminary injunction: and 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;

"(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:

"(3) a preliminary injunction shall issue restraining consummation of such proposed acquisition or merger until the order of the Commission in respect thereof or the judgment entered in such action has become final unless the defendants show that the Commission or the United States does not have a reasonable probability of ultimately prevailing on the merits, or that they will be irreparably injured by the entry of such an order, in which case the court may deny, modify, or subject such preliminary injunction to such conditions as the court shall deem just in the premises: *Provided, however,* That a showing of loss of anticipated financial benefits from the proposed acquisition or merger shall not be sufficient to warrant denial, modification, or conditioning of such an injunction; and

"(4) if a decision by the district court on such motion for a preliminary injunction is not issued within sixty days after issuance of the order temporarily restraining consummation of such proposed acquisition or merger, under paragraph (1) of this subsection, such order shall be vacated unless, for good cause, the chief judge of the United States court of appeals for such circuit extends such order.

"(e) Failure of the Federal Trade Commission or the Assistant Attorney General to request additional information or documentary material pursuant to this section, or failure to interpose objection to an acquisition within the periods specified in subsections (b)(1) and (b)(2) of this section, shall not bar the institution of any proceeding or action, or the obtaining of any information or documentary material, with respect to such acquisition, at any time under any provision of law.

"(f)(1) Whenever any person violates or fails to comply with the provisions of subsection (a) of this section, such person shall forfeit any pay to the United States a civil penalty, of not more than $10,000 for each day during which such person directly or indirectly holds stock or assets, in violation of this section. Such penalty shall accrue to the United States and may be recovered in a civil action brought to the United States.

"(2) Whenever any person fails to furnish information required to be submitted, pursuant to subsection (c)(1) of this section, such person shall be liable for the penalties provided for noncompliance with the provisions of the Federal Trade Commission Act or the Antitrust Civil Process Act, as the case may be.

"(g) In any proceeding instituted or action brought by the Federal Trade Commission or the United States alleging that an acquisition violates section 7 of this Act, or section 1 or 2 of the Sherman Act, upon application of the Federal Trade Commission or the Assistant Attorney General to the United States district court within which the respondent resides or carries out business, or in which the action is filed, such court shall, as soon as practicable, enter an order establishing the purchase price of the acquired stock or assets, requiring the acquiring person or persons to maintain the personnel, assets, stock, or firm being acquired as a separate entity unless the interests of justice require otherwise, and may enter an order requiring the profits of the acquired firm, stock or, assets to be placed in an escrow account, pending the outcome of the proceeding or action. Upon entry of a final order or judgment of divestiture under section 7 of this Act, or section 1 or 2 of 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.), commonly called the Sherman Act, the court shall order that the divestiture be accomplished expeditiously. To the extent practicable, the court may deprive the violator of all benefits of the violation including tax benefits.".

SEC. 2. The amendment made by this Act shall take effect one hundred and twenty days after the date of enactment of this Act. Effective upon the date of enactment of this Act, the Federal Trade Commission is authorized and directed to carry out the requirements of section 7A (b)(3) and (b)(4) of the Act commonly called the Clayton Act, as amended by this Act.

Mr. FLOWERS. Our chairman, Mr. Rodino, wrote the committee report on the 1961 premerger notification and waiting bill. There are some differences between these earlier bills and this one. The 1957 bill required advance notification only for mergers involving companies worth $10 million or more.

But this bill raises that limit to $100 million or more, largely in recognition of 20 years of inflation. The 1959 bill set a premerger waiting period of 90 days while this one provides for a 30-day period which can be extended by 20 days or more.

The underlying purpose of those early bills remains the purpose of this one—to stop potential monopolies before they are created by stopping illegal mergers before they take place.

This bill seeks to achieve that goal. It will provide the Government with advance information about large mergers and a reasonable time to analyze that data. If the proposed merger then appears to be illegal, the Government will have a fair chance to stop it before it takes place. Otherwise the Government can challenge illegal mergers only after they are completed, in a divestiture proceeding.

But untangling two companies after their assets and companies have been merged is costly, time consuming, and is rarely successful. It has been compared to "unscrambling the eggs in an omelet." Our first witness spent years trying to unscramble the omelet created by one illegal merger.

He finally succeeded but that one case, I understand, Mr. Watkiss, lasted 17 years, and went to the Supreme Court 6 times. I want to yield to my distinguished colleague, the gentleman from Illinois, Mr. McClory.

Mr. McClory. Thank you, Mr. Chairman.

I welcome the testimony we are about to receive in this hearing and in our consideration of this important legislation. The antimerger law does not prohibit conduct as such but conduct which has an anticompetitive effect. Thus it is often difficult for either participants or observers to determine whether the antimerger law has or has not been violated.

But here more than elsewhere in our antitrust laws the national policy is not so much to punish the violator as it is to protect competition. No criminal sanctions await the violator of the antimerger law as they do the violator of the Sherman Act, and that is as it should be.

But rather than showing weakness in our commitment to the antimerger law, the nonpunitive approach underscores the paramount significance of a policy which is too important to our national wellbeing to predicate enforcement on criminal law terms. This law has not worked that well. The prohibitions are more majestic than effective. The good faith of business and fear of litigation have been the substantial reasons for adherence to the law.

But for those who act in bad faith or those who have no fear of litigation, the antimerger law has not been effective. In our search for solutions we must not overlook the fact that mergers are necessary to the health of the general economy and necessary to the viability of individual businesses on many occasions.

Thus we must strike a balance in trying to make the law to ban anticompetitive mergers more effective. We must not exact too great a price from those who participate in mergers that are in the public interest.

How much dare we bother the good in order to stop the bad? This bill has five major points. It would provide for notification, a waiting period, automatic temporary restraining orders, a shift in the burden of proof for preliminary injunctions, and an escrow arrangement. Mr. Chairman, I would think that a balance of competing interests would require us neither to accept nor to reject all of these points.

I trust these hearings will shed light on these issues so we can make informed and responsible judgments in our markup of H.R. 13131. Thank you.

Mr. FLOWERS. Mr. Watkiss, we want to welcome you to this subcommittee. I understand you have a prepared statement for us.

[The prepared statement of David K. Watkiss follows:]

STATEMENT OF DAVID K. WATKISS, LAWYER, SALT LAKE CITY, UTAH

I am David K. Watkiss, a lawyer from Salt Lake City, Utah, and am pleased to respond to your request to testify on H.R. 13131 on the need for premerger notification. My comments represent personal views developed largely during my seven-year experience as Chief Counsel for the ultimately successful applicant in the divestiture proceeding *United States* v. *El Paso Natural Gas Company*. This important enforcement action, discussed and reviewed in numerous articles and characterized in a Wall Street Journal editorial "Antitrust Gone Mad," involved most of the classic issues of divestiture and provided a concentrated practical course in the problems of divestiture.

If a premerger notification requirement like the one proposed had been on the books 20 years ago, I would probably never have had this interesting experience, but more importantly, the public and the courts would have been spared the ordeal of the El Paso case. Notice and information from the major western interstate pipeline of its intention to acquire the only other interstate pipeline west of the Rockies would have produced a stay of the stock acquisition or at least an injunction against the subsequent merger and thus, the prevention of the 17-year restraint of competition in western natural gas markets. An effort by the Department of Justice to obtain a restraining order when the stock acquisition was announced was denied by the trial court even though the Supreme Court, when it reached the merits of the merger in 1964, unanimously found in so many words that "if El Paso can absorb Pacific Northwest without violating § 7 of the Clayton Act, that section has no meaning in the natural gas field." 376 U.S. at 662. If there had been no merger the case would have ended then, but another 10 years were required to accomplish the Supreme Court order requiring "divestiture without delay". Despite this prolonged and unsupportable delay, the El Paso case had a salutary effect because the business community observed the Justice Department and courts persevere until a satisfactory remedy was finally achieved.

A brief description of the history of this divestiture case illustrates why legislation such as you are considering is needed to avoid the damage to the public interest that results from years of protracted litigation during the course of which a monopolistic or anticompetitive condition was allowed to continue because of no effective means at the outset to stop the unlawful acquisition and no efficient means to unravel it expeditiously. The El Paso litigation and the difficulties encountered in structuring a divestiture decree to meet the criteria required by the Supreme Court emphasizes the need to avoid divestiture by maintaining the separate identities while the violation is litigated if this can be reasonably and responsibly accomplished. While a successful divestiture was finally obtained, the period of time required with its attendant economic uncertainties and changing market conditions, together with the considerable expense and effort needed to achieve a satisfactory result graphically illustrates the desirability of this legislation.

El Paso Natural Gas Company (El Paso) was organized and commenced business as a natural gas pipeline transmission company in 1928. It began supplying natural gas to the State of California in 1947 Pacific Northwest Pipeline Corporation (PNW) was certified by the Federal Power Commission in 1955 to supply natural gas to the Pacific Northwest, particularly the States of Oregon, Washington and Idaho. The PNW pipeline was constructed to deliver gas supplies from the San Juan Basin in northwestern New Mexico. Supplemental sources of gas were obtained by PNW from Canada.

PNW, with an excess supply of natural gas for its new and developing market, began discussions with certain California consumers to determine if it could supply California. El Paso, the sole supplier of gas from outside California thereupon commenced negotiations to acquire all of the stock of PNW and this stock acquisition was consummated in 1957. Almost immediately, the Justice

Department filed suit against El Paso under § 7 of the Clayton Act contending that the acquisition substantially lessened competition in California.

A month after the filing by the Justice Department, El Paso applied to the Federal Power Commission (FPC) for approval of an asset merger of the two companies under § 7 of the Natural Gas Act. Confusion and controversy followed over which forum should proceed first, with the District Court finally deciding to wait for the Commission to proceed. In December of 1959, the FPC approved the merger which was thereafter immediately consummated.

The State of California appealed the FPC order. In 1962, the United States Supreme Court vacated and remanded the case to the United States District Court for the trial of the Clayton Act violation holding that the Clayton Act suit against El Paso's acquisition of control should have been tried in the Federal District Court before the FPC permitted the consummation of the merger and that the regulatory authority of the FPC did not empower the Commission to immunize the transaction against antitrust attack under § 7 of the Clayton Act.[1] Subsequently, in 1964, a unanimous Supreme Court found that the acquisition violated § 7 of the Clayton Act and with but one dissent ordered "divestiture without delay" remanding the case back to the District Court for compliance with the mandate.[2]

In 1965, the District Court endorsed a plan of divestiture negotiated by El Paso and the Justice Department. However, this decision was appealed to the Supreme Court by three appellants, who had unsuccessfully attempted to intervene in the case and to be heard on the conditions of the divestiture plan. The Supreme Court reversed determining that intervention should have been afforded to all persons who might be adversely affected by the disposition of the acquired property, overturned the divestiture decree, and laid down criteria for an effective divestiture.[3]

Divestiture hearings began in 1967, with intervention granted at the outset to 29 new parties which included most of the western states and all of the customers of El Paso. There were ten applicants to acquire the new company who were required to present their respective qualifications, divestiture plan and how they would operate the new company and particularly how they intended to reinstitute competition in the relevant markets. This trial, known as Divestiture II, was lengthy extending intermittently from mid-1967 to mid-1968 and generating some 11,000 pages of transcript. In an effort to insure the ability of the new company to acquire the needed new reserves and to otherwise vigorously compete, the District Court finally chose the financially strong and experienced Colorado Interstate Gas Company (CIG), the only gas pipeline operator among the applicants, to acquire the new company rather than selecting a sale to interests outside the gas pipeline industry. This choice raised antitrust problems on its own for the anti-competitive restraints found objectionable in the original acquisition were likewise raised by the new company being divested to another potential competitor in the California or northwestern markets and an actual competitor for gas supplies for such markets.

This decision was appealed to the Supreme Court and despite subsequent attempts by the parties to dispose of the appeal, the Supreme Court in an extraordinary, unprecedented action, again overturned the divestiture plan.[4]

Petitions for rehearing delayed remand of the case to the District Court for a year, but finally, in 1970, new divestiture hearings were commenced with the same parties, but this time with only seven applicants for acquisition. The difficulties of establishing a New Company that could compete as effective as PNW had been able to do, some 15 years earlier, despite changed economic circumstances in the natural gas industry where competition had shifted from markets to obtaining natural gas supplies, was manifest to all. Lengthy hearings were again required to solve these issues, extending into 1972 and generating 9,000 pages of transcript. The District Court's decision was appealed to the Supreme Court again, but this time the Supreme Court refused review and the lower court's decision became final in March of 1973.

The court proceedings were thus finally concluded some 16 years after the suit was filed and 9 years after the acquisition was held illegal and "divestiture

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[1] *California v. F.P.C.*, 369 U.S. 482 (1962).

[2] *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964).

[3] *Cascade Natural Gas Co. v. El Paso Nat. Gas Co.*, 386 U.S. 129 (1967).

[4] *Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co.*, 395 U.S. 464 (1969) reh. denied, 399 U.S. 937 (1970).

without delay" ordered. However, there was still a number of difficult tasks to be performed before divestiture could actually be effected. Negotiations were required to resolve issues which the court had left open such as the purchase price to be paid and the disposition of nonutility assets. Thereafter, months were spent restructuring the long term debt to be assumed by the new company. Terms and conditions of new bonds and debentures had to be agreed upon and the complex documents then printed and signed by over ninety institutions. The printing bill alone for these debt instruments exceeded ½ million dollars and El Paso had an even larger bill for printing new instruments that it required. Also, during this final period, the staffing of key positions, structuring of organizational charts and final development of operational plans had to be completed, together with the creation of detailed accounting procedures and computer programs.

The substantial expense involved in the prosecution of the El Paso case from its initiation in July of 1957, until divestiture was finally achieved in February of 1974, has never been publicly documented. Colorado Interstate expended a total of $2½ million as an applicant in both of these divestiture proceedings. The Apco Group, the ultimately successful applicant, expended over $1 million in only the final hearings in Divestiture III. The cost of organizing Northwest Pipeline and structuring it for divestiture exceeded $2 million with additional long term debt roll-over costs of approximately $850,000 and an FPC filing fee of approximately $200,000 for the required certificate.

In addition to the lengthy and expensive court hearings and the extended period thereafter before divestiture could be effected, there were also activities concerning this case in both the Senate and House of Representatives of the United States Congress with attendant expenditure of substantial sums. On several occasions El Paso attempted to preserve the illegal merger by promoting special interest legislation in the form of a "Forgiveness Bill". Prolonged uncertainty as to when divestiture would take place, who would acquire the divested properties, and what gas supply the acquiring firm would have caused great anxiety in the western gas markets. Because of this understandable concern and the mounting skepticism that a satisfactory divestiture would ever be accomplished considerable support developed for this special legislation.

This support was, of course, organized and orchestrated by El Paso which, with its great resources, was able to muster an impressive political effort that almost succeeded in obtaining the special bill. The bill's supporters argued that competition could not be re-created after years had passed and market conditions had changed and that the divestiture would create two weak utilities while destroying a strong one to the prejudice of the public interest. These contentions, although contrary to the evidence presented in the divestiture proceedings, were widely accepted. One discerning voice likened the pleas for special legislation to the situation where a burglar pleads to keep stolen goods because he can put them to greater advantage than the true owner.

I am happy to report that the new company created by the long-delayed divestiture is alive and well and that none of the ominous predictions materialized. While "divestiture without delay" was not achieved, I believe the fundamental goal of antitrust policy was finally fulfilled by re-establishment of the status quo anti acquisition. However, the extraordinary expenditure of time and resources devoted to this effort makes one wonder if there isn't a better way to effectuate the important public policy of § 7 of the Clayton Act. While there is no tally of the total cost in obtaining divestiture, it ran into many millions, employed for years dozens of lawyers, accountants and others, consumed great quantities of the scarce judicial and law enforcement resources and permitted a noncompetitive market structure to exist for a decade after that market structure had been declared unlawful by the high Court. Another uncalculable cost was incurred by the diversion of substantial time and energy of key El Paso executives from their important duties of running a major utility and developing new sources of energy supplies because of the inordinate demands made upon them in the defense of this antitrust proceeding.

There are a number of reasons supporting this proposed legislation, but the avoidance of the necessity of an extended, costly divestiture proceeding is certainly one of the most important. Divestiture is, at best, a difficult remedy, with an inherent risk that it will not succeed. Nevertheless, divestiture where feasible, is in most instances, the only truly effective remedy for consummated violations of § 7 of the Clayton Act because it is the only possible way to restore something close to the premerger competitive situation.

In *International Salt Company v. United States*, Justice Jackson pointed out the importance of securing such effective relief from trade restraints in antitrust cases:

"A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendant's illegal restraints. If this decree accomplishes less than that, the government has won a lawsuit and lost a cause."[5]

Unfortunately, a number of cases reveal a clear victory in the battle of proving a violation, but something far less than victory in the vital remedial phase, the goal of antitrust enforcement.

While new legislation to improve antitrust enforcement is necessary, it must be carefully considered and constructed because all mergers and acquisitions are not anti-competitive and, in fact, some are pro-competitive and economically desirable. Therefore, such activity should not be unduly inhibited. It is necessary that the government's challenge of acquisitions and mergers which appear to threaten competition should be based upon an informed understanding of the facts to the fullest extent possible. This requires the divulging of information by the parties and a reasonable opportunity for government review. Furthermore, a court should have an adequate record on which to exercise its discretion to prohibit or allow the consummation of acquisition or merger pending final judgment. Finally, it is necessary for effective antitrust enforcement that the profits and advantages of an unlawful acquisition should, to the fullest extent possible, be removed. I believe that your bill as drafted, adequately fulfills these needs.

If the eggs of a potentially unlawful acquisition or merger can be kept unscrambled and the economic incentives of pursuing such acquisitions and mergers or of delaying any subsequently ordered divestiture can be minimized or removed, the El Paso experience may become an object of historical curiosity rather than an unfortunate and exaggerated example of the necessary course of a divestiture proceeding.

TESTIMONY OF DAVID K. WATKISS, ESQ., WATKISS & CAMPBELL, SALT LAKE CITY, UTAH

Mr. WATKISS. Thank you, Mr. Chairman.

Mr. FLOWERS. I think we will probably have some questions for you afterwards. Had we had this legislation over these last 20 years, you might not be with us here today. But we certainly want to welcome you in the obvious event that we have not had this legislation for 20 years.

You may proceed as you see fit.

Mr. WATKISS. Thank you, Mr. Chairman. I am a lawyer from Salt Lake City, Utah, who tries a variety of lawsuits and I do not hold myself out as a particular expert in antitrust.

I happened to be retained as chief trial counsel by the ultimately successful applicant in the *El Paso* case and spent 7 interesting years learning all about divestiture. The case, with which I am sure you are all familiar, was a very important enforcement action. It has been discussed and reviewed in many articles and featured in many seminars and speeches.

The Wall Street Journal had an interesting characterization of it called "Antitrust Gone Mad." This case, however, involved most of the classic issues you find in divestiture cases and provided me and many other people with a concentrated, practical course in the problems of divestiture.

If the Eisenhower effort had succeeded some years ago and we had put on the books at that time legislation of the type you are considering, the 17-year saga of the *El Paso* case would not have come about, and the public would have been spared that long ordeal.

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[5] 332 U.S. 392, 401 (1947).

Prior notification that the El Paso, the major western interstate pipeline, was about to acquire Pacific Northwest, the only other interstate pipeline in the West, would in my opinion have produced an injunction staying the merger and thus the prevention of the ensuing 17-year restraint of competition in the western natural gas markets.

An effort by the Department of Justice to obtain a restraining order when El Paso's stock acquisition of Pacific Northwest was announced was denied by the trial court even though the Supreme Court, when it reached the merits of the merger in 1964, unanimously found in so many words that "if El Paso can absorb Pacific Northwest without violating section 7 of the Clayton Act that section has no meaning in the natural gas field."

If there had then been no merger, the case would have ended there, but another 10 years were required to accomplish the Supreme Court order requiring "divestiture without delay." Despite this prolonged and unsupportable delay, the *El Paso* case, I believe, had a salutory effect because the business community observed the Justice Department and the courts persevere until a satisfactory remedy was finally achieved.

A brief description of the history of this divestiture case illustrates why legislation such as you are considering is needed to avoid the damage to the public interest that results from years of protracted litigation, during the course of which a monopolistic or anticompetitive condition was allowed to continue, because there were no effective means at the outset to stop the unlawful acquisition, and no efficient means to unravel it expeditiously.

The *El Paso* litigation and the difficulties encountered in structuring a divestiture decree to meet the criteria required by the Supreme Court emphasize the need to avoid divestiture by maintaining the separate identities of the parties to the proposed merger while the violation is litigated, if this can be reasonably and responsibly accomplished.

While a successful divestiture was finally obtained, the period of time required, with its attendant economic uncertainties and changing market conditions, together with the considerable expense and effort needed to achieve a satisfactory result, graphically illustrates the desirability of the legislation that you are presently considering.

Prior to World War II, the California natural gas market was supplied from in-state sources. Immediately after the war, El Paso Natural Gas Co. began to supply California with gas from outside the State. California was a burgeoning market which provided a great opportunity for a small, growing company. Pacific Northwest Pipeline Corp. (PNW) was certified by the Federal Power Commission in 1955 to supply natural gas to the Pacific Northwest, particularly the States of Oregon, Washington, and Idaho.

The PNW pipeline was constructed to deliver gas supplies from the San Juan Basin in northwestern New Mexico. Supplemental sources of gas were obtained by PNW from Canada.

PNW, with an excess supply of natural gas for its new and developing market, began discussions with certain California consumers to determine if it could supply California. As soon as PNW began these discussions in the California market, El Paso, the sole supplier of gas from outside California, began looking on this new entity west of the Rockies as a possible acquiree—something that should be obtained if at all possible in order to maintain the California market for itself. El Paso and PNW commenced negotiations. In 1957, about a year after Pacific Northwest actually began doing business, El Paso finally acquired the PNW stock. Almost immediately the Justice Department filed a section 7 Clayton Act case contending that the acquisition substantially lessened competition in the California market.

A month after the filing by the Justice Department, El Paso applied to the Federal Power Commission for approval of an asset merger of the two companies under section 7 of the Natural Gas Act. Confusion and controversy followed over which forum should proceed first, with the district court finally deciding to wait for the Commission to proceed.

In December of 1959, the FPC approved the merger which was thereafter immediately consummated.

The State of California appealed the FPC order. In 1962 the U.S. Supreme Court vacated and remanded the case to the U.S. district court for the trial of the Clayton Act violation, holding that the Clayton Act suit against El Paso's acquisition of control should have been tried in the Federal District Court before the FPC permitted the consummation of the merger and that the regulatory authority of the FPC did not empower the Commission to immunize the transaction against antitrust attack under section 7 of the Clayton Act.

Subsequently in 1964, a unanimous Supreme Court found that the acquisition violated section 7 of the Clayton Act and, with but one dissent, ordered "divestiture without delay," and remanded the case to the district court for compliance with that mandate.

A year later, in 1965, the district court endorsed a plan of divestiture negotiated by El Paso and the Justice Department. However, this decision was appealed to the Supreme Court by three appellants, who had unsuccessfully attempted to intervene in the case to be heard on the conditions of the divestiture plan.

The Supreme Court reversed, determining that intervention should have been afforded to all persons who might be adversely affected by the disposition of the acquired property; overturned the divestiture decree; and laid down strict criteria for an effective divestiture.

Divestiture hearings began in 1967, with intervention granted at the outset to 29 new parties, including most of the Western States and all of the customers of El Paso. There were 10 applicants to acquire the new company who were required to present their respective qualifications, divestiture plan, and details on how they would operate the new company and particularly how they intended to reinstitute competition in the relevant markets.

This trial, known as Divestiture II, was lengthy, extending intermittently from mid-1967 to mid-1968 and generating some 11,000 pages of testimony. In an effort to insure the ability of the new company to acquire needed new reserves and to otherwise vigorously compete, the district court finally chose the financially strong and experienced Colorado Interstate Gas Company (CIG), the only gas pipeline operator among the applicants, to acquire the new company rather than selecting a sale to interests outside the gas pipeline industry.

This choice raised antitrust problems on its own, for the anti-competitive restraints found objectionable in the original acquisition were likewise raised by the new company being divested to another potential competitor in the California or northwestern markets, and an actual competitor for gas supplies for such markets.

This decision was appealed to the Supreme Court and despite subsequent attempts by the parties to dispose of the appeal, the Supreme Court in an unprecedented action, again overturned the divestiture plan.

Petitions for rehearing delayed remand of the case to the district court for a year, but finally in 1970 new divestiture hearings were commenced with the same parties, but this time with only seven applicants for acquisition.

The difficulties of establishing a new company that could compete as effectively as PNW had been able to do, some 15 years earlier, despite changed economic circumstances in the natural gas industry where competition had shifted from markets, to obtaining natural gas supplies, was manifest to all.

Lengthy hearings were again required to solve these issues, extending into 1972 and generating 9,000 pages of transcript. The district court's decision was appealed to the Supreme Court again, but this time the Supreme Court refused review and the lower court's decision became final in March of 1973.

The court proceedings were thus finally concluded some 16 years after the suit was filed and 9 years after the acquisition was held illegal and "divestiture without delay" was ordered. However, there were still a number of difficult tasks to be performed before divestiture could actually be effected.

Negotiations were required to resolve issues which the court had left open, such as the purchase price to be paid and the disposition of non-utility assets. Thereafter, months were spent restructuring the long-term debt to be assumed by the new company.

Terms and conditions of new bonds and debentures had to be agreed upon and the complex documents then printed and signed by over 90 institutions. The printing bill alone for these debt instruments exceeded one-half million dollars, and El Paso had an even larger bill for printing new instruments that it required.

Also, during this final period, the staffing of key positions, structuring of organizational charts and final development of operational plans had to be completed, together with the creation of detailed accounting procedures and computer programs.

The substantial expense involved in the prosecution of the *El Paso* case from its initiation in July of 1957, until divestiture was finally achieved in February of 1974, has never been publicly documented.

Colorado Interstate expended a total of $2½ million as an applicant in both of these divestiture proceedings. The APCO group, the ultimately successful applicant, expended over $1 million in only the final hearings in divestiture III.

The cost of organizing Northwest Pipeline and structuring it for divestiture exceeded $2 million, with additional long-term debt, roll-over costs of aproximately $850,000, and an FPC filing fee of approximately $200,000 for the required certificates.

In addition to the lengthy and expensive court hearings and the extended period thereafter before divestiture could be effected, there were also activities concerning this case in both the Senate and House of Representatives of the U.S. Congress, with attendant expenditures of substantial sums.

On several occasions El Paso attempted to preserve the illegal merger by promoting special-interest legislation in the form of a "forgiveness bill." Prolonged uncertainty as to when divestiture would take place, who would acquire the divested properties, and what gas supply the acquiring firm would have caused great anxiety in the western gas markets.

Because of this understandable concern and the mounting skepticism that a satisfactory divestiture would ever be accomplished, considerable support developed for this special legislation.

This support was, of course, organized and orchestrated by El Paso which, with its great resources, was able to muster an impressive political effort that almost succeeded in obtaining the special bill. The bill's supporters argued that competition could not be recreated after years had passed and market conditions had changed and that the divestiture would create two weak utilities while destroying a strong one, to the prejudice of the public interest.

These contentions, although contrary to the evidence presented in the divestiture proceedings, were widely accepted. One discerning voice likened the pleas for special legislation to the situation where a burglar pleads to keep stolen goods because he can put them to greater advantage than the true owner.

I am happy to report that the new company created by the long-delayed divestiture is alive and well, and that none of the ominous predictions materialized. While "divestiture without delay" was not achieved, I believe the fundamental goal of antitrust policy was finally fulfilled by restablishment of the status quo ante acquisition.

However, the extraordinary expenditure of time and resources devoted to this effort makes one wonder if there is not a better way to effectuate the important policy of section 7 of the Clayton Act.

While there is no tally of the total cost in obtaining divestiture, it ran into many millions, employed for years dozens of lawyers, accountants, and others, consumed great quantities of scarce judicial and law enforcement resources, and permitted a noncompetitive market structure to exist for a decade after that market structure had been declared unlawful by the Supreme Court.

Another uncalculable cost was incurred by the diversion of substantial time and energy of key El Paso executives from their important duties of running a major utility and developing new sources of energy supplies, because of the inordinate demands made upon them in the defense of this antitrust proceeding.

There are a number of reasons supporting this proposed legislation, but the avoidance of an extended, costly divestiture proceeding is certainly one of the most important. Divestiture is, at best, a difficult remedy, with an inherent risk that it will not succeed.

The history and the statistics that your staff has developed will show this. Nevertheless, divestiture where feasible, is in most instances, the only truly effective remedy for consummated violations of section 7 of the Clayton Act because it is the only possible way to restore something close to the premerger competitive situation.

In *International Salt Company* v. *United States*, Justice Jackson pointed out the importance of securing such effective relief from trade restraints in antitrust cases:

A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendant's illegal restraints. If this decree accomplishes less than that, the government has won a lawsuit and lost a cause.

Unfortunately, a number of cases reveal a clear victory in the battle of proving a violation, but something far less than victory in the vital remedial phrase, the real goal of antitrust enforcement.

While new legislation to improve antitrust enforcement is necessary, it must be carefully considered and constructed because all mergers and acquisitions are not anticompetitive, and in fact some are procompetitive and economically desirable.

Therefore, such activity should not be unduly inhibited. It is necessary that the Government's challenge of acquisitions and mergers which appear to threaten competition should be based upon an informed understanding of the facts, to the fullest extent possible.

This requires the divulging of information by the parties and a reasonable opportunity for Government review. Furthermore, a court should have an adequate record on which to exercise its discretion to prohibit or allow the consummation of an acquisition or merger pending final judgment.

Finally, it is necessary for effective antitrust enforcement that the profits and advantages of an unlawful acquisition should, to the fullest extent possible, be removed. I believe that your bill, as drafted, adequately fulfills these needs.

If the eggs of a potentially unlawful acquisition or merger can be kept unscrambled, and the economic incentives of pursuing such acquisitions and mergers or of delaying any subsequently ordered divestiture can be minimized or removed, the El Paso experience may become an object of historical curiosity rather than an unfortunate and exaggerated example of the necessary course of a divestiture proceeding.

Thank you for the opportunity of making this statement. If you have any questions, I will gladly try and answer them.

Mr. FLOWERS. Thank you very much, Mr. Watkiss. Do you have any figures that would indicate the profits, on a daily basis, that El Paso earned because of the acquisition of Pacific Northwest?

Mr. WATKISS. I believe at the time we were in our hearings it was determined by the economic information provided by El Paso that they realized some $10 million a year in net profits. Some of the people sitting there with little else to do figured out that this totaled about $28,000 a day. So they could afford to pay for the big battery of lawyers, accountants and others working on the case.

Mr. FLOWERS. That sounds like a profitable violation of the antimerger laws there. I hope this bill won't be accused of being an antijobs bill. Employment incentives and job bills are what the Congress is concerned with now.

The current status in this field creates a lot of jobs for lawyers.

Mr. WATKISS. It was said that the case would not end until all the lawyers got their children through college.

Mr. FLOWERS. I am honored to meet a man who has had a career case. We don't see many of those down in Tuscaloosa, Ala.

Did the Government try to get a temporary restraining order in the *El Paso* case?

Mr. WATKISS. I was not involved at that time and I speak from hearsay, but it was my understanding that they tried to block the merger after it had been approved by the Federal Power Commission but that was unsuccessful.

Mr. FLOWERS. Do you have any knowledge of how many Government attorneys were involved in the El Paso matter?

Mr. WATKISS. I think this is one of the great problems I saw in this case and that is the imbalance in resources that were brought to bear. El Paso is one of the major utility companies in this country with tremendous resources.

They hired the very best in lawyers and public relations firms, experts of all kinds. When they came into a courtroom, they were well prepared and presented a great position. The Government on the other hand—and I think it is notorious in the history of antitrust enforcement—they really make the big effort in proving the violation.

Once they prove the violation, then they can come up on the Hill and say, "We won another one," when appropriations time comes around, so that is the big issue: Winning the case. But, when you get down to the vital goal of antitrust, namely the remedial phases, for some reason or another, the resources just are not there.

When you get in a courtroom with a judge in complicated, technically complex, industrial litigation, here is the Justice Department, in our case represented by one man with no backup, no accountants and really no help contesting against this very, very large, well-financed, experienced utility.

It really wasn't a fair contest. That is why I think it took so long because the Supreme Court could see that and they kept referring it and sending it back for an appropriate remedy.

Mr. FLOWERS. One of the basic issues is who should have the burden of proof in the hearing on a preliminary injunction. Is it fair for it to be on the Government, or should it be on the merging party?

Mr. WATKISS. Well, I know this is a matter of some controversy and I will give you a personal opinion. It seems to me that it would be better for industry to take the burden on themselves. The reason I say that is this: You can't have it both ways.

You want to have a short period to determine whether or not there is a probable violation, so that the merger should be stayed—and it should be a short period. You don't want to discourage appropriate acquisitions and mergers. Therefore you can't string it out for a long period of investigation and development of facts.

From what I have seen of the Government, it does not have the resources and the manpower to really develop the facts quickly so it can go to a court and put on an informed, appropriate presentation. So if industry wants to have the short period, and I think they should have it, then I think the burden should be on them, because before they move they have made a very careful investigation.

They know the industry. They know the economics of the industry. They know how the company to be acquired fits into the overall picture and how their company fits into the picture. They are in a position to come forward quickly and make a presentation to the court as to why the acquisition is in the public interest, why it does not violate the law or why it should not be stayed.

So in this balance, that is where I think the burden ought to be.

Mr. FLOWERS. Is there any incentive now on the parties to litigate speedily the possible merger divestiture trials?

Mr. WATKISS. Not at all. That is a problem, a big problem. The *El Paso* case pointed that up. I don't accuse El Paso of doing anything wrong. But why should they amputate a vital organ quickly? There is no incentive at all. Just the opposite: They enjoyed $10 million a year plus the control of the western gas markets which they had monopolized.

Mr. FLOWERS. There is always a chance somebody is going to come along and say you don't have to divest.

Mr. WATKISS. There was a chance they might get special relief and get to keep it.

Mr. FLOWERS. What about a premerger court battle? Do the parties have any incentive to speedily litigate there?

Mr. WATKISS. I would defer to people more expert than I. I feel when I speak to a group like this on the *El Paso* case, I am more of an exhibit than a witness. The experience I have had in this case and what I do know——

Mr. FLOWERS. Around here, we call you a gentleman with a lot of seniority.

Mr. WATKISS. Bank mergers as I understand it are automatically stayed. This has proved to be very effective and I believe that they have found out that they oftentimes get those problems solved in a matter of days or a few months, as distinguished from the problems in the other areas where you don't get that cooperation.

I don't think with the right information the Justice Department would be moving in many of these cases to obtain stays. I don't think it will become a big problem in the courts and I know it is going to save tremendous amounts of time and resources in the event you can avoid divestiture.

Mr. FLOWERS. I yield to the gentleman from Illinois at this time.

Mr. MCCLORY. Thank you. Thank you for very interesting statement and your very helpful advice to this subcommittee, Mr. Watkiss.

I wanted to pursue the questioning along the lines started by my colleague, Mr. Flowers. Under this bill, the respondents would be required to furnish such information and such material as required initially during the 30-day period and then during the extended period.

Of course the Federal Trade Commission and the Attorney General have other resources for getting information with respect to corporations and corporate activities. Then I wonder why, after furnishing that information you still feel that a preliminary injunction should become final unless the respondent establishes or the corporation establishes its innocence? The burden is placed on the respondent to vindicate itself.

Mr. WATKISS. The way you phrase the question points up my concern. I think what happens in these matters is it is not a matter of establishing guilt or innocence. I think rather than merely dealing in probability courts in the past have indicated a great reluctance to move into a stay of a big business transaction.

There has been very few effective restraints that have been obtained by the Department of Justice, I think. Again I have not made a careful statistical review of this but this is my understanding.

I think if you leave it in the discretion of the court and the court is looking at the probabilities and the defendant in effect comes in with all of the information that it has obtained before it decided to move, and certainly if it knows it has got to make a showing in the court if the Justice Department initiates any type of action, it will be more careful in preparing the facts before it moves.

I think it would be much more effective. You have got to remember, sir, that judges by nature are conservative people and there has been a great deal of judicial reticence and judicial caution that has been exhibited in the past, particularly in this area.

I think judges are responsible people and I think when the facts are put before them, I think they will make the proper determination. It is my opinion that the defendant is in a much better position to make the case.

It is not the proving of innocence or the proving of guilt. It is merely the probabilities, the probability that the Government does not have a case, the probability that the public interest will not be damaged.

Mr. McCLORY. Isn't this a new development in the law, though, for the defendant? You are right, the word "probability" is used. But for the defendant to establish that the plaintiff, the United States, does not have a reasonable probability of ultimately prevailing is a new standard.

Mr. WATKISS. I think it is a change but it is not unique. I think the bank law requires an automatic stay; but this one is not automatic. You will have an automatic stay for a short period but then a court will make a determination. It will be at the discretion of the court as to whether or not that preliminary injunction will be granted.

Mr. McCLORY. It seems to me that we are providing some new initiatives, new weapons, new tools for the Attorney General for the Federal Trade Commission by requiring notice, and requiring the production of information.

We are about to act on legislation to provide for civil investigative authority. With these other tools we are putting into the hands of the Government, would you be unhappy if we say the injunction ought to be based on the case made out by the Government?

Mr. WATKISS. I would not be unhappy and I think all of these things are steps in the right direction. I am only expressing a personal opinion. I can't say to you that I am sure I am right.

Mr. McCLORY. There are some questions raised as to this part of the bill, in addition to furnishing the information, the defendant is required to disprove the Government's case before the Government makes its case.

Mr. WATKISS. My views, I think, were developed, certainly, from the experience that I have had. I also participated in some hearings on the Senate side and as I recall at that time Mr. Kauper who heads up the Antitrust Division expressed similar views.

That comes about from practical experience and knowing judges and how they operate. It is based on that 25 years in the courtroom.

Mr. McCLORY. The defendant does have information available after furnishing——

Mr. WATKISS. But you see, oftentime we talk about 20 days and 30 days as if that is a long period. You are dealing with some very complex problems, and whether or not you have the adequate staff and the resources down the street in the Department of Justice to really get into it and be able to properly analyze it and present it in a satisfactory manner, as to that, I have some doubt.

It gives them enough information to decide whether or not they should move. But whether or not they can go before a court and make an informed showing of the type the court is entitled to, I have some doubt.

Mr. McClory. That might support further modification of the length of time.

Mr. Watkiss. If you are going to put the burden on the Government, you have got to give them adequate time. If you want a shortened period, you are going to have to put the burden on the acquiring party.

Mr. Flowers. The gentleman from Ohio, Mr. Seiberling.

Mr. Seiberling. Thank you.

Since the final disposition of the *El Paso* case, has anyone brought any damage actions against El Paso or the other merging parties under the Clayton Act?

Mr. Watkiss. No; not as far as I know. It was strictly an action by the Government to effect a divestiture, to end a violation that affected the competitive market area in the west.

Mr. Seiberling. Do you feel that the threat of damage actions for violations of section 7 is a threat that has much deterrent value?

Mr. Watkiss. I am not sure I can adequately respond to that. I personally don't have any such feeling. But it may be only because I have not had enough exposure.

Mr. Seiberling. I don't either because no one has ever successfully brought a damage action for a violation of section 7. So while it is theoretically possible, I imagine that the problems of proof would be extremely difficult. The reason I am asking this is because there is no real deterrent against going ahead with a merger even if you think it might violate section 7.

Is that correct?

Mr. Watkiss. I think that is absolutely right. There is no deterrent. The acquiring company has everything to gain and nothing to lose right now.

Mr. Seiberling. Well now, let me say that I have spent a great deal of time in this field. In fact, I would say of all my antitrust work, that was my major responsibility in 21 years of practice.

The largest portion of the time was spent on mergers, only I was on the side of the companies wanting to merge.

I might say that having had to approve legal fees for some of the firms including some involved in this *El Paso* case, I can appreciate how expensive it was. Of course, there are times when the mere requirement of premerger notification, let alone a stay, would prevent a merger from ever going ahead because the parties sometimes feel unless they consummate the merger before their competitors or someone else finds out about it, that is the end of it.

While that may be awkward from the standpoint of the parties concerned, I wondered, do you feel that has in itself any anticompetitive effect? In other words, could not the requirement of prenotification plus the requirement of a delay in the merger until the procedures contemplated by this act are completed kill some mergers or prevent them from getting very far?

Mr. WATKISS. I am not sure it will kill them but it will have the effect of making the business community a little more responsible and in and of itself it is a positive element here.

Mr. SEIBERLING. Well, I would not say that the companies that are trying to merge a business are necessarily irresponsible. They are only looking at it from their own point of view. Of course, keeping open our competitive system also means allowing businesses freedom to act in connection with acquisitions or sales, as well as requiring them to compete.

My question is whether you think that the prevention of mergers which do not have any serious anticompetitive effects but which are prevented because the parties feel they can't go through this procedure would itself have serious anticompetitive implications?

In other words, would this bill have an anticompetitive result in that sense?

Mr. WATKISS. I don't think so. I think again it has to be properly enforced. With proper enforcement which I feel confident will be the case, I think it is a bill that will be beneficial.

I don't think you will have any serious detriment on the economy or the business community and I think it is clearly in the public interest.

Mr. SEIBERLING. I am inclined to agree with you, but I might say some of our colleagues on the corporate side of the legal profession disagree quite violently with that point of view.

Now I would like to ask you about paragraph 7(g) of the bill, on page 11, which would require the court to enter a hold separate order in merger cases. Do you think that that is essential?

Mr. WATKISS. If it requires the court to do so, I am not sure I am in favor of that. I thought it gave the court discretion to do so.

I know the word "shall" is used there.

Mr. SEIBERLING. "The court shall as soon as practicable enter an order." It only does it upon pleas by the Attorney General or the FTC. But if they apply, then—as I read it—it is mandatory.

Mr. WATKISS. On line 14, it provides, "unless the interests of justice require otherwise."

Mr. SEIBERLING. You are right.

Mr. WATKISS. This is what I think should be in the bill. I think the court should look at each case and make a determination based upon informed judgment.

Mr. SEIBERLING. I am not quite sure now that I read it again that it is totally discretionary. It says

> Upon application of such, the Court shall enter an order establishing the purchase price of the acquired stock and assets, requiring the person or persons to maintain the personnel, assets stock, or firm as a separate entity unless the interests of justice require otherwise, and may enter an order requiring the profits to be placed in escrow.

I guess it does give the court discretion though it is a rather peculiarly worded section.

Mr. WATKISS. It is. I read it with some concern because I don't think it should be mandatory. I would suggest to whoever is marking the bill up that they might add the word "and" at the end of line 11. It might be a little easier to read and a little clearer.

Mr. SEIBERLING. In other words, you do not feel this should be mandatory in every case?

Mr. WATKISS. I do not.

Mr. SEIBERLING. Do you feel that this bill will increase the burden on the courts by making premerger actions more feasible and more commonplace, or will it more than be offset by the fact that the courts will not be burdened with unscrambling the eggs after a merger?

Mr. WATKISS. I am satisfied that is the case. I do not think it will add burdens to the court. I think it will relieve burdens on the court.

Mr. SEIBERLING. Would you support a provision barring the disclosure of all required premerger information? The Senate bill I understand had such a provision barring public disclosure otherwise than at a trial, of course.

Mr. WATKISS. You are talking about confidentiality?

Mr. SEIBERLING. Yes.

Mr. WATKISS. I think there should be a confidentiality requirement.

Mr. SEIBERLING. What about the confidentiality of the merger itself?

Mr. WATKISS. To have effective cooperation, the business community must know that the information it is providing will be treated in a confidential manner until the public is otherwise informed through other sources.

Mr. SEIBERLING. Do you feel that the bill would adequately or does adequately address the issue of tender offers, particularly hostile tender offers?

Mr. WATKISS. I have a problem with that in one area and it may be because I have not studied it with enough care. I believe that tender offers should not be unduly inhibited and this requires the appropriate timing, so that the Williams Act's 60-day requirement on picking the stock up is protected.

I believe the way you have it, it still might work, but I should point out that a stock acquisition is not in my judgment as serious as an asset acquisition or a merger, because you can hold stock separately and you can require the stock to be liquidated much easier than you can pull apart a company once the two have been merged.

I don't look at that as quite as serious a problem. I hope it does not unduly inhibit a legitimate stock tender offer.

Mr. SEIBERLING. Suppose after control of a corporation is obtained through a tender offer, there is next a move to, in effect, merge the assets of the two corporations?

Mr. WATKISS. That is what happened in El Paso and that is when the trouble began, when they got a situation that required additional 10 years of court time. Even the stock acquisition has dangers if it is improper because you obtain control of the direction of the company. So you just can't move it aside and say we can exclude it from this bill. It ought to be a part of it.

Mr. SEIBERLING. Well, do you feel that the ability to move in at such time as they announce that they are going to scramble the corporations is sufficient protection from the standpoint of getting the premerger notification and all that?

Mr. WATKISS. No. I think the bill should apply to stock acquisitions as well because there may be circumstances in the particular acquisition which force the Government to move at the outset, to keep the acquiring company or the one that intends to acquire the other company from even obtaining stock.

I think this should apply where appropriate.

Mr. SEIBERLING. I agree because once you get stock control, then the court is going to be more reluctant to try to force divestiture, because obviously this could be difficult from a financial standpoint and financially destructive to the interests of the other stockholders.

But the bill, as I recall, exempts tender offers where the total amount of stock involved or the voting stock would be 10 percent or less. Of course, in some cases 10 percent might result in de facto control, though it isn't likely in most cases.

Do you have any thoughts on that?

Mr. WATKISS. I don't. I think that requires study to determine what a proper time is or a proper amount is.

Mr. SEIBERLING. Thank you, Mr. Chairman.

Mr. FLOWERS. The gentleman from Kentucky, Mr. Mazzoli.

Mr. MAZZOLI. Thank you, Mr. Chairman.

I was wondering if the gentleman—if he would tell me in what fashion the public was injured in the *El Paso* case?

Mr. WATKISS. That was the big argument engaged in around the corner in the House Commerce Committee room and also on the Senate side. There was the great contention that there are economies in size and the bigger the utility, the better it is for the public interest. Of course that is not what the law says.

What you had out there is the giant El Paso Natural Gas Co. becoming an actual monopoly west of the Rockies. Whether or not that had any serious impact upon the economy of California where the lessening of competition was alleged, market economists could only say after careful study. I personally feel the merger had a damaging effect on the development of needed gas supplies.

In the fifties, the battle was for markets. Today it is for gas supplies. I know that after El Paso acquired that pipeline, the competition to develop gas supplies in the basins of the Rockies, the sedimentary basins of the Rocky Mountains, stopped.

Once they acquired Pacific Northwest Pipeline Co., they disbanded the exploratory arm of the company because there was no one left to compete with. Earlier, of course, PNW had competed with El Paso. Well, once they had acquired the company, they controlled it. They could develop it if and when they needed it, but they were not forced to do so by the pressure of competition.

That is not in the public interest.

Mr. MAZZOLI. Is public damage any facet to be considered under the present law of mergers, and would it be anything to be considered under this bill that is now before the committee?

Mr. WATKISS. Well, I am not sure exactly what you are getting at.

Mr. MAZZOLI. I am not sure I know what I am getting at either, but I am trying to educate myself about these bills and also about the whole field you have been working in for most of your professional life.

Would this public damage which you feel occurred, at least indirectly, in the *El Paso* case, would that aspect have to be determined by the courts to be present or potentially to exist in the future, before a merger could be challenged under the present law, and before it could be prohibited in the law that is now before the committee?

Mr. WATKISS. Certainly the Justice Department won't move unless they believe there is a probable violation. We are here talking about section 7 in the Clayton Act which prohibits mergers that could substantially lessen competition or tend to create monopolies.

If the acquisition is not going to have that potential harmful effect, the Government is not going to move. This bill, of course, is designed to help them make their move, and help make their enforcement much more effective than it has been in the past. If we believe now in antitrust and free and open markets and economies, certainly this bill I think will aid in that effort.

Mr. MAZZOLI. You indicated that the Government tried to enjoin the El Paso merger by getting a temporary restraining order, but that it was refused by the court. As I understand here from counsel, it is because the Government had not proved that the merger was clearly illegal.

Could that same situation prevail if this proposal before the subcommittee were to become law? Would there be that problem of one court feeling one way and another court another?

Mr. WATKISS. There is always that problem. Anyone who walks into a courtroom knows that some judges are receptive to certain positions and others are not. That is why you want to try to make the intent of Congress as clear as possible. In your declaration of policy, or wherever you spell out the intention of Congress, you want that judge who will read what you have enacted to know the purposes and the goals that you are seeking.

More than that I can't say, because as I say every situation is far different.

Mr. MAZZOLI. I guess what I am driving at is do you think we are going to cause too much paperwork, and cause too many proper mergers to become caught up in this procedure, and therefore in effect inhibit the public interest or cause it harm by throwing roadblocks in the path of lawful mergers?

Mr. WATKISS. I don't believe so. I think legislation such as you are considering has been urged by knowledgeable people for some 20 years, as the chairman has indicated. I think it is late in coming.

Mr. MAZZOLI. I have been asked to bring up some points here about some time limits, though I am not sure I fully understand them. On page 2 of the bill, the notification and waiting period required by this section—beginning on line 20—shall expire 30 days after the person subject to subsection (a) files certain papers with the FTC, or until expiration of any extension which is referred to on page 7. I wondered if you have had a chance to study that to determine whether or not there can be several of these extensions of 20 days, or whether that means only one 20-day extension, or whether in your study of the bill you put any emphasis on that?

Mr. WATKISS. I really have not. As I read it, the Government has a right after they have received the initial set of information to request additional data if they feel it to be necessary.

Once they receive the requested information, they have 20 days thereafter to further consider it. I assume that that is all.

Mr. MAZZOLI. I was asked to try to make the record clear on that point.

Mr. WATKISS. I want to make it clear. I am not in favor of permitting the Government to drag this out unduly. I think decisions need to be made because certainly the companies that are involved just can't be involved in something protracted, a long, administrative type of hearing.

Mr. MAZZOLI. Let me ask you this one question, sir, to wrap up my time. If we could roll the clock back 7 or 8 or 10 years back to when this El Paso merger occurred, and had a bill like H.R. 13131 been law at that point, what would have been the difference given this new law?

Mr. WATKISS. I don't think we would have ever had the El Paso problem, if you had had this legislation on the books in the 1950's.

Mr. MAZZOLI. Why would we not have had the El Paso entanglement?

Mr. WATKISS. This bill would have precluded the merger that took place, so even if they had attempted the stock acquisition, there would have been an effective way to separate the two, by spinning off the stock, and we would have been saved about 10 years of divestiture effort.

I, at least, think that would have clearly happened. There is a likelihood in my view that you would have never had the initial stock acquisition had there been a premerger notification requirement and an opportunity for the Government to move in.

Mr. MAZZOLI. The Government would have been able to move in a different fashion had this matter been law at that point?

Mr. WATKISS. That is my opinion. There were some people of the view and some very responsible law firms that gave El Paso some opinions that the antitrust law did not apply to this merger, because El Paso was a regulated utility.

Mr. MAZZOLI. Since there was difference of opinion on the part of many skilled lawyers, I wondered if the *El Paso* case was not one of those monumental legal cases which occur every now and then, that becomes one of those landmark cases. I wondered if we will not be entangling smaller, less important companies.

Mr. WATKISS. I don't think you are passing this just because of *El Paso*.

Mr. SEIBERLING. There is another case involving Kennecott Copper and Peabody Coal in which the courts upheld the FTC determination that the acquisition was in violation of section 7, as I understand it. I frankly had very grave doubts as to the wisdom of that decision. It was a rather close situation because Kennecott was not really in the coal business in any significant way, even though Peabody was the biggest coal company.

I wondered if you might have a situation where in a premerger case the court might decide that the merger was OK and let it go ahead, where it was a close case as perhaps this was.

Wouldn't that permit some mergers that would, if litigated after the fact, be held to violate section 7?

Mr. WATKISS. You know, I have heard of Kennecott and Peabody and where you were referring to it earlier, that case crossed my mind. I always thought that was a stock acquisition and there was not a merger.

Mr. SEIBERLING. I am using merger in a generic sense. It was a stock acquisition.

Mr. WATKISS. I think they were having trouble selling the stock and that shows again the acquisition of stock itself is a problem very often.

Mr. SEIBERLING. That is correct. But assuming that was a borderline case, where you have a borderline case and the court rules in that premerger proceeding that it is OK for the merger to proceed, that may in some cases cause a merger to stand that would otherwise fall if it is attacked after the fact, as I see it. Is that a problem, a likely problem?

Mr. WATKISS. Well, certainly everything should be done to make responsible judgments early because the longer the delay, the greater the problem. That I think is the purpose of this bill, so that informed judgments can be made earlier and so the Government can move and the business community will know where they stand on these things and the Justice Department will and the public will, and you won't have these interminable delays and the stifling of competition and uncertainties in the marketplace existing for a number of years.

Mr. SEIBERLING. What you are saying is if there is a premerger proceeding and the court holds that the merger may proceed, then it is going to be much more difficult later for the Government to upset that merger, even though theoretically they still have the power to do so.

I know that when you get a ruling from the Justice Department or FTC on a merger, theoretically that helps you if later the Government decides to attack the merger—again using "merger" in a broad sense.

Most businessmen don't want to get a ruling because they say, "What is the use of applying for the ruling, because it does not bind the Government anyway." But I think from the standpoint of business, that a premerger ruling by the court that the merger was OK would have a far more binding effect as far as protecting those parties against a later effort to upset that merger, than if they had not had the premerger ruling.

From that standpoint it might be beneficial to the merging parties in terms of keeping the merger from becoming unglued by Government attack at a later time. Would you agree?

Mr. WATKISS. I think that is certainly probable, although the early determination by the court is based again on probability. The subsequent trial may develop facts that had not been developed at the outset that would justify a different conclusion.

Mr. SEIBERLING. That is always a possibility.

Mr. FLOWERS. The gentleman from New Jersey, Mr. Hughes.

Mr. HUGHES. Thank you, Mr. Chairman. I have no questions.

Mr. FLOWERS. Mr. Watkiss, we again want to thank you for after 17 years coming to this subcommittee and giving us briefly a good insight into your experience, and some guidance on this legislation.

Counsel?

Mr. POLK. I would like to draw your attention to subsection (d)(4) on page 9 of the bill which deals with the burden of proof in preliminary injunctions. Could you generally state what the law is today with regard to the Government's burden of proof?

Mr. WATKISS. Well, again, I did not make a careful study to come and dazzle you with my knowledge of all the rules. As I recall, you are dealing with Federal Rule of Civil Procedure 65, governing temporary restraining orders and preliminary injunctions, which I think is what your question is about.

That really spells out the very short period for which you can obtain a temporary restraining order, only 10 days, plus an extension, and the requirements for issuing a preliminary injunction.

I think what you basically have here is the Government showing its probable right to relief, and the probable danger or danger to the public interest if relief is not granted. So you have in effect a twofold burden or two layers that you are going to surmount to justify relief.

Mr. POLK. I take it from reading the language of (d) (3) that something is done other than merely shift the burden to the defendant, for the defendant has to show—at least on the first point—that the United States does not have a reasonable probabiliy of ultimately prevailing. But with regard to the second factor of irreparable injury, it is not irreparable injury to the market, but irreparable injury to itself which is the issue.

That is a different question, isn't it?

Mr. WATKISS. That is possible. I have not focused on that. Therefore I would be reluctant to take your time for my views. I am not sure exactly what they mean by that because the only thing I believe they could show is that there would be some financial detriment to them. I don't believe that is any valid basis.

Mr. POLK. If you read the proviso, that seems to be taken away. That was going to be my next question. Showing loss of anticipated financial benefits from the proposed acquisition or merger shall not be sufficient to warrant denial, modification, or conditioning of such injunction." If you take that right away, what can the defendants offer to prove irreparable injury to themselves?

Mr. WATKISS. Well, I think the pertinent inquiry is really the damage to the marketplace or the damage to the economy if the merger goes through—or the lack of it. It seems to me what the defendant would be interested in showing is, one, there is little probability that the Government will be able to show a violation, and two, even though they could show the violation under the circumstances of a particular acquisition, it will not have any permanent or seriously damaging effect that cannot be remedied by appropriate judgment of the court.

Mr. POLK. I take it that when you spoke awhile back in favor of shifting the burden of proof at this stage, you were speaking in favor of a shift in the burden of proof as you just explained it?

Mr. WATKISS. That was what I was contemplating, sir.

Mr. POLK. Thank you.

Mr. SEIBERLING. Will the gentleman yield?

Mr. POLK. Certainly.

Mr. SEIBERLING. As I understand this bill, it does not at all change the substantive law of section 7. So, if any of the legal justifications that are used under section 7 or are permitted under section 7 are there, then they could be advanced as a basis for showing that the Government did not have a reasonable probability of ultimately prevailing.

For example, if they could show that the company being acquired was a failing company, presumably that would meet that burden if the court found in fact that it was.

Would it be your interpretation that there was any greater burden placed on the defendant in terms of the quality or quantity of proof required to show these various justifications, or merely that they have to come up with the proof instead of waiting for the Government to advance its case?

Mr. WATKISS. It was certainly my understanding from the reading I had made of the bill and also the experience that I had reviewing the bill that was presented in the Senate that you were not changing the issues. In other words, the issues before the court remain the same and as you point out, there is no change in the substantive law.

You are merely shifting the burden from the plaintiff to the defendant.

Mr. SEIBERLING. We are shifting the factual burden rather than the legal burden.

Mr. WATKISS. Right, who goes forward. Who must make the presentation.

Mr. FLOWERS. Mr. Watkiss, thank you.

Our next witness is Eleanor M. Fox, Esq., of Simpson, Thacher and Bartlett of New York City, who is representing the American Bar Association. We want to welcome you. I understand you have a short statement. You are giving us views of the American Bar Association, a rather large and diverse body I might say, and perhaps there are diverse views within the association.

If you would wish to comment on the diversity as you proceed, that would be in order, too. You may proceed as you see fit.

TESTIMONY OF MS. ELEANOR M. FOX, ESQ., SIMPSON, THACHER & BARTLETT, NEW YORK CITY, ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Ms. FOX. Thank you. I am glad to be here today. I have a prepared statement on behalf of the American Bar Association. I would welcome the opportunity to say a few words about the diversity of the ABA and about how the ABA position came into being.

Before I do go to the prepared statement, in partial response to Mr. Watkiss, I would like to read a couple of lines from a recent opinion, *United States* v. *AMAX*. I want to read these lines not as a full answer to the *El Paso* problems, and not as an example of the way things usually are, but as an example of the way things sometimes are and I hope they can be.

This is an action brought by the Government, a merger case, against *AMAX* and *Copper Range*. The case was filed by the United States on August 25, 1975. The defendants voluntarily agreed to postpone the closing of the merger pending the result of an expedited trial.

There was a 4-day trial from September 16–19, 1975. The trial was concluded and the opinion was written and filed on October 24, 1975, within 2 months after the filing of the complaint. The *AMAX* precedent is exemplary, and shows how the *El Paso* problems can be avoided even under the present law.

Now I should like to turn to the genesis of the ABA position on the bill. The first step in formulating that position was a study by the section 7 (Clayton Act) Committee of the ABA, which I chair. The section 7 committee submitted a report after soliciting all the members of that committee for their views. There are more than 100 members of the section 7 committee alone. The persons who wrote the report initially were Phillip Proger, Tom Ford, William Pinzler, and myself. Lawrence Slade wrote a dissenting report, urging that the bill be fully supported on the grounds that mergers produce unhealthy concentrations of power and our laws should be strengthened against them. Another member urged flat opposition to the bill on the grounds that mergers are generally procompetitive and that there should not be obstacles in their way

The majority recommendation was approved and adopted by the Council of the Antitrust Section, after the section solicited views of all members, and by the Board of Governors of the ABA.

I turn now to my statement on behalf of the ABA.

H.R. 13131 is intended to aid antitrust enforcement against illegal mergers. It would not change rules of legality, but it would change procedures. The essential changes it would make fall into four categories:

1. Premerger notification.
2. A 30-day waiting and discovery period which could be extended by 20 days or more.
3. Automatic temporary restraining orders, with a shift of burdens from plaintiff to defendant on the ensuing motion for a preliminary injunction, and
4. Where a preliminary injunction is not entered, a nearly automatic hold separate order and a mandate to deprive the losing defendants of the benefits of the acquisition.

The first two categories are aimed at giving the Government sufficient knowledge and sufficient time to sue and to seek preliminary relief when appropriate. We believe these are proper objectives. We think a premerger notification program and a waiting or notification period for certain merging companies could be salutary and would be an aid to antitrust enforcement.

But the last two categories are, in our view, unnecessary and overly restrictive. Their predominant effect will be to deter or abort lawful business transactions. If a merger is probably unlawful, the courts will grant a preliminary injunction under principles prevailing today.

If it is probably lawful, it seems wrong that the courts should stand in its way at the outset of a litigation or impose penalties on the loser at the conclusion.

I should like to deal in greater detail with each of the four categories of the bill.

First, premerger notification:

We support in concept notification of mergers over a minimum value. Of course the Federal Trade Commission already has a similar program. The premerger notice provisions of the bill do not add a good deal to the existing FTC requirements, but they do include more mergers jurisdictionally, they do insure notice reasonably prior to consummation of the transaction, and they do make the filings directly available to the Assistant Attorney General in charge of the Antitrust Division.

We believe such additions are salutary.

However, we believe the notice provision suffers from overbreadth. It requires the reporting of $10 million acquisitions by $100 million companies. Such acquisitions are probably not likely to offend the antitrust laws.

Inclusion of all such transactions is likely to deluge the antitrust authorities with meaningless paper and immerse them in unnecessary administrative duties. The Federal Trade Commission has used the more realistic reporting minimum of $250 million in sales of assets, and apparently, according to the testimony of former FTC Chairman Engman, it has found this minimum satisfactory.

As Chairman Engman said:

If we have to conduct full investigation of all mergers exceeding the $100 million assets or sales test . . . the fruits of our efforts might not be worth the cost.

I go now to the waiting period.

A short waiting period sufficient to give the Government time to analyze transactions would be an aid to responsible antitrust enforcement. Thirty days would seem to be a reasonable time. The bill allows an additional extension of 20 days after receipt of information and documents requested by the Government. This add-on period may present problems that should be cured.

The most obvious problems inhere in the tender offer situation. The offering company must, under the Williams Act, accept tendered stock within 60 days of tender or risk its withdrawal.

To cure the time problems caused by the possibly extended waiting period, we propose the following: In order to take advantage of the discretionary time extension, the Government should be required to make its request for information and documents within 10 days after notification is filed.

Third, temporary restraining orders and preliminary injunctions.

Subparagraph (d) of the bill would grant the Government a temporary restraining order at its will, and on the ensuing motion for preliminary relief the usual burdens would be shifted.

The preliminary injunction would issue unless defendants show that the Government does not have a reasonable probability of success on the merits, or that defendants will be irreparably injured by loss other than loss of benefits of the transaction.

We oppose these provisions. We think that no automatic stay is necessary beyond the specified waiting period of at least 30 days.

We believe, further, that when the Government decides to challenge a merger as illegal, it should have the burden of proving its right to relief, just as every other plaintiff in virtually every other case must sustain a burden of proof.

Presumably within the notice period the Government will have assembled sufficient facts to prove that it is entitled to preliminary relief, if it is so entitled.

The burden that the bill would place on defendants—to prove that the Government has no reasonable chance of success—would be a hard one to carry, and one would expect preliminary relief to issue even where the Government's case is thin.

As experience teaches, the grant of preliminary relief often aborts the deal. Therefore, we can expect many lawful transactions, and even procompetitive ones, to be frustrated. The present law that the Government just show a reasonable likelihood of success seems a far fairer allocation of the burdens.

The problem of automatic and near automatic stays is magnified in tender offer cases where entry of the order will almost surely kill the tender offer. Therefore the case is particularly strong for eliminating tender offers under the Williams Act from subparagraph (d).

Indeed, we believe subparagraph (d) should be eliminated in its entirety, except for its very salutary expediting procedures, for the existing law governing temporary restraining orders and preliminary injunctions is fair and effective.

Finally I turn to hold separate orders, escrowed profits and disgorgement of benefits.

Subparagraph (g) mandates a hold separate order unless justice requires otherwise, authorizes escrowing of profits, and empowers the court to order disgorgement of the benefits of the transaction.

This provision is, of course, intended to cover those cases in which no preliminary injunction issues under paragraph (d). It is hard to understand how such restrictions are merited in a case in which the Government—to borrow words from subparagraph (d)—"does not have a reasonable probability of ultimately prevailing on the merits."

In any event, a hold separate order—although at times appropriate—should be won by the plaintiff in an adversarial proceeding, or negotiated.

Subparagraph (g) provides also that the court may order that profits of the acquired firm, or stock or assets, be placed in escrow, and that the court may deprive the losing defendant of all benefits of the violation. These provisions are apparently intended as a deterrent to illegal acquisitions, and as a method of preventing acquiring companies from profiting from their illegal acts.

In the abstract, these objectives are salutary; but in practice we fear the provisions may be anticompetitive as well as unfair.

They may be unfair because the subparagraph (g) case is the case of a merger that on its face is probably lawful; for either the Government has not deemed it important to seek preliminary relief, or its motion for relief has been denied. There would seem not to be a public interest in penalizing a company that made a probably lawful merger.

The provisions may be anticompetitive because they tend to dampen the acquirer's incentive to improve the performance of the acquired firm. The acquirer is likely to prefer to spend its money and efforts where its investment is a surer one.

The ill effects may be pronounced in the case of an acquired firm in need of new capital, new facilities, or new management. The bill would deter these infusions, while competition policy should encourage them.

We believe that subparagraph (g) provides disincentives to competition and unfair penalties and we oppose it.

In conclusion, we favor premerger notification and a reasonable waiting and discovery period, during which the Government may gather information sufficient to make enlightened decisions whether to sue and whether to seek preliminary relief.

Having this information, the Government will be well situated to get preliminary relief wherever it is reasonably likely to prevail on the merits.

When the Government's case is so thin that it is not likly to prevail, we believe the merging companies should have the right to consummate their transaction, and we believe they should fully retain their incentives to operate efficiently and to compete effectively. I thank you very much.

I would be very happy to hear and try to answer any questions you may have. In the event that the ABA has not addressed itself to the question, I will be testifying personally. I would like you to assume that my testimony will be personal unless I state otherwise.

Mr. SEIBERLING. Thank you, Ms. Fox. In other words, you are testifying as an individual and not as a representative of the ABA?

Ms. FOX. Where I can testify for the ABA, I will so state and I will do so.

Mr. SEIBERLING. I see.

Ms. FOX. A number of questions have been suggested to me that I know that ABA has not specifically addressed.

Mr. SEIBERLING. But your prepared statement is authorized by the ABA's section on antitrust laws?

Ms. FOX. The position was approved and adopted by the council and by the board of governors of the ABA.

Mr. SEIBERLING. I am a member of that section and have been for quite a few years and I wondered, just so that we can eliminate or at least discount any likely bias, wouldn't you say the ABA's antitrust section is overwhelmingly composed of lawyers engaged in representing defendants in antitrust litigation, or house counsel for corporations?

Ms. FOX. I have not made a survey. The ABA encourages persons of all views to belong.

Mr. SEIBERLING. I understand that but I am referring now to the section on antitrust law. They always seem to come down rather strongly on the side of the not strengthening the antitrust laws, although I must say that I think your statement is very carefully thought out and has some very cogent points.

I am not trying to detract from it. I am merely trying to get it in context.

Ms. FOX. To the best of my ability and the ability of my colleagues, we do what we think is right rather than to represent private interests.

There are many who truly believe that the bill would be against competition and is not an improvement to competition.

Mr. MCCLORY. Would the Chairman yield?

Mr. SEIBERLING. I will but I would like to comment. I think that is absolutely true and I know that there are a great many people from some of the most outstanding law firms that have among the largest corporations in the country as their clients, and who believe very strongly in the principles of the antitrust laws and try to get their clients to conform to them.

And I am not suggesting that the position of the section is biased deliberately. I am merely suggesting that if the people are mostly engaged in representing one point of view, that that is bound to color their point of view. Just as the previous witness undoubtedly has a coloration on the other side of the coin, so to speak, this is probably true of your counsel, too.

Mr. MCCLORY. Among the counsel that serve on the antitrust section of the American Bar Association, there are included those who would be representing corporations endeavoring to resist a merger as well as those who are trying to affect a merger; is that true?

Ms. Fox. You raise a very interesting point. In this world of tender offers and takeovers, firms that represent corporations have clients on both sides of the case very often. We also find that large corporations are more willing to sue larger corporations for monopolistic practices and for other reasons.

So today a number of people in large firms have had experience as plaintiffs' lawyers as well as defense lawyers.

Mr. SEIBERLING. I think the gentleman makes a very good point.

As a matter of fact, some years ago, you may recall, Northwest Industries tried to take over the B. F. Goodrich Co. by tender offer. It just happens that while I worked at that time for a competing company, Goodyear—Goodrich is the other guy, you may recall—the whole community which I happened to represent was up in arms about this effort by a foreigner from Illinois to try to move in and take over one of our leading companies.

The State of Ohio actually enacted some changes in its corporation law to help block that and it was successfully blocked. I think the gentleman makes a very good point.

Ms. Fox. Yes.

Mr. SEIBERLING. I will admit my own coloration. I am still smarting a little bit from the ABA's unwarranted opposition against another bill, the Antitrust Parens Patriae Act. They came down pretty hard against it and they never accepted our invitation to appear in person and testify in the hearings, though we had hearings 2 years in a row.

They merely submitted a statement after the fact attacking the bill. So I am a little bit unhappy with the ABA's section on antitrust law for that reason and I am frank to say so. Someone from the ABA testified before the Senate subcommittee but not before the House Judiciary Committee.

I let that pass because I just thought I ought to state that I have a little bit of personal feeling in this matter.

Ms. Fox. I don't understand that to be the case, but I will inquire about it.

Mr. SEIBERLING. Isn't it a fact that the ABA did not testify on the previous bill before this committee and only submitted a statement even though we invited them both times?

Mr. DUDLEY. That is right.

Ms. Fox. It is possible that the statement was not approved until after the hearings were closed.

Mr. DUDLEY. That is what happened. There was a statement in preparation but it was not approved until after the hearings closed.

Ms. Fox. The ABA is interested in testifying on such issues. Mr. Allen Holmes testified on S. 1284 before the Senate Judiciary Committee.

Mr. SEIBERLING. I felt they came on a little strong and we did not have a balanced statement of the kind that you have made.

It seems that you make a very good point that perhaps requiring reporting of $10 million acquisitions by $100 million companies, while it does not affect a large number of companies—I understand there are only about 1,000 companies with assets of more than $100 million in the country—nevertheless, it could be a burden that is more than the Justice Department and FTC can handle if all of these mergers took place.

On the other hand, I am informed by counsel that last year there were less than 100 mergers that would be covered by this bill. Over the last 5 years, there have been somewhat more than 100 such mergers per year, but it is still a fairly small amount considering there are several thousand mergers every year.

Would you like to comment any further on this in the light of that observation?

Ms. Fox. I myself am skeptical about the statistics. I have seen statistics regarding mergers of certain asset sizes rather than sales sizes which indicate relatively small numbers of mergers that would fall within reporting requirements.

It is possible if you look to annual sales rather than assets, you would find a much larger number. I don't know the figure exactly, but my impression is that it is quite a lot higher, very substantially higher than 100 a year, that would be taken in by the reporting requirements.

Mr. Seiberling. Well, if we changed it to 250 million as you suggest by quoting the FTC requirements, of course section (b)(2) of the bill would apparently give the FTC and the Justice Department the power to make rules covering smaller mergers where they felt it was necessary.

So I wondered if that might still provide the additional flexibility, or do you feel that that section is improper also?

Ms. Fox. I would like to read (b)(2). What page is that?

Mr. Seiberling. It is on page 3.

Ms. Fox. Yes. I believe that that clause, which starts: "(2) Notwithstanding any other provision of law"—I believe that that clause contains some ambiguity. I think you may be implying broad Government powers from the words: "Notwithstanding the applicability of subsection (a) of this section, no person shall acquire stock or assets within 30 days after filing a notification."

Mr. Seiberling. Apparently the staff has interpreted this as giving the FTC and the Justice Department the power to cover smaller mergers than are specified in subsection (a).

Ms. Fox. The Senate bill at first contained a specific provision to that effect, and it was dropped out. The FTC has such power and it has exercised it in its merger notification program.

Also, the FTC now requires notification of particular mergers of smaller size in areas that it has identified as problem areas. I think the FTC has this power without this bill. I doubt that the Justice Department does. I do not read this section as giving the Justice Department or the FTC any additional power in that regard. I really think that all this section means is that no one within the coverage of the bill where notification is required shall within the waiting period merge unless the FTC or Assistant Attorney General waives the waiting period.

Mr. Seiberling. Well, I certainly think we need some clarification of the intent of this section of the paragraph and accommodation with 4(A) on page 4, which apparently is interpreted to promulgate rules of general or special applicability, in lines 16 and 17, as giving them that power. If we are going to give them that power, we certainly ought to spell it out in unmistakable terms.

Ms. Fox. I don't read 4(A) as giving them that power. I read 4(A) as giving them the power to make rules within the confines of the notification already authorized.

Mr. SEIBERLING. I thought you made a very good point with respect to the subparagraph (g) on page 11, to the effect that this covers cases in which no preliminary injunction has been issued under subparagraph (d). And therefore it is hard to understand how such restrictions are merited where the Government apparently did not think that there was a reasonable probability of its own case prevailing.

Nevertheless, it can segregate the assets. I think that could be very unfair and damaging to an otherwise proper merger. Similarly, it could be anticompetitive, as you pointed out. However, to me that emphasizes the importance of subparagraph (d) which allows the Government to get a temporary restraining order and puts the burden of proof on the parties to the merger.

Thirty days is not a very long time, even if extended by the additional 20 day-plus provision to receive and analyze evidence. It seems to me that if the parties know that they are going to meet this burden possibly, that they are going to have all of the evidence lined up beforehand, whereas if they know that the Government has to meet the burden, they are going to do everything they can to string it out, and I know how they can do that because I have done it myself many times.

The defendants' bar are past masters at dragging things out and trying to delay. I wondered, looking at the realities of the situation, if it is really unfair to impose that burden on the merging companies.

Ms. FOX. I would like to deal with the problem from a different point of view because as you have indicated, what you are interested in, and I am interested in, too, is that the Government has the opportunity to get the information so it can make its case if there is a case.

There has to be a strong obligation on a company to make that information available. I think the Government has to move rapidly and diligently to ask the right questions and get the information.

As the bill is now written, the pressure is on the company to produce the information. The Government can get an extension of time if the company does not produce. So, if that is adopted, the Government should be in a position to make its case if it has one. I don't think it would be necessary to reverse the burden.

I do have some problem about an open-ended period of time for the company to comply. This raises a little different problem from the one you discussed. But if one does put a time limit on the length of the waiting period, one wants to be sure that the company will comply within the waiting period.

I would hope that in most cases the Government request would be to the point and not unduly burdensome so that the company could comply within the 30 days.

Mr. SEIBERLING. Perhaps we ought to write into this bill that if the parties feel that the Government's request is unduly burdensome, they can apply to the court for an order restricting it. I suppose they can anyway under the Federal rules.

But who is in a better position than the parties themselves to come forth with the evidence justifying the merger? As a lawyer for corporations, I can say as far as internal rules are concerned, a company could not go ahead with a proposed merger unless it had an opinion from its own counsel that it would not run afoul of the Clayton Act.

In order to give that opinion, counsel would have to do a very extensive job of researching the effect of the merger and the economics of it and the relevant markets. So I really don't see where the companies are not in a position to go ahead. In fact, I know in many cases we volunteered the information to the Justice Department and the FTC—when they asked us about a proposed merger—in order to show it was justified.

What is the matter with that?

Ms. Fox. The company is in the best position, and does have the information, and what I want to see is that that information be shared and shared immediately at the outset.

Mr. Seiberling. Why shouldn't they have the burden of showing the probability?

Ms. Fox. This is a very basic jurisprudential issue—is the merger presumed to be illegal before it is found to be legal or is the merger presumed to be legal until it is found to be illegal?

I come out on the side of saying that the acts should not be presumed illegal, that the Government should come forward and make its showing, carry its burden. However, its burden on motions for preliminary injunction should not be so severe that the Government cannot ever win.

In some judicial circuits, the rules are flexible enough so the Government can win if it looks like the Government probably has a case.

This is so in the second circuit where I practice. Other courts say the plaintiff, on a motion, must make a clear showing of probable success, and if that is the test the Government may have too hard a burden to carry, particularly because in many of these cases there are difficult fact questions.

But even if the Government can show that there is a serious fact question, it can't always show that the facts will be resolved in its favor.

I would like to see standards adopted like those the second circuit uses. I don't know whether it should be written into the bill, but it could be, to make it clear that you don't need "a clear showing of probable success."

I talk for myself only and not for the ABA, because I have not discussed the issue or gotten approval.

There is an amendment that was proposed to S. 1284 which, I am told, was proposed by Senator Hruska, which could make the government's burden easier.

It is designated as amendment key No. 26 and I have supplied it to your counsel. The test would be that the Government would be entitled to win on a motion for preliminary injunction where, "weighing the equities and considering the United States' likelihood of ultimate success, such action would be in the public interest."

The standard that has been applied in the second circuit is slightly differently stated, but I think has very much the same effect. There are two tests and the meeting of either one would give the plaintiff the right to relief.

One says the plaintiff must show reasonable probability of success plus irreparable injury. And in Government merger cases, irreparable injury to the public is usually virtually presumed from a probably illegal merger.

The second test is the one that has the lighter burden for the Government. The plaintiff is entitled to preliminary relief where it—and I will quote this—"has raised questions going to the merits, so serious, so substantial and difficult as to make them a fair ground for litigation" and "where the balance of hardships tips decidedly toward the party requesting the temporary relief."

The quotation is a quote within a quote, cited in *Gulf & Western Industries* v. *Great Atlantic & Pacific Tea Co.*, which is reported at 476 F. 2d 687.

Mr. SEIBERLING. Is that a rule of court or is that a rule laid down in a judicial decision?

Ms. FOX. It is a decisional rule. It seems to be changed slightly from court to court and from time to time.

Mr. SEIBERLING. Well, that sounds like something we ought to give very serious consideration to. I agree with you that it somehow goes against my feeling as a lawyer that the burden of proof—that a merger should be presumed illegal unless shown to be legal.

However, when you get into this whole realm of economic policy and section 7 which deals with probabilities, it is a pretty vague area, anyway.

I just am not sure that the question of legality versus illegality is the concern here so much as economic policy. But I think you make a very good point and I think it is something we ought to consider very carefully. Obviously the present state of the law is not satisfactory either, and exhibit A is the *El Paso Natural Gas* case.

Ms. FOX. The *El Paso Gas* case is a travesty as far as judicial time, parties time, and the public interest is concerned. I think, No. 1, that it is unique. No. 2, the illegality as of the time of the proposed merger, was not all as clear as some may think it was. There were serious problems of regulation versus antitrust, and whether the regulatory interests were paramount. There were also some questions of first impression because Pacific Northwest was not a direct competitor of El Paso; Pacific Northwest had not sold in the market of El Paso prior to the acquisition. It had solicited some customers of El Paso. The case has strong elements of potential competition—a rather new concept at the time.

In other words, what I am saying is, at the time of the El Paso acquisition, there did not appear to be a clear violation. At this moment in time, it looks like a clear violation, and everyone says, how did that ever get by?

Mr. SEIBERLING. I think I better yield to Mr. McClory or I will be accused of attempting to monopolize.

Mr. MCCLORY. Thank you, Mr. Chairman. You mentioned in your statement with respect to the subject of notification that there is an existing Federal Trade Commission notification practice.

Ms. FOX. Yes.

Mr. MCCLORY. What supports that practice? Is it statute or regulation?

Ms. FOX. It is a rule or regulation. It is not a statute.

Mr. MCCLORY. There is no existing statutory authority requiring this giving of notice?

Ms. FOX. That is right.

Mr. McClory. If we enact this legislation, that would be the first?

Ms. Fox. Yes.

Mr. McClory. In the decisions that have come to your attention, none of them have established rules which would be binding on corporations requiring them to give notice?

Ms. Fox. The FTC rules are binding and I believe there are penalties for violations.

Mr. Seiberling. As I understand it, the FTC does not have any mandatory waiting period.

Ms. Fox. That is right. The FTC at first had a premerger notification rule and it changed it to a merger notification rule that requires notice in most of the covered cases 10 days after agreement in principle.

Mr. Seiberling. There is no advance notice required?

Ms. Fox. It is technically not advance notice but it virtually always is advance notice because usually 10 days after the agreement in principle is substantially more than 30 days before the consummation.

Mr. McClory. Well, if they have that kind of rulemaking authority and if they are enforcing it, why do we need a new statute to require the giving of notice?

Ms. Fox. Under the bill, there are more mergers covered jurisdictionally. The notification would go directly to the Justice Department as well as to the FTC. It now goes directly to the FTC. It is available to the Justice Department if they want to see all of the filings, but I do not believe that the Justice Department, as a regular practice, sees the FTC filings. The bill does much more than just notification. It includes a waiting period and other provisions.

Mr. McClory. There is no penalty under the existing rule, is there?

Ms. Fox. There is a penalty of $100 per day if default continues 30 days after notice of default.

Mr. McClory. In the bill the penalty would be $10,000 a day for merging without having given the notice. How do you feel about that penalty?

Ms. Fox. It is a large penalty, but I don't feel bad at all if the illegally consummated merger is a clearly covered merger. It could present problems if there are questions whether or not a particular merger is covered. In that event, I would simply hope that the penalty would not be applied.

Mr. McClory. The only other problem is if there is no injunction and there is a hold separate order to put the funds in escrow, and a divestiture is ordered, to the extent practicable, the court may deprive the violator of all benefits of the violation including tax benefits.

I suppose that is consistent with what the court might order now under the existing practice, is it not?

Ms. Fox. It is not clear to me that a court has the power to deprive the violator of the benefits of the deal in the way of assessing a penalty. However, the court does have the power to do various things which could have a similar result. For example, the court can require the acquiring company to set up a viable new company and to put large amounts of assets in it.

Mr. McClory. Say there is an injunction which is dissolved on final hearing, or there is no injunction, and the merger goes ahead and it is subsequently found in litigation that there is a violation of the antitrust laws. Do you think that this penalty should apply?

Ms. Fox. I do not think this penalty should apply at all. I think that it is probably anticompetitive to tell the company at the outset that you are going to deprive it of the benefits of the transaction. This means that the acquiring company is not going to invest in, and put money into, the acquired company. It is not going to have the incentive to make it a strong, viable company. I also think that it is unfair to have such a provision because these subparagraph (g) cases are cases where the violation is probably not clear because the Government either has not brought a motion for preliminary injunction, or has lost that motion.

Mr. McClory. While you are here and we have the benefit of your expertise, you have made a couple of comments with respect to language in the bill. If you would refer to page 3 of the bill, I would like to ask you a few questions.

In subparagraph 2 beginning—"notwithstanding"—and so on, it says, "No person or persons shall within 30 days following the filing of the notification . . ." Actually what we mean is "No persons who are covered by this act," which means companies with $10 million or more in assets. So if we added after "persons" the words "described in section 7A(a)," that would be more precise, would it not?

Ms. Fox. Yes, it would be.

Mr. McClory. Then, again in subparagraph (2), we refer to "the Assistant Attorney General may," and you want to put the word "merge"—well, I have to go back a little bit: "No person or persons, described in section 7A(a), shall within 30 days following the filing of the notification pursuant to paragraph 3 of this subsection, or until the Federal Trade Commission and the Assistant Attorney General may otherwise authorize under (c)(4), proceed to merge," and so forth.

Ms. Fox. I did not follow that.

Mr. McClory. Where do you want the word "merge"?

Ms. Fox. "Acquire" is on line 16 which includes "merge."

Mr. McClory. Merge might not be——

Ms. Fox. You are right. It would be more accurate to put "merge."

Mr. McClory. Where would you put it?

Ms. Fox. Right before "acquire."

Mr. McClory. Would that improve it?

Ms. Fox. I think a couple of words might have to be changed just for the rules of syntax, so that it reads properly. If you put "merge with, or acquire, directly or indirectly, the whole or any part of the stock or other share capital or of the assets of," that would do it.

Mr. McClory. Thank you very much.

Mr. Seiberling. I would like to ask one other question. I do think that there is some necessity of putting some pressure on the Department of Justice not to drag these things out indefinitely, even if we should go with the language in the bill that is before us.

Perhaps we could glean from the Second Circuit's rules some means of doing this. Assuming we went ahead with this bill, have you any suggestions as to how to cut it off at some point, and at least force the Government to make some additional application to show that they are proceeding expeditiously?

Ms. Fox. Yes, I do have some ideas with respect to the Government's request for information. Under the bill there is some ambiguity as to how long the Government can request information and how long the waiting period can be extended. I think some changes in wording could be made.

Mr. SEIBERLING. If you would like to give us your further thoughts on that for the record, we would be glad to include a letter or something to that effect if you want to think about it some more.

Ms. FOX. In substance, I would like it to be clear that the Government must request the needed information promptly in order to be able to take advantage of the tack-on period. It can request anything it wants thereafter, but should not have the right to extend the waiting period based on such later requests.

Mr. SEIBERLING. Should there be a "sunset" rule with respect to any injunction so that they would have to come back and renew their request for injunction after a certain period of time? Suppose an injunction were granted—a preliminary injunction—under the provisions of this bill? Should it have a time limit?

Ms. FOX. It is usually granted pending trial and I believe the bill would require the expediting of the trial.

Mr. SEIBERLING. I wondered if there should be a mandatory limit at which point the court would have to require rejustification of the injunction. I just throw that out. You might want to think about it.

I want to recognize Mr. Hughes.

Mr. HUGHES. Thank you, Mr. Chairman. Thank you, Mrs. Fox, for your testimony. I think you have made a lot of valid points. I am sure you are concerned with shifting the burden, and also I have some concerns about section (g). However, I am confused about your testimony. I thought that you felt that some form of premerger notification was important.

Yet as my colleague from Illinois was questioning you I got the impression that you felt that perhaps there were presently tools that would require notification within 10 days after a merger takes place. Yet many companies are notifying in advance. Isn't that your testimony?

If in fact premerger notification is good, why shouldn't it be standardized? Why shouldn't we have a rule?

Ms. FOX. I believe it should be standardized. Perhaps I said something to confuse the record. The FTC has procedures that go a long way. I nonetheless support the notification provisions of the bill because I think the requirement should be standardized.

Mr. HUGHES. Something else with regard to subsection (g), particularly with regard to the hold-separate and profit escrowing aspects.

That subsection makes it mandatory. Would you favor a different approach by a court or do you think a court already has that discretion?

Ms. FOX. On hold separate orders, there are clearly effective procedures by which a plaintiff can get a hold separate order.

Mr. HUGHES. Do you feel they are adequate at the present time?

Ms. FOX. I do feel they are adequate. I also think the language suggested by the proposed Hruska amendment to S. 1284—Key amendment No. 26—would be a good addition. I say this again personally, for myself only. Here there would be enacted into law a clear provision making it relatively easy for the Government to get a hold separate order in a proper case.

This provides that if the Assistant Attorney General demonstrates to the court that it is necessary and appropriate to obtain a hold separate order, it may be granted. I think such addition would be salutary. I know that today in a number of courts such a rule would probably be applied in any event. There would have to be some showing of likelihood of success. But given such a showing and equities for the Government, a hold separate order may be granted today. It may be salutary to include clear language to this effect in the bill.

Mr. HUGHES. Thank you, Mr. Chairman.

Mr. SEIBERLING. The gentleman from Illinois is recognized.

Mr. MCCLORY. Are you fearful that this authority granted to the Government to demand information as you indicated could frustrate the attempts to effect a merger through a tender offer, because of the extension of the time beyond the existing 60 days limitation?

But even beyond that, are you fearful that these demands for information might have a serious adverse effect on competition, in other words to frustrate proper competitive mergers and acquisitions, which would be inconsistent with our purpose here, unless we build in something specific that will prevent that from occurring?

Ms. FOX. I would like to address both issues, the tender offer issue, and, will the bill prevent proper competitive mergers? The bill as written probably would prevent proper competitive mergers.

If restrictions were put into the bill along the lines of my prepared statement, I don't worry that proper competitive mergers will be frustrated. It may always happen that some companies will say I just don't want to report and the market is going to change and I will not go through the merger.

If the waiting period is short, that will not usually happen.

I don't think this bill is meant to deter tender offers. I think it would deter a large number of tender offers, just because of the notification and waiting periods.

Mr. MCCLORY. What if we provided for notification 10 days before the tender offer?

Ms. FOX. My impression is that that would deter tender offers. The offering company would be hesitant to give anyone the information, and there may also be questions about disclosure under rule 10b-5. I have heard a proposal that tender offers be treated as follows: That the offering company be allowed to take down the stock of the target company immediately upon making the tender offer (subject to Williams Act limitations) but that the tendered stock then be held in escrow for the waiting period term.

I think that proposal has no antitrust risks because you do not have companies between whom confidential information is going to be exchanged. You don't even have control of the target company by the company that is acquiring the stock.

I don't believe this will usually be in the area of investment stock—exempted from the bill—because the company might be going for control or might intend to exercise influence. I think that the proposal I mentioned would probably satisfy the tender offer problem and yet not create any risk of undermining the antitrust objectives.

Mr. SEIBERLING. Well, thank you. I thought your suggestion on tender offers made a lot of sense. I have a conditioned reflex against tender offers because of various experiences in connection with my own community and industry.

But nevertheless, I realize that they do serve a proper competitive purpose, weeding out inefficient managements and that sort of thing, although sometimes they are used as pure manipulations by Wall Street interests—which is a dirty word in my part of the country, I might say. However, I think that maybe we should look at this objectively and not emotionally.

Mr. McCLORY. Ms. Fox, he is not referring to Wall Street lawyers.

Mr. SEIBERLING. I am referring to Wall Street investment bankers. Does counsel have any questions?

Mr. POLK. Ms. Fox, I would like to ask you the same question that I asked Mr. Watkiss. In your opinion is there something more done in (d)(3) than shift the burden of proof from the Government to the defendant?

Ms. FOX. It does not exactly shift the burden of proof, as I believe you pointed out in your question. By some courts' standards today the Government must prove a reasonable probability of success. That is a commonly accepted standard. That burden is directly shifted.

The other part is what you are particularly pointing out in your question. Today the Government has the burden of proof to prove irreparable injury but it is usually presumed. Most courts will say if the merger is illegal, the public is presumed to be injured by it.

The Government does not have a difficult time on the irreparable injury standard. Also today courts will balance the equities. If you have a failing company, that will be balanced against the Government.

If the company makes a case that it really needs to go through with this merger and, along with that case, that the merger is not going to be too damaging to competition or will not damage competition, the court will certainly listen to it and weigh the evidence.

Here you have an alternative standard in that the defendant could defeat the preliminary injunction if it could prove either of two points, either that it would be irreparably injured or that the Government does not have a reasonable likelihood of prevailing.

They are slightly different standards.

Mr. POLK. Thank you for your observations.

Mr. McCLORY. Mr. Chairman, I want to add my appreciation for this very enlightening and very helpful testimony by one of the most impressive witnesses that I think has come to testify in the course of our hearings on antitrust and monopoly legislation.

I want to thank you.

Ms. FOX. Thank you very much. It was a pleasure to testify.

Mr. SEIBERLING. Let me join Mr. McClory in that compliment to you. You show tremendous knowledge and expertise in this field, and we appreciate your assistance.

Thanks so much.

The subcommittee now stands adjourned.

[Whereupon, at 12:08 p.m., the subcommittee adjourned subject to call of the Chair.]

MERGER OVERSIGHT AND H.R. 13131

THURSDAY, MAY 13, 1976

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:45 a.m. in room 2141, Rayburn House Office Building, Hon. Romano L. Mazzoli presiding.

Present: Representatives Mazzoli, Jordan, Mezvinsky, Hughes, Hutchinson, McClory, and Cohen.

Also present: Earl C. Dudley, Jr., general counsel; Thomas S. Runge, Alan A. Ransom, counsel; Franklin G. Polk and Kenneth G. Starling, associate counsel.

Mr. MAZZOLI. The subcommittee will please come to order.

In the absence of Chairman Rodino, I would like to read for the record his opening statement today:

"This morning we continue hearings on H.R. 13131. This bill would establish premerger notification, waiting, and stay requirements for large mergers, and thereby strengthen enforcement of the Federal antimerger law in section 7 of the Clayton Antitrust Act.

"The problem this bill seeks to cure is not a new one. Indeed, the Congress has been considering bills very much like this one for 20 years. And in fact, the House passed a bill very similar to this one in 1957, by unanimous vote. President Eisenhower urged this bill's passage for 5 successive years, as did Attorney General Herbert Brownell. And former Chairman Celler, who will be with us later this morning to testify on behalf of this measure, sponsored many of these bills. I, myself, wrote the committee report on the 1961 premerger notification and waiting bill, which was strongly backed by Attorney General Robert F. Kennedy.

"Of course, there are some differences between those early bills, and this one. But the basic purpose of those early bills remains the purpose of this bill. It is to stop potential monopolies before they are created, by stopping illegal mergers before they take place.

"This bill seeks to achieve that goal. It will provide the Government with advance information about large mergers, and a reasonable time to analyze that data. If the proposed merger then appears to be illegal, the Government will have a fair chance to stop it before it takes place.

"Otherwise, the Government can challenge illegal mergers only after they are completed, in a divestiture proceeding. But untangling two companies after their assets and management have been merged is costly, time consuming, and rarely successful. The task has aptly been compared to 'unscrambling the eggs in an omelet.'

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"On March 10, this subcommittee heard strong support for this measure from Antitrust Division Chief Thomas E. Kauper and the Federal Trade Commission's Paul Rand Dixon.

"Last week, we heard further support for this bill from David K. Watkiss of Salt Lake City, who spent many years trying to 'unscramble the omelet' created by one illegal merger. He finally succeeded, but that one case lasted 17 years, and went to the Supreme Court six times. It points up the great burdens these divestiture cases impose, both on the parties and on the Federal Courts, and surely underscores the need for this bill.

"Our second witness last week, Ms. Eleanor Fox, testified for the American Bar Association, and also expressed support for this bill's premerger notification and waiting requirements, with minor exceptions. However, she opposed the bill's additional provisions on premerger injunctions. These would shift the burden of proof in premerger actions from the Government's shoulders—where it presently rests—and place it upon the merging parties. This is only a procedural change, not a substantive one, but it is significant and bears careful study."

At this point, I would like to yield to our distinguished colleague, the gentleman from Illinois, Mr. McClory, for any opening remarks he might make, or might make on behalf of the minority.

Mr. McClory. Thank you, Mr. Chairman.

I want to commend the chairman on the statement of our chairman, Mr. Rodino, that you read. I do not have any prepared opening statement, but this thought occurred to me in the course of your statement, and that is that this legislation will provide implied protection to the large number of companies that engage in lawful mergers and other types of acquisitions, and should benefit the entire private enterprise institution, as well as provide the Congress and the Department of Justice with better control and better oversight of those mergers that are in violation of the antitrust laws, but the discovery of which is not made until the merger occurs.

Thank you, Mr. Chairman.

Mr. Mazzoli. I thank the gentleman for his comments.

Our first witnesses this morning are Dr. Willard F. Mueller and Dr. Kenneth G. Elzinga.

Mr. Mueller was for many years the chief economist for the FTC and is now Vilas research professor of economics at the University of Wisconsin.

Dr. Elzinga is the author of many studies on merger and divestiture cases, and is now professor of economics at the University of Virginia's James Wilson Department of Economics.

I would like to welcome both of you gentlemen, and I understand that you each have a short statement, and then we will begin our questioning. Dr. Mueller?

[The prepared statement of Dr. Willard F. Mueller follows:]

Statement of W. F. Mueller, Former Chief Economist, Federal Trade Commission

Mr. Chairman and Members of the Committee, it is a pleasure to appear before you on a subject with which I have been concerned for many years. Based on my experience of eight years as chief economist of the Federal Trade Commission during the 1960s and my experience and study since then, I strongly endorse the purposes and provisions of H.R. 13131.

The Celler-Kefauver Act of 1950 is the most important antitrust law enacted in over half a century. Enforcement of the Act represents the largest and most sustained effort in the history of antitrust. In the first 25 years, the antitrust agencies have issued over 400 merger complaints, challenging about 1,500 acquisitions with combined assets of almost $50 billion. Were it not for the Act many more American industries would have become excessively concentrated. Despite frequent lackluster enforcement, the overall record is one of the few success stories in the over eight decades of America's antitrust history.[1]

Yet, from the outset, the merger enforcement effort was marred by a critical flaw. Whereas the antitrust agencies won many victories in the courtroom, the public interest was not fully served. In the end, the loser often retained the spoils over which lengthy and costly legal battles had been fought.

Based on my personal experience and study of this enforcement effort, I conclude the government has achieved adequate divestiture in relatively few of the numerous mergers it has challenged. By successful divestiture I mean the reestablishment of the acquired unit as an independent enterprise and the restoration of competitive conditions as they existed before the merger. Numerous cases have been concluded with (1) no divestiture, (2) token divestiture, or (3) divestiture of the acquired firm to another corporation rather than the restoration of the illegally acquired firm as an independent going concern of comparable or larger size than when it was acquired. This represents a serious indictment of enforcement policy.

The defects of present merger enforcement activities may be summarized as follows:

(1) Defendants frequently now do not have an incentive to cooperate fully with the enforcement agencies and the courts in expediting litigation. Experience in this and other areas of antitrust has taught defendant attorneys than delay usually works to the defendant's advantage. The frequent result is needlessly long litigation, frequently exceeding a decade.

(2) Once a merger is consummated, prolonged litigation results in the loss of competition during the period of litigation. If the merger is anticompetitive, the damage to the public interest continues so long as the merger remains intact.

(3) Protracted litigation and a history of inadequate relief tends to breed contempt for the effectiveness of the enforcement agencies. Rivals of a firm making an acquisition (even when the latter's acquisition is challenged) are encouraged to make "defensive" mergers, particularly in the case of vertical mergers. (See FTC Staff Report on *Mergers and Vertical Integration in the Cement Industry*, April 1966.) Or, they simply may gamble that their acquisition will not be challenged, and that even if it is successfully challenged, they will not incur a serious economic penalty. At best, they may be permitted to keep acquired units while agreeing to make no further acquisitions; at worst, they will be required to divest the acquisition to another company, often at a profit over the original purchase price.

(4) Once a merger is fully consummated, it often is impossible to restore the state of competition existing prior to the merger. Frequently acquired companies' assets are hopefully scrambled with those of the acquirer, acquired plants may be closed, acquired brands may be eliminated, and key management of the acquired firm may be replaced.

(5) Where protracted litigation results in actions cited in (4) above, this situation may implicitly or explicitly influence either (or both) the nature of the *decision* or the *relief* meted out by the FTC and the courts. Frequently, once assets have been fully scrambled, the FTC's relief has consisted solely in prohibitions against further mergers or in partial, token divestiture.

In summary, so long as firms are permitted to merge without first obtaining premerger clearance or before the case is litigated, there will be needlessly long litigation, adverse effects on the decisionmaking processes of the FTC and the courts, and inadequate, or worse still, meaningless relief. I therefore believe the objectives of the Celler-Kefauver Act would be greatly enhanced if the Congress enacted H.R. 13131.

With your indulgence, I shall discuss briefly some facts bearing on the preceding remarks concerning the adequacy of existing enforcement policy.

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[1] W. F. Mueller, *The Celler-Kefauver Act, Sixteen Years of Enforcement*, Report to the Antitrust Subcommittee of the Committee on the Judiciary, U.S. House of Representatives, October 16, 1967. W. F. Mueller, *Public Policy Toward Mergers: A Case Study of the Dairy Processing Industry*, forthcoming.

THE NATURE OF RELIEF IN FTC CASES

Table 1 summarizes the nature of relief achieved in 77 merger cases brought by the FTC during 1951–1975. These are cases in which a challenged company having sales or assets of $100 million or more acquired a firm with assets or sales of $10 million or more. Another 73 Federal Trade Commission complaints would not have been covered by the standards of H.R. 13131. (Table 1 also excludes three joint venture complaints.)

The cases are classified into various categories based on my personal familiarity with some cases and the final disposition of the matter as reported by the FTC. Although my analysis is based solely on FTC cases, I believe many of my comments apply to Department of Justice cases as well.[3]

TABLE 1.—FTC MERGER CASES CLASSIFIED BY NATURE OF RELIEF, 1951–75 (INCLUDES ONLY CASES WHERE THE CHALLENGED FIRM HAD ASSETS OR SALES OF $100,000,000 OR MORE AND WHERE THE ACQUIRED FIRM HAD ASSETS OR SALES OF $10,000,000 OR MORE)

Status or relief	Number of complaints (1)	Percent of complaints (2)	Percent of completed cases (3)	Value of challenged assets (millions) (4)	Percent of challenged assets (5)	Percent of challenged assets (6)	Average total assets challenged in complaint (millions) (7)
Cases dismissed	8	10	12	[1] $283	5	7	$35
Cases resulting in divestiture of entire acquired firm	16	21	24	650	11	16	41
Cases resulting in partial divestiture of acquired assets	22	29	33	1,827	31	44	83
Cases rsulting in no divestiture	14	18	21	925	16	22	66
Cases where divestitute ordered but not yet accomplished	7	9	10	475	8	11	68
Total completed cases	67	87	100	4,160		100	62
Cases pending	10	13		1,675	29		167
Total cases	77	100		5,835	100		76

[1] When complaint challenged more than 1 acquisition, only those acquisitions with assets or sales of $10,000,000 or more were included.

Note: The FTC issued a total of 150 complaints challenging acquisitions with combined assets of $6,800,000,000. 44 of the complaints involved acquiring companies with assets of less than $100,000,000; and 29 involved complaints where companies of over $100,000,000 acquired companies with assets of less than $10,000,000. 3 additional complaints involved joint ventures. In 1 case it was not possible to determine the assets of the challenged firm and in 305 cases it was not possible to determine the assets of any of the acquired firms.

Source: Unpublished study of W. F. Mueller. Preliminary.

I first call your attention to the fact that only eight of the cases (10 percent) were ultimately dismissed by the Commission or Appellate Courts. None was dismissed by the Supreme Court. The remainder of the cases resulted in formal decisions, consent decrees, or are still pending. I emphasize, however, that the decision to dismiss a case may not depend solely on whether or not a violation has occurred. In some cases a decision may be influenced by the belief that protracted litigation has made meaningful relief impossible. The classic example of this was the Commission's disposition of *FTC vs. Pillsbury Mills*, the first case brought by the FTC under the new Act. This case involved 14 years of litigation, ultimately leading the Commission to dismiss the case because of lack of public interest. By 1966, after the case was remanded to the Commission for reconsideration, one of the acquired company's operations had become an integral part of Pillsbury and the brand name of the other acquired company had been allowed to become worthless. Thus, a case was dismissed not because it did not violate the existing precedents covering horizontal mergers, but because the passage of time had made meaningful relief extremely difficult if not impossible. This again proved how in antitrust law, defendants may benefit when the wheels of justice grind slowly.

[3] See Willard F. Mueller, "The ITT Settlement: A Deal with Justice," *Industrial Organization Review*, Vol. 1, No. 1, 1973, pp. 67–86.

Finally, it should be noted that the cases dismissed generally involved smaller mergers. The challenged assets averaged $35 million per complaint, which was less than half as large as the average of all complaints (Table 1, column 7).

FTC Cases Resulting in Complete Divestiture

Sixteen of the merger cases in which litigation has been completed resulted in the divestiture of the entire challenged acquisitions. These acquisitions had combined assets of $650 million (16 percent of the assets of the completed cases). These complaints, like those in the cases dismissed, involved smaller mergers than the average of all complaints.

Few of the cases in this category resulted in total victory. Practically all of the divested properties were sold to other corporations rather than reestablished as independent competitors.

Two prominent examples are the sale of the remaining assets of the St. Helen's Paper Co. (acquired in 1956 by Crown Zellerbach Corp.) to Boise Cascade Corp. in 1964; and the sale of the Visking Corp. (acquired by Union Carbide Corp. in 1956) to the Ethyl Corp. in 1963. Both divestitures resulted in so-called product extension conglomerate mergers, i.e., both the acquiring and acquired firms operated in related product lines.

Thus, most of the FTC cases in the "complete" divestiture category resulted in conglomerate mergers rather than in restoring the acquired unit as independent, going concern.

One of the most prominent exceptions was the reestablishment of the Clorox Co. as a new business entity after it had been acquired by P & G in 1957. However, this example also illustrates the great difficulties involved in accomplishing successful divestitures after protracted litigation. In this case, despite the 1967 Supreme Court decision sustaining the FTC's divestiture order, it took another five years before satisfactory divestiture was completed. This was 15 years after the FTC had challenged the merger. Thus, even when complete divestiture is accomplished, the public interest may suffer because protracted litigation has tied up enforcement resources for a long period and competition may be injured during the period of litigation. There was evidence in the P & G record indicating that such injury to competition had indeed occurred.[3]

I believe the Justice Department's record is not much better than FTC's, except where it succeeded in obtaining preliminary injunctions. For example, following the Supreme Court decision in the famous *Brown Shoe* case in 1962, the acquired company, Kinney, which had been acquired in 1955, was sold in 1963 to the F. W. Woolworth Corporation. Thus, the relief resulted in a conglomerate merger with a corporation with sales of $1.2 billion. Had the government received a full injunction during litigation, Kinney likely would have been in business as a going, independent concern at the end of the trial.

On the other hand, the Justice Department did receive a preliminary injunction in the historic *Bethlehem Steel* case. The complaint in this case was issued December 12, 1956 and the District Court declared the merger illegal December 19, 1958. Had there not been a full preliminary injunction, the acquired corporation, Youngstown Sheet and Tube (with assets of $573 million), probably would not be operating as a separate corporation today.

FTC Cases Involving Partial Divestiture

Twenty-two of the cases resulted in only partial divestiture of the acquired assets. These cases involved 44 percent of the assets of all completed FTC cases. Not only were these cases most numerous, but the average assets per complaint was higher than in all other categories of completed cases.

For the most part, only partial divestiture occurred because many of the assets of the acquired companies had become scrambled with those of the acquirer, thereby making meaningful relief extremely difficult or impossible. I am unable to estimate for all complaints falling in the partial divestiture category the value of assets ultimately divested. But I believe it to be less than one-half. For example, the Federal Trade Commission challenged the merger activity of the nation's four leading dairy corporations—Borden, Beatrice, Foremost and National (Kraftco). Whereas the acquisitions challenged in the complaint had combined sales of $686 million, the divestitures ultimately ordered by the Commission had

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[3] Commission decision in *The Matter of the Procter & Gamble Company*, Docket No. 6901, November 26, 1963, pp. 67–69.

sales of only $186 million, or 27 percent of the total.[4] The major relief achieved by these cases was ten year prohibitions against further mergers by the four companies involved.

Other cases of partial divestiture were dismal failures. For example, in 1963 a complaint was issued challenging several potato chip acquisitions by the Frito-Lay Corporation. One of these was the Red Dot Potato Chip Company of Madison, Wisconsin. Red Dot had been a very successful regional firm. Following its divestiture, Frito-Lay discontinued the brand name. When Frito finally was ordered to divest the company in 1968, the buyers attempted to resurrect the Red Dot brand name but failed, with the result that the Madison plant was closed. Needless to say, many citizens in the area blamed the government for destroying a successful business.

FTC Cases Resulting in No Divestiture

Fourteen cases were terminated without requiring any divestiture. These cases involved a larger average volume of challenged assets than the dismissed cases and those resulting in total divestiture.

The Commission decided not to require divestiture in these cases for a variety of reasons. In several cases in the food retailing and department store industries the Commission believed simple prohibitions against further acquisitions for 10 years, without prior Commission approval, provded adequate relief. But, in my judgment, even in these cases the decision may well have been different had a preliminary injunction been in effect when the Commission made its decision as to appropriate relief. I say this because in each case the original complaint called for divestiture.

In other cases, however, I believe that the decision was more directly influenced by the perceived difficulty of divestiture because the acquired firm had lost its original identity by the time the Commission decided upon appropriate relief.

Cases Where Divestiture Has Been Ordered But Has Not Yet Been Completed

Seven (10 percent) of the FTC's completed cases fall in this category. The most important of these is the Kennecot-Peabody merger. The FTC challenged this acquisition August 5, 1968, and had its order of divestiture affirmed by the Court of Appeals September 15, 1972. The Supreme Court denied certiorari April 1, 1974. Over two years have passed since the Supreme Court acted, and yet the FTC has failed to achieve divestiture. Based on press reports, Kennecot has argued repeatedly that it cannot effect a successful divestiture because Peabody (the nation's largest coal company) is too large to sell to another company. The most appropriate solution, of course, would be to reestablish Peabody as an independent corporation, as was done in the P & G-Clorox divestiture. This problem would not exist today had the merger been stayed until a decision had been reached on the merits. Based on past experience, the FTC will not receive complete divestiture in all these cases in which divestiture has been ordered.

In summary, the merger enforcement record of the antitrust agencies must be judged as only a partial success. To date, its greatest impact has been in stopping many mergers that may otherwise have occurred,[5] not in obtaining adequate relief for those that were challenged. The time is long overdue for strengthening enforcement effectiveness so that those violating the law no longer will benefit from doing so.

SIZE OF ACQUIRED AND ACQUIRING FIRMS IN FTC AND DEPARTMENT OF JUSTICE COMPLAINTS

Section 7A(a) of H.R. 13131 covers mergers when firms with assets or sales of $10 million or more are acquired by corporations with assets or sales of $100 million or more. Table 2 classifies by asset size all mergers challenged by the FTC and the DOJ during 1951–1975. In absolute numbers, more challenged acquisitions fell in the less than $10 million size class than all others combined. Many, and perhaps most, of these were relatively unimportant and would not have been

[4] W. F. Mueller, *Public Policy Toward Mergers in the Dairy Processing Industry*, forthcoming.

[5] Mueller, "Sixteen Years . . .," *op. cit.* and *Public Policy Toward Mergers in Dairy Processing, op. cit.*

challenged individually. They assumed significance only because they were part of a series of acquisitions by a single firm. Examples of this are the *Borden Company* and *Beatrice Foods* complaints, which challenged 110 and 175 acquisitions, respectively. Because of the nature of such acquisitions, it does not seem necessary to require premerger clearance prior to each small merger, except where a company or industry has a history of numerous prior acquisitions. In such cases, the FTC and DOJ could establish rules covering smaller mergers, which I believe is provided for by Section 7A(b)(2). I think this is a desirable provision.

A substantial number of challenged acquisitions (153 involving combined assets of $3.3 billion) involved firms with assets of $10 million to $49 million (Table 2). These acquisitions fell in a large number of different industries, and therefore could not be covered effectively by a special FTC rule. I therefore believe that $10 million represents a meaningful lower level for acquired companies covered by this bill. Examples of important cases where the acquired company fell in the $10–50 million asset or sales class are Pillsbury Mills-Ballard & Ballard Co.; Procter & Gamble-Clorox; and General Foods-S.O.S. Co. Examples of important DOJ cases in this size category include Brown Shoe-Kinney and Alcoa-Rome Cable.

TABLE 2.—SIZE OF CHALLENGED COMPANIES IN FEDERAL TRADE COMMISSION AND DEPARTMENT OF JUSTICE MERGER COMPLAINTS, 1951-75

Assets of acquired company [1] (millions)	Number of companies	Percent of total	Total assets (millions)	Percent of total
Size unknown	482	37.4	(2)	(2)
Under $10	576	44.6	$970	3.3
$10 to $49	153	11.9	3,326	11.2
$50 to $99	31	2.4	2,263	7.6
$100 and over	48	3.7	23,061	77.9
Total	1,290	100.00	29,620	100.0

[1] In practically all cases, assets are for year prior to acquisition.
[2] Not applicable.

Note: Excludes joint venture complaints.
Source: Unpublished study of W.F. Mueller. Preliminary.

Nor would this represent an unduly burdensome number of companies for the agencies to examine. Over the past five years, fewer than 100 firms in manufacturing and mining with assets or sales of $10 million or more were acquired by firms with assets of $100 million or more.

I believe that consideration paid should be included, in addition to sales and assets, as a measure of size. In some cases, consideration paid more accurately represents the value of the acquired unit, particularly in cases where much of the value of the acquired unit is due to a brand name or other nontangible assets carried on the books at a nominal value. For example, during 1970–1974, 35 acquisitions for which the FTC reported assets of between $10 million and $20 million, the amount of consideration paid exceeded the value of reported assets.[6] In 29 of these cases, the consideration paid exceeded assets by 25 percent or more; for the 35 acquisitions the average consideration paid exceeded reported assets by over 100 percent. Hence, it seems likely that a significant number of firms with assets below $10 million had an actual value exceeding $10 million.

As shown in Table 3, 224 FTC and DOJ complaints involved acquired companies of $10 million or more.[7] The bill would have covered the acquired company in about 74 percent of these complaints. I do not believe the minimum size limit of the acquired firm should be raised from $100 million to $250 million, as suggested by former FTC chairman Engman. This would have excluded a substantial number, 52, of the complaints actually brought by the agencies under the Act since 1950.

[6] FTC, Bureau of Economics, *Statistical Report on Mergers and Acquisitions*, Report No. 8–15–27, October 1975.
[7] These are all merger complaints except banks and joint ventures.

TABLE 3.—SIZE OF ACQUIRING COMPANY IN MERGER CASES BROUGHT BY THE FEDERAL TRADE COMMISSION AND DEPARTMENT OF JUSTICE, 1951-75

Size of acquiring company in year of complaint (millions)	Number of companies		Percent of total	
Not known	9	[1] (2)	2.7	[1] (1.0)
Under $10	18	(5)	5.5	(2.2)
$10 to $49	47	(25)	14.3	(11.1)
$50 to $99	42	(26)	12.8	(11.6)
$100 to $249	74	(52)	22.5	(23.2)
Over $250	139	(114)	42.2	(50.9)
Total	329	(224)	100.0	100.0

[1] This is the number of cases where the acquired firms had assets or sales of $10,000,000 or more.

Note: Excludes 76 bank mergers and 8 joint ventures.

Source: Unpublished study of W. F. Mueller. Preliminary.

There certainly is nothing sacred about the $250 million size limit currently used by the FTC in its merger notification program. I have personal knowledge on this subject since I suggested the $250 million limit when I recommended in March 1969 that the FTC adopt its merger notification program.

It might be helpful to this Committee if the present FTC program is placed in historical perspective. I first recommended in the early 1960s that the FTC use its powers under Section 6 of the FTC Act to require premerger notification. It was not until 1966, however, that a majority of the Commission approved its first premerger notification programs. By a 3 to 2 vote, as I recall, the Commission agreed to require all food retailers and wholesalers with sales in excess of $100 million to notify the Commission at least 60 days prior to the consummation of any acquisition. This requirement was an integral part of its merger guidelines in food distribution.[8] As part of its merger guidelines in the cement industry, the Commission also required *all* portland cement companies to notify the Commission 60 days prior to requiring any ready-mixed concrete producers.[9]

By early 1969 the merger movement had accelerated to dizzy heights; acquired manufacturing and mining assets rose from $4 billion in 1967 to $8 billion in 1967, and to $12 billion in 1968. By early 1969 they were running at an annual rate of over $15 billion. A growing number of persons became concerned with the accelerating merger activity. Richard W. McLaren, the newly appointed Assistant General for Antitrust, indicated that he intended to take a much more aggressive stance toward conglomerate mergers than his predecessors. In early March 1969 he announced that the department would probably challenge any merger among the top 200 industrial corporations. I agreed with McLaren's position, and recommended that the Commission make a similar statement. I also urged that such an enforcement announcement would be more credible, and its enforcement more effective, if the Commission adopted a premerger notification program for all corporations subject to its jurisdiction with assets of $250 million or more. The Commission did not accept the recommendation that it endorse publicly McLaren's new tougher approach, but it did unanimously adopt the premerger notification recommendation. I recommended the $250 million size limit for acquiring companies because I was most immediately concerned with the accelerating number of mergers by very large companies. But in retrospect, I believe a lower size limit is warranted. If $100 million is used as the lower limit, this would cover about 1,000 corporations that control about 80 percent of all assets of manufacturing and mining corporations, and several hundred additional corporations that control a large segment of distribution and trade. Although several hundred thousand corporations would not be covered by the program, it

[8] Federal Trade Commission, *Enforcement Policy with Respect to Mergers in the Food Distribution Industries*, January 3, 1967, p. 11. Although this and latter FTC merger notification programs required notification prior to the merger, the Commission subsequently decided that it did not have authority to require notification prior to a merger. It therefore currently requires that firms covered by these programs notify the Commission after they have entered into a merger agreement.

[9] Federal Trade Commission, *Enforcement Policy with Respect to Vertical Mergers in the Cement Industry*, January 3, 1967, pp. 11–12.

is the merger activity of the relatively few large corporations that should be monitored most closely because they control the bulk of the business in most industries.

THE APPROPRIATE STANDARD FOR GRANTING PRELIMINARY INJUNCTIONS

The root of the problem of inadequate relief discussed earlier is that the acquired firm loses its identity as a separate corporation during a legal proceeding. The most successful relief has been in cases where the court granted a preliminary injunction enjoining the merger until it was decided on its merits. But the DOJ has a poor record in obtaining such injunctions (Table 4). During 1958–1974, it received 29 (49 percent) of the preliminary injunctions requested,[10] of which 15 percent were only partial injunctions. Its record was very poor even in horizontal merger cases, where it was awarded full injunctions in only 42 percent of the cases requested. The actual picture is more dismal than this, however, since the government usually attempts to obtain such injunctions only in horizontal and vertical cases. Its track record is so poor in conglomerate cases that it rarely requests injunctions in such cases.

I therefore agree with the provisions of Section 7A(d)(3) which shifts the burden of proof by requiring that defendants prove that the government "does not have a reasonable probability of ultimately prevailing on the merits. . . ."

TABLE 4.—PRELIMINARY INJUNCTIONS RECEIVED BY THE DEPARTMENT OF JUSTICE IN MERGER CASES, 1955-74, CLASSIFIED BY TYPE OF MERGER CHALLENGED

Type of merger	Total	Full injunctions: Denied	Full injunctions: Granted: With consent	Full injunctions: Granted: Without consent	Partial injunctions: Denied	Partial injunctions: Granted: With consent	Partial injunctions: Granted: Without consent
Horizontal	41	17	9	8	2	3	2
Vertical	5	2	1	2			
Conglomerate	13	9	1	2		1	
Total	59	28	11	12	2	4	2

Source: Nature of injunctive relief based on Department of Justice submission hearings before Subcommittee on Antitrust and Monopoly, Committee on Judiciary, U.S. Senate, on S. 1284, pt. 2, app., pp. 1009–12, May 7, 1975. Classification of cases is by W. F. Mueller. The conglomerate merger category includes all mergers that are neither horizontal nor vertical.

Understandably, many have considered that this is an excessively harsh burden. One's judgment is influenced by what he hopes to achieve by merger enforcement. The record of the first 25 years of enforcing the Celler-Kefauver Act demonstrates that the effort has resulted in satisfactory divestiture in relatively few cases where preliminary injunctions were not issued. However, I fear the language of Section 7(d)(3) will result in unnecessary legal battles before the court grants a preliminary injunction. I therefore support the language that appeared in the original version of the Hart-Scott bill, S. 1284, which would have required the court to enter an order staying a merger if requested to do so by the FTC or DOJ after instituting a proceeding during a specified waiting period. This is essentially the same requirement as that of the Bank Merger Act of 1966, which provides for an automatic preliminary injunction against consummation of a merger challenged by the DOJ within 30 days of the banking agencies' approval of a merger. I believe the record of enforcement of the Bank Merger Act demonstrates the wisdom of the approach.

As a minimum, I believe the original Hart-Scott language should be applied to very large mergers, where the firms have sales or assets exceeding $250 million. Such mergers involve combining huge, generally conglomerate corporations. The potential competitive consequences usually are difficult to determine in a short time and divestiture is always particularly complex because of the corporation's huge size. Moreover, except in unfriendly takeovers, in my experience such large mergers require considerable study and negotiation prior to the

[10] Its prospects for success are even poorer than the above suggests, since in about half of the cases the injunctions were issued with the consent of the defendant.

final merger, so that delay of up to 90 days ordinarily would not result in serious private adverse consequences. But more importantly, the public has an especially large stake in such mergers because firms in this elite size class comprise most of the economy (over 80 percent of the assets of manufacturing and mining corporations). Because of this I would add a proviso to the bill requiring that in each case where such mergers are not challenged, the agency investigating the merger prepare a special public report explaining in detail why it believes the merger *does not* violate Section 7. This would not be an excessive burden since there are relatively few such acquisitions each year (only 14 during 1970–74). This would insure accountability by the enforcement agencies and would provide the Congress with information in determining whether new legislation is required to deal with such mergers.

THE SPECIAL PROBLEM OF TENDER OFFERS

There is a danger that if tender offers are treated identical to other mergers, the bill would frustrate this method of acquisition. Since tender offer mergers may be procompetitive, anticompetitive, or neutral with respect to competition, government policy should not discriminate against such mergers. To be successful, tender offers often require expeditious action, since delay enables the target company, which usually is unfriendly to the offer, to engage in various tactics to frustrate the takeover. Unless the merger is anticompetitive, public policy should remain neutral with respect to tender offers, i.e., it should not needlessly take steps that favor one private party over the other. The language of the bill favors, albeit unintentionally, the target company because it would delay the tender offer.

Because of the potential anticompetitive effects of such mergers, I would not favor exempting them entirely. Perhaps an alternative approach could be devised whereby the acquiring company be required to place the tendered stock (as well as all stock acquired prior to the offering) in escrow until such time as the decision is made as to whether to challenge the merger. This would permit the acquiring company to proceed with its tender offer at its own hazard. Because of the many legal technicalities involved, I am not sure of all the ramifications of such an approach. For example, if the merger is subsequently disallowed, a problem would exist in disposing of a large block of stock because it had not been traded for a period of time. Therefore, it might be appropriate to place a limit on the percentage of stock acquired (e.g., 51 percent), thereby insuring that an active market for the stock would continue to exist. This would facilitate divestiture should the government ultimately prevail on the merits.

I am not sure these suggestions, or those of others, will permit you to draft a statute that anticipates all the complications involved in tender offer mergers. I fear experience may prove the standard either too harsh or too lenient. You therefore might, in addition to drafting specific language, direct the FTC to use the rule-making authority provided in the bill to develop appropriate standards on this subject. The Commission in consultation with the DOJ might then perfect the appropriate policy toward such mergers based on their experience and continuity study of the problem.

CONCLUSIONS

Some persons may reason that H.R. 13131 is not needed because the merger pace has slackened since the record levels of 1967–70, when more manufacturing assets (of firms with assets over $10 million) were acquired than the combined total for all other years during 1948–66. It would be a gross mistake, however, to infer that this slowdown in merger activity makes it unnecessary to enact H.R. 13131. History teaches that the recent tempo of mergers is only temporary, since merger activity always abates during recessions. Indeed, the value of acquired assets has increased each year since 1972, when they reached their lowest level since 1960. Finally, merger activity of some companies has continued at a rapid pace despite the general slowdown. (For example, Beatrice Foods acquired over 30 companies during 1970–75.)

This is no time to be complacent about merger-induced industrial restructuring. Rather, the Congress should use this period of "relative" calm in merger activity to perfect the antitrust laws in preparation for the acceleration in mergers that will inevitably accompany the general improvement of economic activity.

TESTIMONY OF WILLARD MUELLER, FORMER CHIEF ECONOMIST, FEDERAL TRADE COMMISSION

Mr. MUELLER. Thank you, Mr. Chairman.

It is a pleasure to appear before you on a subject with which I have been concerned for many years.

Since I have a rather lengthy prepared statement, I shall summarize briefly my main points.

The Celler-Kefauver Act of 1950 is the most important antitrust law enacted in over half a century. In the first 25 years, the antitrust agencies have issued over 400 merger complaints, challenging 1,500 acquisitions with combined assets of almost $50 billion. Were it not for the act, many more American industries would have become excessively concentrated. Despite frequent lackluster enforcement, the overall record is one of the few success stories in the over eight decades of America's antitrust history.

Yet, from the outset, the merger enforcement effort was marred by a critical flaw. Whereas the antitrust agencies won many victories in the courtroom, in the end the loser often retained the spoils over which lengthy and costly legal battles had been fought.

The Government has achieved adequate divestitures in relatively few of the numerous mergers it has challenged. By successful divestiture I mean the reestablishment of the acquired unit as an independent enterprise and the restoration of competitive conditions as they existed before the merger. Numerous mergers have been concluded with (1) no divestiture, (2) token divestiture, or (3) divestiture of the acquired firm to another corporation rather than the restoration of the illegally acquired firm as an independent going concern. This represents a serious indictment of enforcement policy in this important statute.

The defects of present merger enforcement activities may be summarized as follows:

1. Defendants frequently now do not have an incentive to cooperate fully with the enforcement agencies and the courts in expediting litigation. Experience in this and other areas of antitrust has taught defendant attorneys that delay usually works to the defendant's advantage. The frequent result is needlessly long litigation, frequently exceeding a decade.

2. Once a merger is consummated, prolonged litigation results in the loss of competition during the period of litigation. If the merger is anticompetitive, the damage to the public interest continues so long as the merger remains intact.

(3) Protracted litigation and a history of inadequate relief tends to breed contempt for the effectiveness of the enforcement agencies. Rivals of a firm making an acquisition are encouraged to make "defensive mergers, particularly in the case of vertical mergers. Or, they simply may gamble that their acquisition will not be challenged, and that even if it is successfully challenged, they will not incur a serious economic penalty. At best, they may be permitted to keep acquired units while agreeing to make no further acquisitions; at worst, they will be required to divest the acquisition to another company, often at a profit over the original purchase price.

(4) Once a merger is fully consummated, it often is impossible to restore the state of competition existing prior to the merger. Fre-

quently acquired companies' assets are hopelessly scrambled with those of the acquired firm. Acquired plants may be closed; acquired brands may be eliminated, and key management of the acquired firm may be replaced.

(5) Where protracted litigation results in action cited above, this situation may implicitly or explicitly influence either the nature of the decision or the relief meted out by the FTC and the courts. Frequently, once assets have been fully scrambled, the FTC's relief has consisted solely in prohibitions against further mergers or in partial, token divestiture.

In summary, so long as firms are permitted to merge without first obtaining merger clearance, or before the case is litigated, there will be needlessly long litigation, adverse effects on the decisionmaking process of the FTC and the courts, and inadequate, or worse still, meaningless relief. I therefore believe the objectives of the Celler-Kefauver Act would be greatly enhanced if the Congress enacted H.R. 13131.

Pages 4 to 10 of my testimony summarize the nature of relief granted in FTC merger cases, which would have been covered by H.R. 13131; these are my general conclusions concerning these cases.

(1) Seven percent of the cases, measured by acquired assets, were dismissed. Even in these cases, however, the problem of divestiture after prolonged litigation may have influenced the decision to dismiss. The dismissed cases generally involve smaller acquisitions.

(2) Sixteen percent of the cases, measured by assets, resulted in total divestiture. Analyses of these cases indicate that most ended up by simply being acquired by other firms, and therefore, in my view, did not represent total victories. This class of cases also generally involved smaller mergers.

(3) Forty-four percent of the cases ended in only partial divestiture. In these cases less than half of the acquired assets were ultimately divested.

(4) Twenty-two percent of the cases resulted in no divestiture.

(5) In 10 percent of the cases divestiture has been ordered, but has not yet been accomplished. Divestiture in these cases is being delayed in some instances because of the great difficulty of divesting properties after the consummation of the merger.

On pages 11 to 14, I analyze the size of acquired companies in all FTC and Department of Justice cases brought during 1951–75, excluding banks and joint ventures. The prohibitions of H.R. 13131 would have covered less than 20 percent of the 1,290 acquisitions challenged, and would have covered about 60 percent of the complaints issued. If anything, in my judgment, the size standards of the bill should be designed to cover more mergers, not less, as some have suggested.

Pages 15 to 17 of my statement summarize my views regarding the proposed standards for staying mergers until an agency decides whether to challenge the merger, and if challenged, the standards for preliminary injunctions.

Although I believe the bill's approval of shifting the burden of proof in this provision is desirable, I personally prefer the original language of the Hart-Scott bill, S. 1284, which follows the approach of the Banking Act of 1966. I especially recommend such a standard be applied in cases of very large mergers.

Pages 17–18, I comment briefly on the special problem posed by tender-offer mergers. I certainly would not give them a total exemption; however, I offer some modest suggestions as to what might be done to deal with this special problem.

In conclusion, I urge the committee to use this period of relative calm in merger activity to perfect merger enforcement techniques in preparation for the reacceleration of merger activity that will inevitably occur as the economy improves.

Thank you.

Mr. MAZZOLI. Thank you very much, Sir. Dr. Elzinga, maybe you can proceed now, and then we will question you both as a panel.

TESTIMONY OF DR. KENNETH G. ELZINGA, PROFESSOR OF ECONOMICS, UNIVERSITY OF VIRGINIA

Mr. ELZINGA. Thank you, Mr. Chairman.

I genuinely appreciate the invitation to appear before this committee today to offer whatever guidance I can to the consideration of H.R. 13131. Please know that the views I express are my own, I represent no agency or interest group. I understand the committee prefers a discussion format, so I did not prepare a lengthy submission. I do have a brief predication which I would like to state for the record.

A premerger notification bill, from an economic standpoint, will involve both benefits and costs. It is important to recognize that. The potential economic benefits come through facilitating the prevention of anticompetitive mergers. The costs accrue if such a bill stops the consummation of legitimate mergers and if compliance with the bill requires significant time and effort on the part of those involved. I know of no economist who has been able to quantify the dollar magnitudes of the costs and benefits under various types of premerger notification bills. You are working in an area that requires informed judgment and a modicum of guesswork; in such matters, of course, reasonable people may disagree.

My own interest in premerger notification has been through research into the problem of unraveling section 7 violations. Parenthetically, Profesor Mueller, to whom I owe a number of intellectual debts, provoked my research in this area. Let me only reiterate for the record my finding that successful divestiture of a consummated acquisition is difficult, complicated, and, more pertinently, a rare occurrence in the annals of antimerger enforcement. From the economist's perspective, if the Government wins a merger suit and is unable to restore a viable independent center of initiative in the marketplace, its victory is probably a pyrrhic one. My following of section 7 relief has been more casual in the past few years, but my observation is that, while there may be some improvement in the track record, adequate structural relief is still the exception in section 7 enforcement. Of course the need for an H.R. 13131 would be lessened if anticompetitive mergers could be readily unscrambled. But I do not see the postmerger relief process ever attaining a high level of success.

Now, if I may address one other matter. I have studied H.R. 13131 and compared it to title V, the premerger notification component of S. 1284, the Antitrust Improvements Act of 1975. In my judgment the costs of S. 1284 outweighed the benefits, even though the benefits could have been significant. The bill you are considering is a substantial improvement over the Senate's earlier version. There will be costs to society in the operation of H.R. 13131; there are other antitrust reforms I think are more important; and there are parts of the bill I still find unfortunate. But, subject to these latter modifications, and enlightenment I receive this morning, I would press for its adoption.

Mr. MAZZOLI. Thank you very much, sir.

Professor Mueller, how long does it usually take to prepare a merger, prepare all the paperwork and agreements that might have to be reached among and between parties before really consummating a merger?

Mr. MUELLER. Well, it certainly varies greatly, primarily depending on two things: The size of the acquisition, and the personalities and nature of the acquiring firm. In my experience, in some cases, the decision to make an acquisition has been consummated in a very short period of time. But in large merger cases with which I am personally familiar, a great deal of study and analysis goes into the decision on the part of the businesses as to whether or not the merger should take place; and negotiation between the parties—except in the case of unfriendly takeovers—as to the terms involved; a great many legal matters have to be settled with respect to it, and so on.

So, it may require a couple of years, certainly many months.

Mr. MAZZOLI. The point I am driving at is one that you are aware of. If we were to delay these mergers by 40, 50, 60 days, or 90 days, would that in your professional judgment, and based on your study of the subject matter, cause any undue damage or any irreparable injury to parties to large mergers?

Mr. MUELLER. In my judgment, in the case of larger mergers, it certainly would not.

Mr. MAZZOLI. In the case of small ones it could?

Mr. MUELLER. I think there is a matter of balancing the costs and benefits, as Mr. Elzinga indicated. But here again, I do not really see any serious problems. In the case of a friendly takeover——

Mr. MAZZOLI. That is what we are talking about.

Mr. MUELLER. They are going to wait.

Mr. MAZZOLI. Under the terms of the bill one of the companies has to be at least a $100 million company; is that correct?

Mr. MUELLER. Right.

Mr. MAZZOLI. And the other one has to be at least a $10 million company. Now, what is your feeling on these limits, because you mention in your statement that the bill ought to go further than that, and it really ought to cover more than it does; what would be your estimate and your recommendations on that?

Mr. MUELLER. Well, first, as indicated in my testimony—I gave some numbers—as to just how many cases would have been covered by this legislation—about 60 percent of the complaints, and a much smaller percentage of the acquired units. So quite apart from mergers that are never challenged, the bill would cover a small percentage.

I personally think that the original standards in the Hart-Scott bill, where two companies, each having over $10 million, and with combined assets or sales over $100 million, should be covered because in fact a great many significant mergers fall into that category, and are mergers that maybe challenged.

Mr. MAZZOLI. Could you explain that again to me, I am not sure I followed it. What was the Hart-Scott language on that?

Mr. MUELLER. As I recall it, if a company, an acquiring company, say, had $99 million in assets or net sales, it would not be covered by this bill. But title V of S. 1284 would have provided that if such a company acquired a company with sales or assets of over $10 million, it would have been covered as well.

Mr. MAZZOLI. If one or the other party is over $10 million, or is it over $100 million?

Mr. MUELLER. Both parties over $10 million, and the total is over $100 million.

Mr. MAZZOLI. And that is your feeling of what should be in here, is that correct?

Mr. MUELLER. Yes.

Mr. MAZZOLI. And yet, you do feel there are really only very few mergers that cause the problem; is that also correct?

Mr. MUELLER. I'm not sure I understand.

Mr. MAZZOLI. Let me rephrase my question. I believe that you indicated in your statement that it's only a relatively few mergers, those by very big companies, that cause the problem, the problem of reduced competition, the problem of a tendency toward monopoly.

Mr. MUELLER. Well, I am most concerned about these very large mergers, and I am most worried about their treatment under this or any other bill because they are so complex to investigate, and also, there is such a long time period during which the parties negotiate their consummation, that my proposal is that in the very large mergers—and I am talking about $250 million——

Mr. MAZZOLI. $250 million.

Mr. MUELLER. Excuse me, $250 million, that in these cases there should be a stay comparable to that provided under the Bank Merger Act; and I would go further, because these corporations are so important to our economy, they account for the great bulk of it in most sectors, that the antitrust agencies should be required to make a public report as to why they do not challenge such a merger. It is just a matter of emphasis.

The facts show that a great many mergers that would not be covered by this legislation were found to be violations of the Clayton Act.

Mr. MAZZOLI. Do you have any estimate of how many of these big mergers, the ones you say are most troublesome, involving firms with $250 million or more, how many of those would be challenged under this bill, that may not have been under the present law?

Mr. MUELLER. I just looked over the merger statistics, and not more than 20 in the manufacturing sector, I think, were consummated during 1970–74.

Mr. MAZZOLI. You feel the public interest would be served if all 20 of those, just as a matter of fact, and a matter of course, would have to have not only a public report, but also be subject to all the examination and automatic stays available to the Department of Justice; is that your feeling?

Mr. MUELLER. Yes.

Mr. MAZZOLI. Thank you.

Dr. Elzinga, let me ask you, you mentioned the term "unfortunate" in your statement, and indicated that "There are some unfortunate aspects to the bill"; I just wonder if you could just generally give the committee your appraisal of this measure, and the reasons why some aspects are "unfortunate," and which sections those are.

Mr. ELZINGA. Certainly, I would be happy to do that.

My main problem is with subsection 7A(g) of the bill, which appears on page 11; I think that is the most "unfortunate" part of the bill. I have no objection to the provision in it whereby a judge can fashion a "hold separate" order, but I do think it is very inappropriate to place the court in what is essentially a price-setting business, which is a result of the provision whereby the court will set the price of the assets of the firm to be divested. There are a number of problems with this: If the judge sets a price that is too high; that is, a price that is above the present value of the divested, or to-be-divested subsidiary or group of assets, then there will be no buyer, and, consequently, no divestiture.

If the judge sets a price that is too low, economic analysis predicts that there will be a queue of buyers, there will be a lineup of people who will be anxious to purchase these assets, and somebody will have to make some kind of noneconomic decision as to who the lucky person in the queue will be, who will be able to purchase the assets.

On the other hand, if the judge happens to have the wisdom and the foresight to set a price exactly equal to the market value of those assets, well, then that is an unnecessary exercise. Consequently, I would recommend that some more thought be given to that particular provision of subsection (g).

I also am able to restrain my enthusiasm for the profit escrow account aspect of subsection (g). Let me just give you a numerical example of the type of problem that I foresee with that. If there is a firm that has been acquired in violation of section 7, and a divestiture order is entered; and let us assume the market value, or present value of that particular subsidiary is $10 million; and in the process that firm has earned $1 million in profits while it has been under the umbrella of its acquirer; then, once the divestiture order is entered, people will be willing to pay $10 million for that firm, because they will receive the $10 firm, plus, of course, the $1 million that happens to sit in that pouch. If there is no such escrow account, the subsidiary under the divestiture order will be worth only $10 million.

I cannot see that it adds anything to the bill if there are profits of x million in escrow or not. If there are, one must simply add x million to the divestiture price.

On the other hand, the escrow account does, I submit, open up a Pandora's box. I am no accountant, Mr. Chairman, but I predict that the accounting complexities of precisely how that profit escrow will be set up, how it will be calculated, how it will be kept in escrow, will be significant. If there is a large amount of money that is involved here—and in some mergers that will be the case—there will be a great deal of time and effort expended by people on each side to manipulate, or fudge that particular account.

What I am afraid is going to happen is that that escrow account is going to be counterproductive; it is going to be another example of a governmental program having just the opposite effect of that intended. The effect of the escrow provision, I predict, will be to delay relief decrees. Studies indicate that it is hard enough to get effective structural relief in merger cases; and if there is a $5, or $10, or $15 million kitty sitting off on the side that might be made available, then there will be efforts to secure that, or change the magnitude of the figure; and it will only serve to delay what is already a very difficult and time-consuming process.

Finally, with regard to this same subsection, there is language in it which, from a layman's standpoint—and I stress I am not a lawyer and I have some difficulty reading the bill—from a layman's standpoint it seems to restrict the freedom of the court to enact structural relief that might require greater divestiture than those assets that had been acquired in violation of section 7. It might very well be that by the time diverstiture is to take place, that for a viable, independent center of initiative to be reestablished in the marketplace, a court will have to fashion a relief decree that requires the defendant firm to give up more than it had acquired, so that what it gives up will be a viable firm that can survive in what now may be a very changed market situation.

So, I would hate to see any such limitation put upon the court in fashioning relief decrees, if the language of the bill indeed provides that limitation.

Finally, let me mention two other items about the bill, about which I have caveats. If the language of the bill allows the premerger notification period to be open-ended through the request for additional information, then I would be opposed to the bill in that respect.

I also would call your attention and the committee's attention to one part of the testimony of Prof. Joseph Brodley before the Senate, when it was considering the Antitrust Improvement Act of 1975. He suggested in his testimony that there should be some type of penalty to insure that the premerger information provided to the Government agencies would be kept confidential by their personnel. Given the great value of this information and the importance that it be kept in confidence, I thought it was a prudent recommendation, and I would concur with it. I say this in the same spirit that I am sure he did; it is not a reflection of low esteem that I have on the part of the enforcement agencies, for my opinion of them is quite to the contrary; but I still believe that would be a prudent step for this committee to consider.

Mr. MAZZOLI. Thank you very much, Dr. Elzinga and Dr. Mueller. The gentleman from Illinois is recognized for 5 minutes.

Mr. MCCLORY. Thank you, Mr. Chairman.

Are either of you aware, or can you tell us of successful divestitures that have occurred without damage or injury?

Mr. MUELLER. The most successful cases are those in which a preliminary injunction was awarded. Bethlehem-Youngstown, for example, this was an enormous merger, and the Government was awarded a preliminary injunction during the course of that trial. And at the end of the trial, after a Governemnt victory, Youngstown was still a going concern.

Had it been absorbed by Bethlehem. I suspect it would be similar to the situation we have in Kennecott-Peabody today, where Kennecott must now find someone to buy Peabody. When you have a very large company such as this, it is difficult to reestablish it as an independent going concern after the merger is completed.

Apart from the cases where there are preliminary injunctions, I really find very few successful divestitures. One that comes to mind, that I was personally involved in, was the *Procter & Gamble-Clorox* case. There, after many years of litigation and with the benefit of a Supreme Court decision ordering divestiture, the Federal Trade Commission ultimately was able to have Clorox reestablished as a going concern; but I do not consider that a completely satisfactory situation, because even here, during the period of the litigation, I think there were some adverse competitive effects, and an enormous amount of resources were involved in trying to reestablish this.

Mr. ELZINGA. Congressman McClory, may I respond to your question, too?

Mr. MCCLORY. Yes.

Mr. ELZINGA. I think it is important that the record show that there have been some cases where the Government has been able to secure successful relief. In a study that I did of early relief decrees under section 7 cases I concluded that *Bethlehem Steel*, which Professor Muller mentioned, and in addition the *American Radiator*, *National Sugar*, *Spalding*, *Standard Oil of Ohio*, and *Union Bag* cases, all resulted in successful relief decrees.

I think what is distressing to Professor Mueller, myself, and others, is that these are rare, these are exceptions that occur, but they are not the general result in section 7 enforcement.

Mr. MCCLORY. You mentioned, Dr. Elzinga, the costs involved. Now, it seems to me that the costs we are giving our attention to are the terrible costs to the Government of protracted litigation, the terrible costs to the whole private enterprise system, particularly to the companies with their attorneys' fees and accountants' fees. But in addition to that, what about the cost to the public, and what about the cost to competing companies that are adversely affected by the mergers which are eventually found to be illegal, as well as the costs of efforts then made to try to unscramble them?

I know when our distinguished next witness, Chairman Emanuel Celler, was chairman of the committee, we studied a great many mergers, and the illegality of some of these mergers. One of the large conglomerates we examined was ITT, and ITT had merged with, or absorbed an insurance company, Hartford Fire Insurance Co., and by the time we were investigating that merger, the assets, the liquid assets, had been diverted to other acquisitions. How do you effect a reversal of that kind of merger?

It presented a dilemma which I think we are trying to meet with this legislation. Have you considered those kinds of costs that are implicit in the illegal merger—the public costs, the costs to competitive businesses, and the general costs to the private enterprise system?

Mr. ELZINGA. Yes; I certainly have. I am an economist by training, so that is my approach to a problem, to try and weigh the costs and the benefits. There is no question that there are benefits to society, to consumers specifically, from stringent and effective antimerger enforcement. The ITT cases you mentioned were particularly unfortunate ones, and ones with which I at one time was involved, trying to secure a different outcome than the unfortunate one which occurred in those three merger cases.

But of course, in addition to these benefits, I am mindful of the costs, and the costs, as you mentioned, are those of the reporting requirements, the legal fees, the administrative costs, all of which are ultimately borne by the consumers as well. That is why we have to try and balance these, that is why at the extreme we would not want a premerger notification bill that required every merger to be reported because many of them are harmless, or procompetitive, and there is no need to inflict on these companies the cost of reporting.

On the other hand, there are significant mergers that have anticompetitive effects, and we know now, the track record is established, the record is in, that it is important the Government know of those in advance, so they can prepare to fight them.

Mr. McClory. I just wanted to make this other comment, to follow up a question the chairman asked, and that is, do you have estimates of how many illegal mergers would be prevented by this legislation, which now go undetected, or are unchallenged because we do not have the information, so we say, "Well, why bother, we don't have the information," and we just let them slide by. Do you have any estimates on that?

Mr. Elzinga. I would defer to Professor Mueller on that, he is the expert on merger statistics.

Mr. Mueller. We do not know how many would have been brought, that were not brought. There are a couple of kinds of evidence. One, we would have had more effective relief, I think, had we had this legislation during the years.

If I might digress a little bit because you raised the *ITT–Hartford* case. One of the really unfortunate results, I believe, is not simply that you do not get adequate relief, but that it influences the decisionmaking process. In the case of *ITT-Hartford*, if we accept the explanation given for settling that case, a major factor for not divesting Hartford was that it would have had all kinds of adverse effects. At the time they were merging they said, "Well, we will hold separate, and relief can come later", and the Government did not get a preliminary injunction; but then, when they came to settlement, the presentation made to the Justice Department was that there would be a ripple effect on the economy, it would hurt stockholders, and all that. Some of that may be true. But Professor Elzinga and I were both involved in the *ITT* cases, I as a witness, and he as an adviser to the Assistant Attorney General, and I guess neither of us were really persuaded by these representations.

Now, as to how many cases would be affected by this bill, how many more cases would be brought, I think we can learn a little bit from the experience with the Bank Merger Act of 1966. Since that legislation was enacted, the "tempo of enforcement" by the Justice Department in the bank merger area has increased very substantially. I have some numbers on that, if you are interested. Between 1960 and 1966, the Justice Department had challenged 18 bank mergers, which was about 19 percent of all the mergers it challenged. Since then it has challenged 57, which represented 42 percent. I think this represented a change in their resources, due to the enforcement of this act, because it now became easier to enforce the law, I think; and in my judgment, the overall impact has been salutary.

Mr. McCLORY. Thank you.

Mr. MAZZOLI. The gentleman's time has expired. The gentlelady from Texas.

Miss JORDAN. Thank you, Mr. Chairman.

I apologize for not hearing all of the testimony of you gentlemen, but I seem to, as I hear what you are saying and summarize your statements, to sense a tilt in the direction that the public interest is not going to be substantially served, even by the enactment of this legislation before us, that there are other things which must occur if the action of the Congress is to truly be in the public interest. Am I right or wrong about that tilt?

Mr. MUELLER. I think the public interest will be served by this legislation. I personally think additional things should be done, both with respect to this bill, and with respect to enforcing the Celler-Kefauver Act generally.

Miss JORDAN. Now, could you tell me what some of those other things are that you are talking about, that we ought to do?

Mr. MUELLER. Well, I am not sure that you were in when I discussed this, but one matter relates specifically to this legislation. I feel that in the case of very large mergers the standard initially set in S. 1284 should be applied, that the merger should simply be stayed; the Government should not have to go through a lot of legal maneuvers that consume a lot of time and distract the parties from the major issue involved. The merger should be stayed until the agencies make a decision to challenge, and then the mergers should be enjoined until it is litigated.

I am talking about very large mergers, say, involving firms with $250 million and more, that represent such important factors in our economy that they are almost quasi-public institutions; when one of these is acquired the public has an interest in it.

So, I would require special standards for them in terms of this bill, in terms of the stay requirement; and also I propose that the agencies be required to actually make a report in each of these cases as to why they do not violate the law, if that is the conclusion.

Miss. JORDAN. And do you feel that we have the capability of enforcing such legislation if it impacts on such large, almost "public interest" entities?

Mr. MUELLER. You mean the existing structure?

Miss JORDAN. The existing enforcement structure.

Mr. MUELLER. We have the capacity to challenge such mergers, but I don't think we have dealt with them adequately; and the agencies have not investigated them fully enough because they have not been under the kind of mandate that such a change would give them.

Miss JORDAN. I just received a note here by staff that points to the provision in this piece of legislation that provides for an automatic preliminary injunction provision that would seem to cover that problem that you mentioned.

Mr. MUELLER. Well, perhaps I don't understand all the legal details, but I understand that they would still have to go before the court and make some showing in order to get a preliminary injunction, despite the shift in the burden of proof, and that the defendants would have to show that the public interest would not be injured, before the merger could be completed.

In these very large mergers, where you have enormous corporations that are conglomerated, it takes a lot of digging to find out what is really involved. I mentioned the *Kennecott* case before, and in that instance it just happened that the companies were not in any great hurry to get any action from the agencies, at least they did not want to precipitate a challenge, and we had considerable time to investigate it. In fact, I was investigating it for the purpose of demonstrating to the Commission that here was the largest merger of the year and it was not covered by existing legislation. But after getting a large number of documents from the company, we found out things about it that we would never have gotten in our original discovery, or original request, and at least to me the merger was very clearly anticompetitive, and it could perhaps even have been challenged under the Sherman Act. It is something that could not—at least by the staff of the Federal Trade Commission—could not have been done in a short period of time, and I am afraid they would have had trouble persuading—let me put it the other way: I think Arthur Dean, who represented Kennecott, could have persuaded the judge that the public was not going to be injured, if that indeed was the case, and that they should thus be permitted to go ahead and merge during the period of litigation.

This is what happened. We now have the companies completely merged, though the merger was later ruled illegal, and now there is an order to divest, but the FTC is having great difficulties divesting the company.

Mr. MAZZOLI. The gentlelady's time has expired. The gentleman from Maine.

Mr. COHEN. Thank you, Mr. Chairman.

I have a couple of questions. On page 4 of the bill, subsection (3), the notification provision, I assume, would require a substantial document to say the least, containing a great deal of information not only about the external sales, but the internal operations as well, a fairly detailed analysis of both companies; would that be fair?

Mr. ELZINGA. I think it would have to be, in order for the document to be worthwhile and productive.

Mr. COHEN. Is that information that would be kept confidential?

Mr. ELZINGA. In my opinion it certainly should be. In fact earlier, Mr. Cohen, before you came in, I suggested there be a provision to insure, perhaps by force of penalty, that the personnel of the agencies keep these data confidential.

Mr. COHEN. What about at the completion of all the notification, the approval or the disapproval, when the question is finally resolved? Should that information be returned to the company submitting it?

Mr. ELZINGA. In my opinion it should be, yes.

Mr. COHEN. We had a similar controversy when we were talking about CID's under H.R. 13489, in terms of that information being supplied to the Justice Department and other agencies, as to whether or not that material should be returned at the completion of their investigation. But here, clearly, I think, we should have that written into the law that such information and documentation ought to be returned to the company supplying it, so the Federal Government does not have a dossier—I think is the phrase used by Congressman McClory—on the individual companies, allowing the Government to monitor them from that point of view.

Mr. MUELLER. I don't think I would agree with my friend Mr. Elzinga. We have become obsessed in this country with corporate secrecy, and have tended to treat corporations in the same way we do private individuals, and call them persons; the evolution of the law has been responsible for this. I see nothing wrong with the Federal Trade Commission, for example, keeping, as they do at the present time, the merger notification information that they get from the corporations.

Mr. COHEN. If the issue has been resolved favorably toward the company, what need is served by the Federal Trade Commission keeping that information?

Mr. MUELLER. I think the issue has not being resolved finally, in many cases for the Commission at the end of the time period often simply has not yet decided to bring a case against a company.

Mr. COHEN. You say the issue is not resolved. Let me switch to page 9. I think Miss Jordan just raised the issue of the preliminary injunction. Here I have a problem in which there is a classic confrontation between one's adherence to a philosophy and adherence toward procedure. Philosophically I find it rather offensive that suddenly we are going to shift the burden of proof to private companies or private individuals to make their case to the satisfaction of the courts, where classically, of course, it is just the other way around in our system, with the Government required to make its case to the court's satisfaction.

I also understand the procedural desirability from the Government's point of view, but I have some problem here where it seems to me we have put a probability upon a probability. On the one hand, in order for a company to prevail, they have to show, No. 1 that the Government does not have a reasonable probability of ultimately prevailing. That is a very difficult burden of proof to me. You have to make a very clear-cut case before the court would resolve that issue.

And the second test is that they will be irreparably injured. My understanding is that, under this bill, loss of profits is not an "irreparable injury." Is that your understanding as well?

Mr. MUELLER. I don't know about the loss of profits aspect, but this matter of shifting the burden of proof in this version of the bill, I think, illustrates the way in which, after a bill has been watered down by putting in language like this, it is then attacked——

Mr. COHEN. Language like what?

Mr. MUELLER. The shifting of the burden of proof. Originally S. 1284 simply would have stopped the merger, as I recall, and there was not any opportunity for the defendant to come in and make a case against a preliminary injunction.

Mr. COHEN. Just a moment: A bill may be submitted, but that does not make it the rule of law in this country. The traditional rule of law in our system is that the Government has the burden of proof. That is not altered by someone filing a bill in the Senate, or in this body.

Now we have to come to the philosophical question: Do we want to make a change?

Mr. MUELLER. I am not sure that is the philosophy in all areas of Government. Certainly, with respect to harmful drugs, I think, the burden of proof in recent years has been changed. With respect to advertising it used to be simply, "Thou shalt not tell a lie", but now it is, "Thou shalt tell the truth", and you have to have ad substantiation. With respect to corporations we have gotten back to——

Mr. COHEN. That is not in the field of litigation. We are talking about litigation in the courts. Who bears the burden of proof under this proposal?

Mr. MUELLER. Under this proposal the burden of proof is on the defendant.

Mr. COHEN. To show that the Government does not have a reasonable probability of ultimately prevailing on the merits. So, you have two probabilities here: One, that you probably will not interfere with competition; and two, you then have a further burden of showing that the Government does not have a reasonable probability of prevailing ultimately. That is a very stiff burden to meet.

Mr. MUELLER. Yes.

Mr. MAZZOLI. I'm sorry, the gentleman's time has expired. The gentleman from Iowa?

Mr. MEZVINSKY. I am interested in how we handle the argument, the FTC has had a merger notification program, and I see in testimony that we are going to have given to us by the chamber of commerce representatives, that that is an adequate enough program; that merger activity can be clearly shown; that there is good reporting; and they say this suggests that few, if any, major acquisitions go unreported.

Why is the FTC merger notification program inadequate?

Mr. MUELLER. Well, in a number of respects. First, the size limit which, by the way, I was responsible for setting. I recommended that program to the FTC. I had been trying to get such a program adopted beginning in the early 1960's, and never had a majority in the Commission. Finally, in two fields, by a three-two vote, they required premerger notification in food retailing and cement. Then came the great merger movement of the late 1960's. After Mr. McClaren came in and took an aggressive stance on conglomerates, I again went to the Commission in an attempt to get it to adopt McClaren's policy, and, for reenforcement, to have a premerger notification program, to give this enforcement policy greater credibility and effectiveness.

I suggested the $250 million limit because the concern of the day was with very large mergers. In retrospect, for a general program, it should go down to $100 million, I think, as a minimum. I indicate that background partly to indicate how this program came about.

Second, of course, although we originally thought the Commission authority for premerger notification, the Commission later concluded that it simply had authority of notification, because it could not require companies to give it information before they committed an act, and the act was the entry into an agreement in principle to merge.

So, now it is simply a notification program. In fact, first they give notification, and I believe 10 days later they submit information. So, the information is not submitted prior to the merger in many cases.

Mr. MEZVINSKY. In most cases prior, or after?

Mr. MUELLER. Pardon?

Mr. MEZVINSKY. Are most of the cases that have been brought to the FTC made prior, or are they actually in fact after the merger?

Mr. MUELLER. Oh, the vast majority are after.

Mr. ELZINGA. No question about that.

Mr. MUELLER. And then the crucial point, of course, is that the FTC program gives them no authority to stay the merger, which is more important than the notification. You can pick up the Wall Street Journal and find out about the big mergers about the same time the FTC learns about them.

But the main difference is that that program does not give the authority to the Commission to stay a merger.

Mr. MEZVINSKY. Let me raise a point that you raised in your conclusion, about the likelihood of mergers after recessionary activity. You point out that when we are in a recession, that merger activity abates, that we should not take that for granted because, as economic activity improves, merger activity will also accelerate.

Is that just based on historical observation, or do you foresee from the climate throughout the country, or your own research, that we are going to have more merger activity in the latter part of the 1970's; and to an accelerated degree because supposedly we will be coming out of a recession?

Mr. MUELLER. Well, based on historical experience, the correlation is pretty close. I think the relationship is a causal one, there are reasons why firms are more likely to merge during periods of active business activity than in recessions and depressions.

I see no reason why that will not happen again, nor do businessmen. There is talk about it in the business press. Last week's Time magazine showed how merger activity, the total numbers, had hit a low point at about the time the stock market hit a low point in 1974, and now there was a resurgence in merger activity. I think there is every reason to believe that merger activity will again accelerate if the recession abates.

Mr. MAZZOLI. I'm sorry, the gentleman's time has expired. With the committee's indulgence, the gentleman from Maine wanted to pursue one point for another minute or so.

Mr. COHEN. Thank you, Mr. Chairman. I just wanted to take issue with the statement made that this proposal of shifting the burden of proof was consistent with other existing laws, and you referred specifically to the truth in lending and truth in labeling, but I think that is not a very good analogy. This prenotification might be consistent with truth in lending or labeling in that a company may have to print a label on a product saying what it contains; but the Federal Government still has the burden of proof in challenging the validity, or the accuracy of that label. That is entirely different than shifting the burden to the company to demonstrate to the satisfaction of the Federal Government that it contains exactly what the label says.

Second. I think we could probably label portions of this bill "From Here to Eternity." On page 7, there doesn't seem to be any kind of restriction, in my opinion, in subsection (c)(2). What is the total time limit involved?

We have the initial 30-day period. Within that period the Federal Trade Commission, or the Assistant Attorney General, can request an extension for further information. I assume it takes some time for the companies to supply that information, and the additional 20-day period does not start running until they actually receive it. There seems to be no limitation upon how long that can be dragged out.

Mr. ELZINGA. Congressman Cohen, I consider that one of the weaknesses of the bill.

Mr. COHEN. How would you recommend we change it?

Mr. ELZINGA. I cannot suggest specific language, of course; that is not my skill. What I would like to see is a 60-, or at most a 120-day "lid", or limit placed upon the premerger waiting period.

In discussing this bill with interested observers, I have heard the argument that if there was a lid, or a limit placed, that it would give defendant firms, or firms that were being investigated, an incentive to delay in the provision of information. I recognize that may be a problem. But on the other hand, it seems to me if firms were to delay, in a conscious fashion in order to not comply with the request for legitimate information that the Government has requested, the Government has the very easy option of going into court to seek a temporary restraining order against the merger. And in fact, I suspect it would make a more telling argument in securing one if the Government could show that the firms under investigation had not complied with the request for this information.

Mr. COHEN. Thank you, Mr. Chairman.

Mr. MAZZOLI. Thank you very much.

Gentleman, thank you very much for your help this morning, it has been very useful. I might say, if you would be prepared to perhaps receive some written questions that we were not able to propound this morning, that perhaps you could provide answers to them for us.

Thank you very much.

Our next witness is James Johnstone, who worked for several years in the Department of Justice, and is now with the law firm of Kirkland, Ellis & Rowe. He is accompanied by Barry Friedman, and will be testifying on behalf of the U.S. Chamber of Commerce.

Mr. Johnstone has carefully examined this bill and has many reservations about it. I am sure the subcommittee will be greatly aided by his testimony, and will give his observations the fullest consideration.

Mr. Johnstone, I welcome you to the Committee in Chairman Rodino's absence. As you have heard the gentlemen before you do, perhaps you can summarize your statement, or at least give us the basic elements of it, and then we can get into the questions. Thank you.

[The prepared statement of Mr. Johnstone follows:]

PREPARED STATEMENT OF JAMES M. JOHNSTONE, REPRESENTING THE U.S. CHAMBER OF COMMERCE

My name is James M. Johnstone. I am a member of the law firm of Kirkland, Ellis & Rowe in Washington, D.C. I have practiced antitrust law throughout my professional career, beginning as a trial attorney with the Justice Department's Antitrust Division, in 1960. My firm is a member of the Chamber of Commerce of the United States and I serve on the National Chamber's FTC Issues Working Group. I appreciate the opportunity to present the views of the Chamber on H.R. 13131.

The Chamber is opposed to H.R. 13131. Without any adequate showing of necessity, this proposed legislation would drastically change the legal procedures and burdens of proof applicable to most corporate mergers or acquisitions. The practical effect of the bill would be to create a pre-clearance system for acquisitions in the unregulated sectors of the economy, and to substitute FTC or Antitrust Division discretion for the decisions of the Courts in determining whether or not proposed mergers or acquisitions could take place.

In our view, such drastic legislative change could be justified, if at all, only if it were shown: (1) that mergers in general, and secret mergers or acquisitions in particular, posed a unique and dangerous threat to a competitive economy; and (2) that our Federal Courts had demonstrably failed to implement national policies against anti-competitive acquisitions in their rulings on preliminary and final relief.

I submit that neither of these propositions can be supported.

In the first place, mergers and acquisitions, as such, are not necessarily illegal or anti-competitive. The current Chief of the Antitrust Division, Thomas Kauper, testified in hearings on H.R. 13131's counterpart, Title V of S. 1284, that "many mergers are pro-competitive, or promote efficiencies. Many more are economically or competitively neutral." Clayton Act Section 7 accordingly does not outlaw all acquisitions but only those which "may substantially lessen competition" in a "line of commerce" and "section of the country." The enforcement agencies currently challenge only a few of the mergers or acquisitions which occur, and they have recently lost some of these challenges, suggesting that suspected Section 7 violations are relatively few, and proven violations still fewer.

Second, the total number of mergers and acquisitions has declined sharply in recent years. By several different measurements, merger activity in the 1974–75 period appears to have declined to only about one-third of the level of the peak years in the late 60's, a period during which the Congress failed to act on pre-merger notification proposals much less drastic than those contained in H.R. 13131.

Third, there is no reason to believe that significant anti-competitive acquisitions occur in such secrecy as to preclude timely action by the anti-trust enforcement agencies or to warrant H.R. 13131's pre-merger notification requirements.

The FTC has long had a Merger Notification Program. This program exists *in addition to* special FTC notification programs applicable to the cement and food distribution industries, as well as numerous FTC orders requiring advance FTC approval of acquisitions by particular companies. Under the Merger Notification Program, which applies to acquisitions combining assets or sales of $250,000,000 or more where the acquired company has assets or sales of $100,000,000 or more, the FTC received some 289 reports in 1974 and 299 in 1975. This suggests that few, if any, major acquisitions go unreported.[1]

Reports to the FTC are not the only way in which proposed acquisitions are made public. Tender offers must be publicized well in advance of the closing date. Publicly held companies generally announce major acquisition negotiations at a relatively early stage.

Thus, there are few, if any, secret acquisitions. Usually, the fact that an acquisition may take place is publicly known in advance of the closing date. Moreover, much information concerning publicly held companies is readily available to the enforcement agencies from the SEC and otherwise, and although there may be exceptions, many corporations do cooperate expeditiously with the FTC and Justice Department information requests in such cases.

There are many practical incentives encouraging companies in an acquisition to cooperate with the antitrust enforcement authorities. Because of the substantial cost of litigation and divestiture proceedings, potential merger partners often want to know the enforcement agencies' intentions *before* consummating their transactions. Prompt disclosure of requested information is usually necessary in this situation.

H.R. 13131 does not stop at providing a pre-merger notification system. It further provides for (1) automatically extended stays of acquisitions if either the Justice Department or the FTC decided to seek additional information following receipt of a notification, (2) automatic Temporary Restraining Orders against acquisitions, whenever either enforcement agency certifies to the Court that it "believes the public interest requires" such relief, and (3) virtually automatic preliminary injunctions against any mergers or acquisitions as to which such relief is sought. Such injunctions are assured, in practice, by elimi-

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[1] Reports are received from both acquiring and acquired companies. The total reports figure in the text presumably represents about half as many reported acquisitions. FTC data on the total number of large acquisitions actually occurring is not directly comparable, but FTC and other data suggest that the number of large acquisitions actually occurrin is probably less than the number reported.

nating the plaintiff's traditional burden of proof and imposing an impossible burden on the defendants to show either that the government "does not have a reasonable probability of success" or that "they will be irreparably injured" (*without* considering the "anticipated financial benefits" of the proposed acquisition or merger).

Such provisions change merger enforcement from a traditional antitrust approach in which the government must prove a violation in order to obtain relief to a "regulated industry" approach in which the parties to a proposed acquisition must obtain enforcement agency approval before proceeding.

Under existing law, preliminary injunctions require a showing by the enforcement agencies of probability of success on the merits and, in addition, a balancing of the equities. Using these traditional standards, the enforcement agencies have obtained preliminary relief in many Section 7 cases. There is certainly no clear pattern of hostility by the Courts to such relief. At the same time, Courts have recognized that "there are 'strong reasons for not making the prohibitions of Section 7 so extensive as to damage seriously the market for capital assets, or so broad as to interfere materially with mergers that are procompetitive . . .'" *Missouri Portland Cement Company* v. *Cargill Incorporated*, 498 F.2d 851, 854 (2d Cir.) *cert. denied*, 419 U.S. 883 (Oct. 15, 1974) (Friendly, J., reversing preliminary injunction granted in private merger litigation).

The proposed legislation makes it virtually impossible for the preliminary injunction Court to weigh the merits of the government's case (*unless* the defendants carry the impossible burden of proving that the government has no case). By so doing, the bill minimizes the chances that the merits will ever be considered since few acquisition proposals survive prohibitory preliminary injunctions. Moreover, the bill virtually eliminates any balancing of the equities, and curbs the Courts' discretion to enter relief short of a complete prohibition against the merger or acquisition (e.g., a hold separate order), unless the enforcement agencies forego or lose complete injunctive relief and seek lesser relief under subparagraph (g).

I am aware of no developments in the merger/antitrust area which could justify such a drastic step away from traditional standards of equity and antitrust jurisprudence. To be sure, the enforcement agencies have not always won when they sought preliminary relief against acquisitions in the Courts. But such a mixed "success" record suggests that the Courts are doing their job of weighing the evidence and the equities. The government does not win every merger case after trial, either. Moreover, to the extent that past results in preliminary injunction cases may reflect the largely unsupervised discretion of individual District Judges, the 1974 Amendments to the Expediting Act, which provide for the appeal of preliminary injunction rulings in merger cases to the United States Courts of Appeal, should bring a greater degree of uniformity and predictability to this area.

In this testimony, I have not discussed in detail other problems of the bill such as the $100 million/$10 million trigger for pre-merger notification, the subsequent waiting period if additional information is sought, or the provisions of subparagraph (g) regarding disgorgement of profits. However, our silence on these provisions should not be construed as support and we will be prepared to discuss them during our oral presentation.

In sum, we believe that the pre-merger notification provisions of H.R. 13131 are unnecessary at best. Those provisions of the bill relating to automatic Temporary Restraining Orders and preliminary injunctions reflect a drastic change in antitrust principles which cannot be justified by any actual danger to competition arising from mergers and acquisitions, and which will inhibit the free flow of capital in a competitive economy.

TESTIMONY OF JAMES M. JOHNSTONE, ESQ., REPRESENTING THE U.S. CHAMBER OF COMMERCE

Mr. JOHNSTONE. Thank you, Chairman Mazzoli.

I would like to set the record straight on the extent of my Justice Department experience. My first 2 years in practice were spent there, and I have been with my present firm ever since.

I do appreciate the opportunity to present the views of the chamber of commerce on H.R. 13131.

We are opposed to the legislation. We do not believe there has been an adequate showing of necessity for the drastic changes which this proposed legislation would make in the legal procedures, and burdens of proof applicable to corporate mergers, or acquisitions in the non-regulated sector of the economy. The practical effect of the bill would be to create a premerger clearance system for acquisitions in the unregulated sectors of the economy, and to substitute FTC or Antitrust Division discretion for the decisions of the courts in determining whether or not proposed mergers or acquisitions may take place.

I think such a drastic change could be justified, if at all, only if it were shown clearly that mergers in general, and secret mergers in particular, posed a unique and dangerous threat to the competitive economy; and secondly, that the courts had demonstrably failed to implement national policy against anticompetitive acquisitions. I don't think either of those propositions can be supported.

In the first place, I think there is general agreement that mergers and acquisition in and of themselves are not inherently anticompetitive. I quoted in my prepared statement the testimony of Assistant Attorney General Kauper, and I think there has been other testimony before the Senate, as well as here, on that point.

Second, the total number of mergers and acquisitions has declined sharply in recent years. Again, I think that is a matter on which there is general agreement.

Third, there is no reason to believe that any significant anticompetitive acquisitions are occurring in such secrecy as to preclude timely action by the antitrust enforcement agencies, or to warrant H.R. 13131's premerger notification requirement.

The FTC has long had a merger notification program, and this program exists in addition to special FTC notification programs applicable to the cement and food distribution industries, and also to the dairy industry. Also, there are numerous FTC orders which require advance FTC approval of acquisitions by particular companies.

Under the present FTC merger notification program—which applies to acquisitions combining assets, or sales, of $250 million or more, where the acquired company has assets or annual sales of $10 million or more—the FTC received some 289 reports in 1974 and 299 in 1975. This suggests that few, if any, major acquisitions go unreported.

Now, as a practical matter, I think it is probable that most of those reports do come in before those acquisitions are closed. The requirement is that the report be made 10 days after "agreement in principle," and with all the difficulties that there are in actually putting together an acquisition of any size, 10 days after agreement in principle is, I think, quite likely to be some time prior to the closing date.

Reports to the FTC are not the only way in which proposed acquisitions are made public, and I believe Mr. Kauper was here earlier at the hearings before this committee, and he outlined the various sources of information.

In short, I do not think there are very many, if any, secret acquisitions. The fact that the acquisition is going to take place, I think, is known publicly in advance of the closing date.

Information concerning the acquisition is readily avaliable to the enforcement agencies from the SEC and from many other sources, and, although there may be exceptions, from my experience corporations do cooperate expeditiously with requests for information from the agencies. There are many practical reasons why companies will cooperate with the antitrust enforcement authorities. Because of the cost of litigation and divestiture proceedings, potential merger partners often want to know the agencies' intentions before consummating their transactions. Prompt disclosure of requested information is usually necessary to accomplish this.

The bill does not stop at providing premerger notification: It goes on and provides for automatically extended stays of acquisitions if either agency decides to seek additional information. It provides for automatic temporary restraining orders against acquisitions on the certification of either agency. And it provides for virtually automatic preliminary injunctions. I say "virtually automatic" because I think in practice once you eliminate the plaintiff's burden of proof and impose an impossible burden on the defendants to show that the Government does not have a reasonable probability of success, or that the defendants will be irreparably injured—but you do not permit them to take into account financial benefits of the acquisition or merger—the result will be that the preliminary injunction is automatic.

These provisions change merger enforcement from the traditional antitrust approach in which the Government must prove a violation in order to obtain relief, to a regulated industry approach in which the parties who propose acquisition must obtain enforcement agency approval before proceeding.

Under existing law the enforcement agency must make a showing of probability of success on the merits to get an injunction, and in addition the courts do balance the equities. Using these standards, the enforcement agencies have been successful in getting preliminary relief. There is certainly no clear pattern of hostility by the courts to such relief.

I think the proposed legislation makes it virtually impossible for the preliminary injunction court to weigh the merits of the Government's case unless the defendants carry the impossible burden of proving that the Government has no case. By doing this, the bill minimizes the chances that the merits will ever be considered, since few acquisition proposals survive prohibitory preliminary injunctions. Also, the bill eliminates any balancing of the equities and curbs the courts' discretion to enter relief short of a complete prohibition against the merger acquisition.

I would like to mention in that connection a decision of the Trade Commission which came down yesterday, reported in this morning's Washington Post, and that is in the *Warner Lambert-Parke Davis* case. That case was quite a cause célèbre around here a few years ago because of a Justice Department decision not to go forward with it, and to assign it to the Trade Commission.

It has now been litigated on the merits. The administrative law judge found no violation of law at all; the Commission has now ruled, and according to the Washington Post, the Commission found approximately 80 percent of that acquisition to be lawful, and 20 percent in certain product lines to be unlawful.

Now, under the bill that is before you, the preliminary injunction court would have no discretion to fashion any kind of preliminary remedy that would take care of a situation like that. As I see it, the court either prohibits the acquisition totally, or it decides the Government has no case, and it lets it go forward. I think this illustrates that this is not as simple a black-and-white proposition as it may appear when you think in terms of a simple horizontal acquisition.

I am aware of no developments in the merger-antitrust area which could justify a drastic step away from traditional standards of equity and antitrust jurisprudence where the Government has the burden of proof. I recognize that enforcement agencies do not always win when they seek preliminary relief against acquisitions in the courts, but I think that suggests that the courts are doing their job of weighing the evidence and the equities; the Government does not win every merger case after trial, either. Moreover, in the past, district judges have been largely unsupervised in these cases because there was uncertainty as to how you could appeal a preliminary injunction ruling.

In 1974, there were amendments to the Expediting Act, which do provide for appeal, and I think as that process is used, it should bring a greater degree of conformity and predictability to the rulings.

In the testimony I have not discussed in detail other problems in the bill. Our silence on various provisions should not be interpreted as support, and I would be prepared to discuss those in answer to questions.

Mr. MAZZOLI. Thank you very much, Mr. Johnstone.

Do you have any difficulty with the open-ended premerger waiting periods after the premerger notification is submitted?

Mr. JOHNSTONE. Yes; very definitely.

Mr. MAZZOLI. If a time limit were to be put on the premerger waiting period, would that be an improvement, in your judgment, of the bill?

Mr. JOHNSTONE. It would definitely be an improvement, yes.

Mr. MAZZOLI. Would it improve it enough to gain your support?

Mr. JOHNSTONE. I don't think so. My view on the notification is that it is really unnecessary; the existing programs have got the information.

Mr. MAZZOLI. You were here in the room, I believe, sir, when the gentlemen testified before you, and that kind of statement has been made by others who have appeared before the committee. So, is there some way you can succinctly answer the observations that they have brought up, which are very strongly in favor of adoption of this kind of a bill, if not these precise words in this kind of a bill?

Mr. JOHNSTONE. Well, I think that, if you look at the banking analogy, there you have a regulated industry in which the whole principle is, everything that a bank does is regulated and gets advance approval. So, you have a regulatory structure in place where the bank has to apply for approval of the acquisition anyway. For years prior to the bank merger legislation all that information came over to the Justice Department, it was reviewed, and the Justice Department would make determinations to bring suit.

Mr. MAZZOLI. How about the public interest?

Mr. JOHNSTONE. I'm not quite finished.

Mr. MAZZOLI. I'm sorry.

Mr. JOHNSTONE. On the other hand, when you are in the unregulated sector of the economy, you are in an area where the standard is not the approval, the standard is free flow of capital. The imposition of a premerger notification and waiting period requirement in that area has, I think, some deleterious effect on the free flow of capital, the freedom of an entrepreneur, if you will, who has decided to retire, to sell his company and end up with some listed stock, rather than the problem of how to divide up the company among his three sons.

Mr. MAZZOLI. How about the public interest? I think some part of the testimony earlier was devoted to what would serve the public interest. Now, obviously we would not be serving that individual's interest, the entrepreneurs who wanted to proceed with winding up his estate, or preparing for the eventualities.

Do you think the public interest would be served by having a kind of orderly procedure wherein all large—if not all—but all large mergers were subject to some kind of premerger examination?

Mr. JOHNSTONE. In the abstract it is hard to disagree with that proposition. I think that examination is in fact taking place. Some of the examination is going on at the enforcement agencies; some of it goes on by private counsel. You cannot measure the effect of the Celler-Kefauver Act simply by looking at the litigated cases and the horror stories about 17-year cases.

Mr. MAZZOLI. The *El Paso* case is one that everybody brings out, and we don't really want to talk about that, that is something unusual; we want to talk about the great run of large mergers.

You then perceive no necessary public interest being served by having a procedure for routine and automatic examination of them?

Mr. JOHNSTONE. I think the procedure for routine and automatic examination would have to reflect a judgment that the results you are getting now are so bad that you want to substitute another process in this area.

Mr. MAZZOLI. In other words, the idea is that some feel the courts are not rejecting enough of them, or finding enough illegalities, so therefore this procedure would provide that kind of a result?

Mr. JOHNSTONE. Well, I would go further back than that and say that you would have to find first that there are a lot of bad mergers occurring, that corporate counsel are not rejecting enough of them in the initial stages.

Mr. MAZZOLI. My time has expired. The gentleman from Illinois, Mr. McClory.

Mr. MCCLORY. I gather from your testimony, Mr. Johnstone, that, really, this is needless legislation. Matters are pretty well the way they are now, and we ought to forget about the whole issue.

You mentioned, for instance, that the Federal Trade Commission now requires notification and requires information to be submitted. Isn't it a fact that the notice that they give comes after the merger, and not before the merger?

Mr. JOHNSTONE. It comes after the agreement in principle to merge. I think that in practice, in most cases, that agreement is reached before the acquisition takes place.

Mr. MCCLORY. There is no waiting period involved.

Mr. JOHNSTONE. No; there is no compulsory premerger waiting period. I am saying that as a practical matter it happens. We had an experience a couple of years ago in which we had a client who came to us and said, "I've got an agreement in principle, I've got to notify the FTC," and we said, "Now, wait a minute, you have too many things hanging here, you don't have an agreement in principle."

They said, "No, we think we do, and anyway, we want to put it in the papers, we are going to go ahead and notify."

So, we helped them, and they put together the notification forms. They were filed with the FTC a couple of days before Christmas. I might say, they were given to a very uninterested economist who was in no hurry to get them. But, in any event, what happened thereafter was that the acquisition fell apart for business reasons within a couple of weeks. So, there was no closing, no acquisition, no nothing. The people had gone to the trouble of putting the thing together, and then we tried to get our documents back from the FTC and they said, "Oh, no, as a matter of policy, we will retain all of those documents."

That is one minor example, but it is an illustration that they get it in advance of the closing.

Mr. McClory. Well, I judge from your testimony that you feel that the corporate personnel are pretty cooperative people and well intentioned, and we really should not worry about them. And now, from what you add, "the real bad guys" are over in the FTC.

Mr. Johnstone. Well, I'm sorry if I gave the impression that the "bad guys" are over at the FTC.

Mr. McClory. Well, they did not give back those documents that they delivered. I think they should have. It would be important to put a provision in any legislation which we enact entitling the Government to issue a civil investigative demand, that the material they get, they ought to give back when the investigation is completed. I support that.

But, let me ask this: The point that reaches us quite emphatically is that there are terrible costs, there is awful confusion, there is almost an impossibility of divestiture, that everybody suffers except some members of the legal profession, who benefit.

Now, can't you see that there are tremendous penalties, and tremendous costs that are involved unless we have some mechanism for trying to determine through informational sources the legality or illegality of proposed or pending mergers?

Mr. Johnstone. I certainly do see those costs, and that is why I think that in practice the mechanism is there. Now, my experience with the clients with which I am familiar, it may not be typical of everything that is going on in the merger area, but if a corporation has a major acquisition in the works, one of the things they are going to do is consult counsel and say, "Do we have any antitrust problems," and in order to get any kind of intelligent advice on that, they have to assemble a lot of information. Now, much of it is publicly available, you get it from SEC documents.

Now, you get an opinion from your own counsel, "Well, there may be problems." and the next step is, "Well, what do you think the Justice Department and the FTC will think about this?" And quite frequently you actually go to them and disclose the information.

My point is that throughout all of this process the merging parties have the option to make an informed and intelligent decision and say, "We think that our legal position is sound, and we are prepared to defend it." I think this bill's automatic premerger stay features take that away from the process.

Mr. McClory. Could I just make one request of the witness, Mr. Chairman, and that is this: Feeling as I do the inadequacy of the existing law, I would request that you forward to the committee your suggestions on modifications of this proposal that might be useful in trying to carry out the objectives the committee has in mind. Would you do that?

Mr. Friedman. We will be happy to do that.

Mr. McClory. Thank you very much.

Mr. Mazzoli. Thank you, Mr. McClory. The gentlelady from Texas, Miss Jordan?

Miss Jordan. Thank you, Mr. Chairman.

I will be interested in the response you send in to the question posed by Mr. McClory because I think you have given your answer, that we do not need to do anything, legislatively, in the whole area of mergers, pre, or post kinds of activities because what we have is adequately serving the purposes we intend to address.

Did I misunderstand your testimony, or is that what you said?

Mr. Johnstone. I think you understood it correctly, that is the policy position, as I understand it, of the Chamber, and it happens to also be my own personal view.

But I certainly will consult with the Chamber and attempt to be responsive to the request.

Miss Jordan. That will be fine.

You seem to be bothered more by the provisions in the bill which relate to the automatic temporary restraining orders and preliminary injunctions. You do state that you have other problems, but those problems really seem to come into your consciousness with a sharper focus than others.

If you read the bill, before any preliminary restraining order is sought, or temporary injunction is sought, there has to be this certification by the involved Antitrust Division of Justice, or the Federal Trade Commission.

Now, would you think that representatives and heads of these two agencies of the Government would make such certification without first determining some adequate and rational basis for seeking to enjoin the merger?

Mr. Johnstone. I think they will conscientiously try to determine an adequate and rational basis. I think that the theories which they may wish to advance may differ from what ultimately turns out to be the law. I think they may occasionally be wrong on the facts. I respect their judgment as prosecutors as to whether or not to bring a case, but I think there ought to be an impartial tribunal before which they have to put the case and prove it before they get the relief they are looking for.

Miss Jordan. It would be a rather unusual circumstance, would it not, for either of those agencies of the Government to exercise a judgment this important in a vacuum, without communicating with and talking to, and discussing the issues with the parties involved?

Mr. Johnstone. I am sure there will be ample opportunity for the whole thing to be ventilated before the agencies, but what I am troubled by is changing the rules of the game. There is obviously ample opportunity for negotiating with the agencies at this point, but we both know that at some point there has got to be an impartial tribunal looking at this.

Miss JORDAN. Thinking about this "impartial tribunal" you are talking about, are you talking about a prehearing by maybe an administrative law judge, or some appointed adjudicator?

Mr. JOHNSTONE. What I am talking about there, and what I am talking about in this preliminary injunction context, is a U.S. district judge.

Miss JORDAN. Well, that is your impartial tribunal.

Mr. JOHNSTONE. That is correct, but under the legislation I don't believe he would be given the opportunity to consider either the merits of the Government's case, or what he really ought to do in fashioning any preliminary relief.

Miss JORDAN. And you read this bill as indicating that the court, the judge, would have no discretion in the matter?

Mr. JOHNSTONE. I think it takes an awful lot of discretion away from him.

Miss JORDAN. All right. Thank you, Mr. Chairman.

Mr. MAZZOLI. I am sorry, the gentlelady's time has expired. The gentleman from Maine.

Mr. COHEN. Thank you, Mr. Chairman.

I think, Mr. Johnstone, that Miss Jordan's skepticism about your response to this committee has to be predicated upon Mr. McClory's statement that it seems to be the rather consistent feeling of this subcommittee that the existing law is not adequate, and that some form of premerger notification would be in order. Given that, what is the best alternative, as far as the Chamber is concerned?

Second, if many of the companies that you represent will seek to eliminate doubt and instability by notifying the FTC and Justice Department, is it really that much more of a burden to formalize it or standardize it?

Mr. JOHNSTONE. I do not know if I could quantify how much more of a burden it would be. I would say the instances I am familiar with, where we have sought it, have been very large acquisitions, much larger than the cut-off point of this bill.

Mr. COHEN. As I understand it, about 1,000 companies would be affected by this bill.

Mr. JOHNSTONE. I think there are probably 1,000 companies over $100 million in annual sales; that is based on the "Fortune 500" statistics.

Mr. COHEN. If the FTC were to request additional information from one of your clients under the 20-day extension period, which you feel is irrelevant, what would be your recourse under this bill?

Mr. JOHNSTONE. Well, I have looked at the bill, and I do not see where the recourse would be. In other words, it does not provide any way to contest the additional information request.

Mr. COHEN. And until you agreed to supply the information, the Justice Department, or the FTC, would simply refuse to approve the merger.

Mr. JOHNSTONE. Yes. You would be in a situation where your waiting period would be extended indefinitely; and on the other hand, if you go ahead and say, "We are going to make this acquisition anyhow," you risk a $10,000 a day penalty.

Mr. COHEN. Would you then be forced to seek relief through a mandamus proceeding, to force the issuance of approval?

Mr. JOHNSTONE. I am a great believer that there is always some way to get in court and get relief, if there is good reason for it; but of course, it is complicated.

Mr. COHEN. The burden is then shifted to you. I would simply point out to the chairman that similar to cases arising under the CID premerger investigation bill, this is a further case where if someone who is being deposed, or from whom information is requested, objects on the grounds of irrelevancy and immateriality, the moving party should have to request a hearing before a district court judge to determine which side is correct.

I would suggest that we have some sort of similar measure in this bill as well, providing such a mechanism.

Finally, I am a little bit troubled about the preliminary injunction proceeding where we shift the burden of proof, although prior witnesses think that is not really a marked change in policy. My question, to the witness and to the Chair as well, is this: The argument is that the merging parties have all of the data on the merger and have already studied its legality, so should they not have the burden of proving that the merger is in fact legal? I think that cuts both ways. If the merging parties have studied all the information and the data, and have studied its legality, and if, under a bill that would come out of this committee or subcommittee, they have to submit that same data and information to the Justice Department or FTC, why should not the FTC or Justice Department have the burden of proof? That is not a question, it is a statement.

Mr. MAZZOLI. The gentleman makes some good observations, and they are certainly grist for our mill.

The gentleman from Iowa is recognized for 5 minutes.

Mr. MEZVINSKY. Thank you, Mr. Chairman.

You were here when I was commenting to Mr. Mueller about your statement on the merger notification program. He pointed out that most of those notifications were made after the fact, rather than before the fact. Would you care to comment on that; is that your impression?

Mr. JOHNSTONE. Well, that was not my understanding of what he said.

Mr. MEZVINSKY. He said a vast majority of the notifications were made after the merger, rather than before.

Mr. JOHNSTONE. My understanding was that he pointed out that all of the notifications are made after an "agreement in principle" to merge; and he said that a vast majority of the cases that have been brought were brought after the acquisition, rather than before.

I don't have actual data on when the FTC gets those notices and data in terms of the acquisition. My own experience has been that the ones that go in through our office get in before closing.

Mr. MEZVINSKY. The reason we are facing this is the problem of divestiture not being an adequate form of remedy. Would you agree that divestiture is not an adequate form of remedy?

Mr. JOHNSTONE. I would agree that there are some cases in which divestiture has been a problem, but I also think the fact that divestiture becomes a problem may well illustrate that you don't need it. There were a series of cases in the grocery industry in the early 1960's that the FTC brought. One of them I was involved in was National Tea. The Commission concluded that a whole series of acquisitions were illegal, but they determined not to seek divestiture, and instead they imposed a 10-year prior notification requirement. This led, ultimately, to the adoption of a notification and enforcement policy for the whole food distribution industry, which probably made a lot more sense in terms of preserving competition, than trying to sell off a number of supermarkets in a number of places.

Mr. MEZVINSKY. Well, what remedies would we have for the problem we are trying to face with merger activity, with the likelihood of merger activity increasing? Do we just sort of let it ride?

I gather that is the position you seem to think, irrespective of what may take place concerning mergers, that the remedies are adequate as is. I am just trying to understand the position of the chamber.

Mr. JOHNSTONE. I think the remedies in place are adequate. I think a lot of the problems of years ago come from not understanding what the statute was about, and people were litigating what the statute really meant. I think we know that, with respect to horizontal and vertical mergers now, and it is easier to make a case.

I do think that what is in place is adequate.

Mr. MEZVINSKY. Don't you sense that there is an overwhelming concern? We will have a witness that will follow you that has a history of looking at this issue. I mean, can we really legitimately say that we can ignore it?

Mr. JOHNSTONE. Well, the decision of the Congress has been, and has been during times when there was a much more clear and present problems of a lot of mergers going on, the decision of the Congress has been not to adopt this legislation.

Mr. MEZVINSKY. You do not feel that there will be an increase in merger activity in the latter part of the 1970's? In other words, your prediction, if you have to look through that crystal ball, will be that merger activity for the rest of this decade will be reasonably inactive, or about the same, or increased; which is it going to be?

Mr. JOHNSTONE. Well, I am not in the busines of making economic predictions. You can look at the statistics and see that things were very high in the late 1960's, they are down now, and they may be starting back up; but we don't know how far it will go. There is data in the Senate record, I believe, which suggests that the peaks, such as we had in the late 1960's, only occur infrequently; my recollection is every 30 or 40 years.

Mr. MEZVINSKY. Are you aware of what some witnesses termed the "midnight mergers," yourself?

Mr. JOHNSTONE. I am not aware of any myself.

Mr. MEZVINSKY. Of any coming in at the last minute. You know what the term "midnight merger" is.

Mr. JOHNSTONE. I know what the term "midnight merger" is. I gather it is, you wait until the last minute to announce it, and by the time you announce it you have done it, and it is too late for the Government to do anything about it.

I am not aware of those occurring in recent years.

Mr. MEZVINSKY. My last question will be, if merger activity actually does increase, would that be a strong reason for this kind of approach being pursued?

Mr. JOHNSTONE. If merger activity increased and it could be demonstrated that the existing weapons, and the legal doctrine the agencies have were not adequately dealing with it, I think it would be appropriate to take a look at this.

Mr. MEZVINSKY. Thank you very much.

Mr. MAZZOLI. The gentleman's time has expired. The gentleman from New Jersey, Mr. Hughes, is recognized for 5 minutes.

Mr. HUGHES. Thank you, Mr. Chairman.

Mr. Johnstone, I wonder if you could tell me as a matter of policy what, if anything, society should do about the unjust enrichment that does take place where competition is restricted in the marketplace after an illegal merger occurs.

Mr. JOHNSTONE. Well, I think that that question assumes something which I don't concede, and that is that there is unjust enrichment.

Mr. HUGHES. Let's work on that assumption that a merger takes place, it does restrict competition in the marketplace, and there has been unjust enrichment. What remedies do you think should be available, if any?

Mr. JOHNSTONE. All right. There is now available a treble damage remedy, which in the facts you suggest would be available to people who are injured.

Mr. HUGHES. Do you feel that divestiture is indeed a weapon that the Government should have in its arsenal?

Mr. JOHNSTONE. Certainly.

Mr. HUGHES. Well, obviously you feel that the present tools are adequate, even though the FTC's program is not a premerger procedure. Let me ask you, obviously you also feel that it is well for companies, as they do in many instances, to notify the FTC before a merger takes place. Do I understand your testimony correctly?

Mr. JOHNSTONE. That is correct.

Mr. HUGHES. Why are companies voluntarily notifying the Justice Department and the Federal Trade Commission. They are actually doing more than they are compelled to do under existing law?

Mr. JOHNSTONE. Well, because the litigation which can result is very troublesome and expensive, and you can look at a proposed merger and say, "We think, as lawyers, that this is a legal acquisition, but there are legal doctrines lying around that would enable the Justice Department to challenge this and tie you up for years in expensive litigation," and the company will say, "Well, we'd better go down and ask them."

Mr. HUGHES. If that makes sense economically as a matter of policy, if it's good public policy, why, then, should we not standardize it so that every firm that falls within the categories spelled out within the legislation must notify beforehand, before the fact, and thus enable the Justice Department to have sufficient time to make the kind of study of the proposed merger that is needed; what is bad about that?

Mr. JOHNSTONE. As a practical matter, I think that there are a lot of acquisitions where in counseling privately you don't reach that point. You look at it, and it is big enough to be covered by that bill, but the company is satisfied with the opinion of its own counsel that it is not a trouble area. So, they say, "OK, we are going to go ahead and we will wait and see if the agencies ask us."

Now, this bill would cut off that option and put an unnecessary extra step in there.

Mr. HUGHES. But, you know, lawyers disagree. I expect that you would get about 15 different opinions right here in the room on any given issue. Suppose that in fact corporate counsel are wrong, and they are looking at it from the wrong perspective, isn't it well to have an agency that has to make the final decision, to sort of review that before the fact to avoid costly litigation; to avoid the inadequate remedy of divestiture?

Is not, as a matter of public policy, the better approach to try to avoid the need for divestiture?

Mr. JOHNSTONE. Well, I think that the answer to that question perhaps depends on a set of facts you cannot find out, and that is, how many lawful acquisitions would be turned off by a notification policy that puts an extra step in there, and puts a lot of discretion into the hands of the enforcement agencies.

Dr. Mueller pointed out that after the 1966 bank merger legislation providing an automatic stay, that the Justice Department challenged 42 percent more bank mergers. Now, I don't think that is necessarily good; and I don't think that would necessarily be wise if applied to the unregulated corporate sector.

Mr. HUGHES. Well, does it not make sense, however, to give the Justice Department and the Federal Trade Commission adequate time to review the merger before it occurs? I would think that the "midnight mergers" bring about a number of decisions by the Justice Department with time running out, that perhaps would not have been made if they had had sufficient time to examine the structure?

Mr. MAZZOLI. I'm sorry, the gentleman's time has expired, and with that all time has expired.

Gentlemen, we want to thank you very much for your help today. As I said earlier, there may be some questions which will be hereafter raised that will be sent to you in writing, along with Mr. McClory's request to you earlier.

Thank you very much.

I am very sorry to have to report, Chairman Celler, that Chairman Rodino is unable to join us this morning by reason of prior and unavoidable commitments, but in his stead I welcome you back to a room in which you served for so many years, and invite you to join us at the witness table, along with Mr. Zelenko. And may I, just for the record, read the words that Mr. Rodino would have spoken today, had he been here:

> It is a great honor for me to introduce our next witness, our former Chairman, Emanuel Celler. We are all deeply aware of his distinguished and unparalleled record of service in this committee and the Congress, and his many great achievements over the years. Certainly, one of the most significant of those achievements is the 1950 Celler-Kefauver Act, which sharply broadened the reach of the antimerger law.
>
> As the FTC's Commissioner Paul Rand Dixon told this subcommittee, just a few months ago, the importance of that act "cannot be over-emphasized." The bill we are now considering would strengthen the effectiveness of that act, and we are therefore especially glad to have your views on it, Mr. Chairman.

As one who did not have the pleasure of being on the committee when you were the chairman, but nonetheless came to Congress when you were one of our colleagues, I want to state that you have certainly established a record on this subject matter that you will speak of today, and in the broad range of many constitutional issues, which perhaps has no parallel in the history of our Republic. We certainly welcome you, and welcome you back to this chamber.

Mr. McCLORY. Will the chairman yield?

Mr. MAZZOLI. Yes, I will certainly yield to the gentleman.

Mr. McCLORY. I thank the chairman for yielding because I want to join in extending a very warm welcome to the former chairman of this committee, a gentleman with whom I have had the privilege and honor of serving during the period he was the chairman, and during most of my experience on this committee.

In looking at the portrait of the gentleman from New York that is behind me on the wall, I note that he is just as handsome as he sits there at the witness table now as he was when that portrait was painted, perhaps a little more handsome than that.

I just want to add my personal affection and respect for the gentleman from New York, and to state very candidly that I have always felt I was treated very fairly and very impartially by the chairman during his service as head of this committee. It is one of the experiences I am most grateful for in my life, that I had the privilege of serving as a member of the committee during the gentleman's chairmanship of the Judiciary Committee. I certainly want to join in welcoming you here this morning.

Mr. MAZZOLI. Thank you very much, very well spoken.

TESTIMONY OF EMANUEL CELLER, ESQ.

Mr. CELLER. I feel a real sense of gratitude in hearing these very gracious remarks by the chairman and Bob McClory. It always brings back nostalgic memories when I enter this room, particularly when I recall that I was a member of this committee and its chairman for a great many years.

It is my pleasure once again to speak to the issue of premerger notification, and I want to thank the members of this subcommittee, and your chairman, Mr. Rodino, for asking me to present my views on this legislation—I have been doing so for some time. It has become a habit with me.

Indeed, one eloquent way to present testimony on H.R. 13131 would simply be to compile a stack of all the hearings held on such measures, in both Houses of Congress, for, as all of us know, the idea of premerger notification has a history almost as long as the Celler-Kefauver amendment, passed 25 years ago.

Experience has demonstrated a basic need for requiring companies to provide advance notification of merger and acquisition plans to the Attorney General and the Federal Trade Commission—or other appropriate body—and to wait for a period of 60 days before consummating the transaction. With such notification and waiting period requirements, not only will the Government agency be adequately informed in advance of important mergers and acquisitions, but it will also be able to make a preliminary determination as to whether or not the proposed transaction is of doubtful legality and, if so, to undertake court action to restrain consummation of the transaction pending adjudication of this question.

In the absence of a provision requiring the submission of advance notification and a waiting period, many companies can obtain the benefits of a completed merger or acquisiton even though the transaction not only is of doubtful legality, but has caused the very damage to the competitive structure which the Celler-Kefauver Act was intended to safeguard. Further, once the transaction has been consummated and the assets commingled, difficult, if not impossible, is reversion to the prior status.

It is recognized that at present the staff of the antitrust enforcement agencies search through newspapers, financial periodicals, trade journals, and other publications, for information regarding proposed mergers and acquisitions. But these enforcement procedures are unsatisfactory in obtaining advance information since many significant mergers and acquisitions are not publicized in advance of consummation.

Mr. Chairman, I am sure that statement sounds familiar. It is. It comes straight out of the report on H.R. 1143, which I introduced on January 7, 1957, and which your distinguished chairman, Mr. Rodino, reported to the House as H.R. 7698 on May 28 of that year. That bill in turn was an echo of H.R. 9424, approved by the House in the 84th Congress; it died in the Senate. All this, in turn, comes from hearings on these four identical bills introduced by myself, Representatives Patman, King, and Evins, in 1960. The arguments are exactly the same now as then, and just as valid.

Who has the best information about planned mergers—the parties or the Government? Clearly the parties, indeed, the stockholders are privy to merger plans well in advance of the time limits specified in the bill. Ultimately, premerger notification will avoid expenditures and considerable time, effort and money by the enforcement authorities, the courts, and by the merging parties themselves. Indeed notification machinery will be in the best interest of all.

The bills of the past were far more stringent, in some ways, than the legislation now before you. They required a 60—not 30—day waiting period for all nonexempted mergers resulting in combined capital, surplus and undivided profits of only $10 million.

While inflation has worked its will on those figures, Congress has not, and in all candor, it is relevant to ask why.

In 1961, Mr. Paul Rand Dixon, the Chairman of the Federal Trade Commission, recounted the parade of horribles—attempts to unscramble corporate omlettes.

The *Pillsbury* case, at that time on appeal to the fourth circuit—8 years from complaint to divestiture—6 years after that, the Federal Trade Commission gave up.

The *Crown Zellerbach* case took 6 years just to get to the ninth circuit.

In more recent time, we have seen the futility of divestiture in Von's Grocery and the Continental Can mergers. Both were held illegal—and neither produced an effective remedy. Some of us here may remember the demise of Country Gentleman in the early *Farm Journal* case, an earlier example of hollow divestiture following asset retention. Mr. Rand Dixon, a man with a flair for language and one who knows firsthand the complexities of financial unscrambling, there quoted the hearing examiner:

The Country Gentleman is dead, and the "assets" which it turned over to respondent are now without value to any newcomers or, indeed, to any farm publication now in the field. When the corn is taken from him and the horse dies, it is the height of vanity to strew the bare corncobs on his grave.

Not long ago, he was back before this committee again, making the very same arguments in the context of merger oversight hearings.

Mr. Watkiss, just a few days ago, recounted to the subcommittee the tale of the "*Unnatural Gas*" case—17 years, and six trips to the Supreme Court for the El Paso-Pacific Northwest, a merger unanimously held by that court to be illegal.

I hope that Congress will not procrastinate. There is no need for any further delay. Some may argue for such delay. The answer to that is the old Spanish proverb: "By the Street of Bye and Bye—you come to the House of Never."

The chain of administration support for a measure such as this runs from President Eisenhower to Attorney General Kennedy to President Ford.

Today, this vitally needed legislation stands a very good chance of passage. S. 1284 contains provisions similar to H.R. 13131. There is interest and determination in both Houses.

The Celler-Kefauver amendments to the Clayton Act stand for the principle of free and open competition. I like to think I battled hard for those principles. The all-too-rapid passage of time has clearly proven that this legislation needs, and deserves, the provisions you are here considering. I strongly urge its enactment.

Thank you.

Mr. MAZZOLI. Thank you very much, Mr. Chairman, for your eloquent statement, and one which certainly makes an important point.

I would like to ask you just one question on my own behalf before yielding to my collaegues, and that is, do you believe that there should be a more definite time involved in the premerger notification process?

Mr. CELLER. Well, I do not necessarily proclaim that 30 days is the proper time, I think this committee might make appropriate changes in its wisdom.

Mr. MAZZOLI. Thank you, Mr. Chairman because it has been brought up by some of the witnesses that because of the lack of a time certain, there appears to be at this point kind of an open-ended aspect to the premerger waiting period. There were some suggestions that a definite time be set, some say 60, 90, or 120 days, within which action will have to be taken, or the merger will be permitted to go through. I wondered how the chairman might feel about that.

Mr. CELLER. Of course, the longer you wait, the more disadvantageous it is to the merging parties, and you have to consider that, of course.

Mr. MAZZOLI. Thank you very much, Mr. Chairman, we appreciate your observation.

The gentleman from Illinois, Mr. McClory.

Mr. MCCLORY. Thank you, Mr. Chairman.

I am also pleased to note that you are accompanied today by associate counsel, the former chief counsel of this committee, Mr. Ben Zelenko. What I want to do is take advantage of the joint expertise you bring here to the committee today. Maybe Mr. Zelenko could also help me.

I think that on this subject of fixing a definite time within which this notification and this informational process has to be completed, that we could improve on the bill, or at least could make it more precise.

If you will look at the bill, Mr. Zelenko, on page 3 under b(1), you will see that it says that, "The notification and waiting period required by this section shall expire 30 days after the person subject to subsection (a)," but then it continues and provides, on page 3, "Or until expiration of any extension of such period, pursuant to subsection (c)(2) of this section." And if you will turn to section (c)(2), you will see that the Federal Trade Commission, or the Attorney General—on page 7—can extend the time for additional periods up to 20 days after receipt of information.

That has raised the question in the minds of some as to whether or not, after any additional information is submitted, there is going to be an additional 20 days, and it will go on, and on, and on; so we would have not just a 60-day period, but a much lengthier period.

Would you be willing to study that, and then suggest some possible amendments to us, which would, I think, coincide with the recommendation of the gentleman from New York, Mr. Celler, to have this consummated within a short period of time?

Mr. ZELENKO. Mr. McClory, Mr. Celler and I have discussed this, and there are two points we want to make. We understand the bill to say that within the 30-day waiting period the Government may ask for additional information. Its request for additional information must be made within that 30-day period. Once that request is made, the 30-day waiting period tolls, and it only resumes again when that information is received by the Government; and then the Government has 20 days from the date of that receipt.

So, as I understand the bill, conceivably 25 days into the notification period the Government could ask for further information. It might take a period of time for the merging parties to submit that information. Upon the receipt of that information by the Government, the Government would have 20 more days.

We read the bill as providing only one request for additional information. The bill seems to talk about one 20-day extension. We think that is important because at least that puts some limitation on numerous requests.

Mr. MCCLORY. I think there are varying interpretations on that. That is one reason why I think we could be helped with respect to clarifying that.

Mr. ZELENKO. Fine, we will try to, Mr. McClory. The only other point I would make is that Mr. Celler and I both believe it would be in the interest of the merging parties as the bill is now written, as a practical matter, to speed up the submission of information because time is of the essence to the merging parties, and there is a built-in incentive in that regard.

Mr. MCCLORY. The other point is made very strongly by Mr. Celler, and that is that upon receipt of that information, the Government can act. On the top of page 2 he talks about the Government undertaking court action to restrain the consummation.

Now, if you look on page 9 of the bill, you will see that in a preliminary injunction proceeding, the preliminary injunction shall issue unless the defendant carries the burden—the burden shifts to the defendant, and the defendant has to disprove his guilt before he is relieved of the preliminary injunction.

That is another area where I think you have differing thoughts with respect to this legislation, and I think that in the prior bills, about which Mr. Celler has given testimony, the burden was on the Government, instead of being on the merging parties.

Mr. CELLER. The very crux of the bill is the fact that the Government has the right to stop the merger temporarily by winning an injunction. That is the very essence of this bill. Without that provision, I don't think the bill will be worth a damn; it would be as useless as a scabbard without a sword. That is the very essence of this bill, the right to be able to do that.

Mr. McClory. Well, we are talking about the period beyond the period of notification, and whether a preliminary injunction would lie after this 50-, or 60-day period, during which time the information is given. At that point, should there be a preliminary injunction unless the defendant disproves his guilt; or should it only issue if—on the basis of this information—the Government is able to establish its case?

Mr. Celler. I think the Government should still have the right.

Mr. McClory. I would like you to think about that, you and your associate counsel, Mr. Zelenko. If you have any suggestions on that, I would be grateful to receive them.

Mr. Mazzoli. The gentleman's time has expired. The gentleman from Iowa.

Mr. Mezvinsky. I am glad the past chairman is here, I did not have the honor of serving with you.

I see in your statement that your original bill was $10 million, and now we are up to $100 million; I gather inflation has come a long way.

Now, to follow up on my point that I raised with the previous witnesses, I gather your position is we should not wait for a new wave of mergers to come, but we should act now; is that correct?

Mr. Celler. Yes, sir. I am willing to accept the $100 million, I would prefer the lower amount that we had in the original bill. But, I want to get something started here.

Mr. Mezvinsky. And it is your feeling we do not have to have new merger activity, there is enough activity now that would justify this legislation.

Mr. Celler. Right.

It is interesting to note that while, for example, there were about 4,000 acquisitions and mergers in 1969—I get this from last week's issue of Time magazine—those mergers fell off due to the recession. Now, as a result of the rebounding of the stock market, and the heightened corporate profits, there has developed an urge to merge. So far this year mergers have risen at more than the 1975 pace.

A few of the well-known acquisitions pointed out by Time magazine are the following more or less conglomerate acquisitions, Pillsbury Co. purchased 113 Steak & Ale restaurants; W. R. Grace's acquisition of Scheppler's Inc., a clothing store; W. R. Grace is a shipping concern. Colgate-Palmolive's buy-out of Charles A. Eaton & Co., a golf and tennis producer; and H. A. Heinz Co.'s takeover of Lane Foods Corp.

Banks are aiding in this merger activity at the present time as money becomes plentiful, and their willingness to make buy-out loans increases.

I am reading from Time magazine, which indicates the need for some sort of action to be taken by the Congress because we are going to be swamped, I think, with mergers from here on out.

Mr. Mezvinsky. The last point I want to make, you would agree with the previous testimony that by all indications we will have more mergers, and have an upsurge of mergers for the rest of this decade; is that your opinion?

Mr. CELLER. I believe that mergers will increase, is that your question?

Mr. MEZVINSKY. Yes; that's my question.

Mr. CELLER. There is no question about it, and this Time magazine article seems to prove it.

Mr. MEZVINSKY. Thank you very much.

Mr. MAZZOLI. Thank you very much. The gentleman from Maine, Mr. Cohen, is recognized for 5 minutes.

Mr. COHEN. Just one statement, Mr. Chairman.

Mr. Zelenko, based upon Mr. Celler's last response to Mr. Mezvinsky, would it be your opinion that the nature of the market, the economy, has changed since Mr. Celler and Mr. Kefauver first introduced their measure back in 1957? During the late 1950s' and 1960's, and perhaps even the early 1970's, isn't it true that most mergers were either horizontal or vertical in nature, but that we are now witnessing the rather recent phenomenon of the conglomerate merger?

I think Mr. Celler mentioned Pillsbury acquiring a totally different company; you can talk about Gulf acquiring a circus. Would this particular measure be responsive to that sort of merger?

Mr. CELLER. I think it might be well to find out what the Celler-Kefauver Act covers and I had occasion to make statements on that. The Government has successfully challenged under Celler-Kefauver horizontal mergers between competitors; vertical mergers between suppliers and their customers; and mergers that eliminate potential competitors. Remember, mergers that eliminate "potential competitors," and mergers that involve companies in different fields and are thus conglomerate in nature, may permit the companies to abuse their economic power through reciprocity arrangements.

Now, it is interesting to note the types of mergers that might be covered; namely, mergers that eliminate potential competitors. A company seeks to merge with B company. "B" is in a position to become a potential competitor of "A," although it might not at that very moment, or at the time of merger, be competitive. If it has the potential of becoming a competitor, it is covered by the Celler-Kefauver Act. There have been a number of decisions of the Supreme Court to this effect.

Mr. COHEN. In other words, a merger may be illegal if it prevents a potential entrant from coming into the market as a competitor, and I agree with that.

Mr. MAZZOLI. Thank you very much, Mr. Cohen.

Mr. Chairman and Mr. Zelenko, we certainly appreciate your help today, and I am sure that Chairman Rodino will try to make contact with you later on today.

Mr. CELLER. I am very grateful for being permitted to testify here this morning.

Mr. MAZZOLI. Thank you very much, you have been very helpful.

I would like to make a note for the record that the record on this matter will be closed on June 1, and our subcommittee now stands adjourned.

[Whereupon, at 12:05 p.m., the subcommittee adjourned, subject to the call of the Chair.]

APPENDIX

DEPARTMENT OF JUSTICE,
Washington, D.C., February 23, 1976.

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

DEAR CHAIRMAN RODINO: In your January 13, 1976, letter requesting that I testify before the House Judiciary Subcommittee on Monopolies and Commercial Law regarding mergers, you requested certain statistical information. I provided some of that information when I submitted to the Subcommittee my written statement prepared for the initially scheduled February 18 oversight hearing. Enclosed is information which supplements that earlier submission.

I am providing the raw data showing the number of Antitrust Division merger investigations broken down by industry during the period of July 1, 1963 to June 30, 1973. I am also providing a summary of that data for your convenience. Unfortunately, I am unable to provide information concerning the types of mergers investigated. The Antitrust Division does not maintain records indicating whether a merger under investigation is horizontal, vertical, conglomerate, or some combination of the three.

Sincerely,

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

Enclosures.

Merger investigations instituted during the period July 1, 1963—June 30, 1973

Industry	*Number of investigations*
Corn	2
Fruits and tree nuts, n.e.c	2
Broiler, fryer, and roaster chickens	1
Poultry hatcheries	1
Livestock services, except specialties	1
Iron ores	2
Copper ores	5
Lead and zinc ores	3
Bauxite and other aluminum ores	1
Metal mining services	1
Uranium-radium-vanadium ores	1
Bituminous coal and lignite	6
Crude petroleum and natural gas	8
Natural gas liquids	1
Oil and gas exploration services	1
Construction sand and gravel	1
Industrial sand	1
Bentonite	1
Clay and related minerals, n.e.c	1
Phosphate rock	1
Sulfur	2
Single-family housing construction	1
Bridge, tunnel and elevated highway	1
Heavy construction, n.e.c	1
Painting, paper hanging, decorating	1
Electrical work	2
Meat packing plants	16
Sausages and other prepared meats	4

Industry	Number of investigations
Poultry dressing plants	2
Poultry and egg processing	2
Creamery butter	1
Ice cream and frozen desserts	1
Fluid milk	5
Canned specialties	1
Canned fruits and vegetables	3
Dehydrated fruits, vegetables, soups	1
Flour and other grain mill products	7
Rice milling	1
Wet corn milling	2
Dog, cat and other pet food	2
Prepared feeds, nec	6
Bread, cake, and related products	6
Cookies and crackers	1
Beet sugar	1
Confectionery products	7
Chewing gum	1
Cottonseed oil mills	1
Soybean oil mills	2
Vegetable oil mills, n.e.c	3
Animal and marine fats and oils	3
Shortening and cooking oils	1
Malt beverages	20
Distilled liquor, except brandy	5
Bottled and canned soft drinks	2
Flavoring extracts and sirups, n.e.c	2
Food preparations, n.e.c	3
Chewing and smoking tobacco	1
Weaving mills, synthetics	1
Women's hosiery, except socks	1
Felt goods, except woven felts and hats	4
Paddings and upholstery filing	1
Men's and boys' suits and coats	4
Men's and boys' shirts and nightwear	2
Men's and boys' separate trousers	1
Men's and boys' work clothing	1
Men's and boys clothing, n.e.c	1
Women's and misses' dresses	2
Millinery	1
Hats and coats, ex. millinery	3
Waterproof outergarments	1
Apparel belts	1
Fabricated textile products, n.e.c	1
Sawmills and planing mills, general	4
Millwork	3
Hardwood veneer and plywood	1
Mobile homes	6
Particleboard	1
Wood household furniture	7
Upholstered household furniture	1
Metal household furniture	3
Mattresses and bedsprings	7
Metal office furniture	4
Public building and related furniture	2
Metal partitions and fixtures	2
Pulp mills	3
Paper mills, except building paper	11
Paperboard mills	8
Paper coating and glazing	1
Bags, except textile bags	1
Sanitary paper products	2
Converted paper products, n.e.c	2

Industry	Number of investigations
Folding paperboard boxes	2
Corrugated and solid fiber boxes	2
Sanitary food containers	1
Fiber cans, drums and similar products	2
Building paper and board mills	1
Newspapers	30
Periodicals	6
Book publishing	14
Book printing	1
Miscellanous publishing	6
Commercial printing, letterpress	5
Commercial printing, lithographic	5
Engraving and plate printing	1
Manifold business forms	1
Greeting card publishing	1
Photoengraving	1
Alkalies and chlorine	2
Industrial gases	4
Inorganic pigments	1
Industrial inorganic chemicals, n.e.c	4
Plastics materials and resins	9
Synthetic rubber	1
Cellulosic manmade fibers	1
Pharmaceutical preparations	11
Polishes and sanitation goods	1
Surface active agents	2
Toilet preparations	4
Paints and allied products	7
Gum and wood chemicals	1
Cyclic crudes and intermediates	3
Industrial organic chemicals, n.e.c	5
Nitrogenous fertilizers	10
Phosphatic fertilizers	3
Adhesives and sealants	3
Printing ink	1
Chemical preparations, n.e.c	4
Petroleum refining	25
Paving mixtures and blocks	1
Asphalt felts and coatings	2
Lubricating oils and greases	2
Petroleum and coal products, n.e.c	1
Tires and inner tubes	5
Rubber and plastics footwear	2
Rubber and plastics hose and belting	2
Fabricated rubber products, n.e.c	2
Miscellaneous plastics products	10
Leather tanning and finishing	1
Boot and shoe cut stock and findings	1
Men's footwear, except athletic	3
Women's footwear, except athletic	3
Personal leather goods, n.e.c	1
Flat glass	4
Glass containers	3
Brick and structural clay tile	3
Structural clay products, n.e.c	1
Vitreous china food utensils	3
Concrete products, n.e.c	2
Ready-mixed concrete	2
Lime	1
Gypsum products	2
Cut stone and stone products	1
Abrasive products	2
Gaskets, packaging and sealing devices	1

Industry	Number of investigations
Minerals, ground or treated	2
Mineral wool	3
Nonmetallic mineral products, n.e.c	1
Glass products, made of puchased glass	5
Ceramic wall and floor tile	1
Clay refractories	2
Blast furnaces and steel mills	15
Electrometallurgical products	2
Steel wire and related products	2
Steel pipe and tubes	4
Gray iron foundries	2
Malleable iron foundries	1
Steel investment foundries	1
Steel foundries, n.e.c	5
Primary copper	1
Primary zinc	1
Primary aluminum	2
Secondary nonferrous metals	1
Copper rolling and drawing	2
Aluminum sheet, plate, and foil	2
Nonferrous rolling and drawing, n.e.c	2
Nonferrous wire drawing and insulating	1
Aluminum foundries	4
Brass, bronze, and copper foundries	1
Primary metal products, n.e.c	1
Metal cans	6
Cutlery	1
Hand and edge tools, n.e.c	1
Hardware, n.e.c	3
Metal sanitary ware	2
Heating equipment, except electric	1
Metal doors, sash, and trim	3
Fabricated plate work (boiler shops)	9
Sheet metal work	3
Screw machine products	2
Bolts, nuts, rivets, and washers	2
Iron and steel forgings	2
Metal stampings, n.e.c	4
Small arms ammunition	1
Valves and pipefittings	3
Wire springs	1
Miscellaneous fabricated wire products	1
Fabricated metal products, n.e.c	4
Turbines and turbine generator sets	2
Internal combustion engines, n.e.c	7
Farm machinery and equipment	2
Lawn and garden equipment	2
Construction machinery	6
Mining machinery	3
Oil field machinery	5
Hoists, cranes, and monorails	3
Industrial trucks and tractors	3
Machine tools, metal cutting types	7
Machine tools, metal forming types	1
Special dies, tools, jigs, and fixtures	1
Machine tool accessories	1
Power driven hand tools	2
Rolling mill machinery	1
Food products machinery	1
Textile machinery	1
Woodworking machinery	1
Printing trades machinery	5
Special industry machinery, n.e.c	9

Industry	*Number of investigations*
Pumps and pumping equipment	1
Ball and roller bearings	4
Air and gas compressors	2
Blowers and fans	1
Industrial patterns	1
Industrial furnaces and ovens	2
Power transmission equipment, n.e.c	3
General industry machinery, n.e.c	4
Electronic computing equipment	16
Office machines, n.e.c	8
Automatic merchandising machines	3
Commercial laundry equipment	1
Refrigeration and heating equipment	12
Measuring and dispensing pumps	1
Service industry machinery, n.e.c	4
Machinery, except electrical, nec	1
Transformers	3
Switchgear and switchboard apparatus	4
Motors and generators	2
Welding apparatus, electric	2
Electrical industrial apparatus, n.e.c	1
Household cooking equipment	1
Household laundry equipment	1
Electric housewares and fans	2
Household vacuum cleaners	1
Household appliances, n.e.c	2
Electric lamps	8
Current-carrying wiring devices	1
Noncurrent-carrying wiring devices	1
Lighting equipment, n.e.c	1
Radio and TV receiving sets	2
Phonograph records	5
Telephone and telegraph apparatus	2
Radio and TV communication equipment	18
Electron tubes, receiving type	3
Cathode ray television picture tubes	1
Electron tubes, transmitting	2
Semiconductors and related devices	2
Electronic components, n.e.c	10
Storage batteries	1
Primary batteries, dry and wet	2
X-ray apparatus and tubes	1
Engine electrical equipment	1
Electrical equipment and supplies, n.e.c	1
Motor vehicles and car bodies	6
Truck and bus bodies	1
Motor vehicle parts and accessories	8
Truck trailers	1
Aircraft	8
Aircraft engines and engine parts	1
Aircraft equipment, n.e.c	6
Shipbuilding and repairing	6
Boatbuilding and repairing	3
Railroad equipment	3
Travel trailers and campers	1
Transportation equipment, n.e.c	2
Engineering and scientific instruments	10
Environmental controls	1
Process control instruments	1
Fluid meters and counting devices	1
Instruments to measure electricity	1
Measuring and controlling devices, n.e.c	5
Optical instruments and lenses	3

Industry	*Number of investigations*
Surgical and medical instruments	3
Surgical appliances and supplies	5
Dental equipment and supplies	3
Photographic equipment and supplies	4
Watches, clocks, and watchcases	1
Jewelry, precious metal	2
Silverware and plated ware	1
Jewelers' materials and lapidary work	1
Musical instruments	4
Games, toys, and children's vehicles	4
Sporting and athletic goods, n.e.c	8
Pens and mechanical pencils	1
Needles, pins, and fasteners	2
Signs and advertising displays	1
Burial caskets	2
Manufacturing industries, n.e.c	3
Taxicabs	1
Bus terminal facilities	1
Local trucking, without storage	2
Local trucking and storage	1
Refrigerated warehousing	2
Deep sea foreign transportation	3
Noncontiguous area transportation	1
Great Lakes transportation	1
Transportation on rivers and canals	2
Towing and tugboat service	5
Marine cargo handling	2
Water transportation services, n.e.c	1
Certificated air transportation	3
Noncertificated air transportation	1
Crude petroleum pipelines	2
Freight forwarding	2
Passenger transportation arrangement	2
Railroad car rental with service	1
Packing and crating	1
Radio broadcasting	8
Television broadcasting	5
Communication services, n.e.c	5
Electric services	5
Natural gas transmission	3
Gas transmission and distribution	1
Natural gas distribution	3
Gas production and/or distribution	1
Electric and other services combined	1
Gas and other services combined	2
Refuse systems	8
Automotive parts and supplies	2
Tires and tubes	2
Construction materials, n.e.c	2
Metals service centers and offices	3
Hardware	1
Plumbing and hydronic heating supplies	1
Professional equipment and supplies	5
Transportation equipment and supplies	1
Scrap and waste materials	1
Durable goods, n.e.c	1
Electronic parts and equipment	2
Printing and writing paper	8
Drugs, proprietaries, and sundries	8
Groceries, general line	4
Dairy products	2
Fresh fruits and vegetables	1
Groceries and related products, n.e.c	3

Industry	*Number of investigations*
Grain	1
Chemicals and allied products	3
Petroleum bulk stations and terminals	1
Petroleum products, n.e.c	5
Beer and ale	1
Wines and distilled beverages	4
Farm supplies	1
Tobacco and tobacco products	1
Nondurable goods, n.e.c	4
Grocery stores	9
New and used car dealers	1
Auto and home supply stores	2
Gasoline service stations	2
Men's and boys' clothing and furnishings	1
Women's ready-to-wear stores	1
Family clothing stores	3
Shoe stores	3
Radio and television stores	1
Eating places	3
Drug stores and proprietary stores	9
Liquor stores	1
Used merchandise stores	2
Book stores	2
Jewelry stores	2
Mail order houses	2
Merchandising machine operators	2
Fuel oil dealers	2
Liquefied petroleum gas dealers	1
Miscellaneous retail stores, n.e.c	1
State banks, Federal Reserve	11
State banks, not Federal reserve, FDIC	8
National banks, Federal Reserve	13
Private banks, not Incorporated, not FDIC	1
Federal savings and loan associations	2
State associations, insured	2
Licensed small loan lenders	4
Installment sales finance companies	6
Short-term business credit	10
Mortgage bankers and correspondents	8
Security brokers and dealers	11
Life insurance	8
Fire, marine, and casualty insurance	8
Surety insurance	1
Title insurance	9
Insurance agents, brokers and service	3
Real estate agents and managers	2
Subdividers and developers, n.e.c	1
Holding offices	3
Patent owners and lessors	1
Hotels, motels, and tourist courts	7
Linen supply	4
Diaper service	2
Dry cleaning plants, except rug	1
Funeral service and crematories	1
Advertising agencies	3
Outdoor advertising services	5
Credit reporting and collection	2
Blueprinting and photocopying	1
Disinfecting and exterminating	2
Building maintenance services, n.e.c	4
News syndicates	2
Data processing services	1
Computer related services, n.e.c	2

Industry	*Number of investigations*
Management and public relations	1
Equipment rental and leasing	1
Photofinishing laboratories	5
Trading stamp services	1
Business services, n.e.c	5
Passengor car rental and leasing	6
Truck rental and leasing	1
Parking lots	1
Motion picture production, except TV	6
Motion picture production for TV	1
Services allied to motion pictures	3
Motion picture film exchanges	3
Motion picture theaters, except drive-in	6
Theatrical producers and services	1
Entertainers and entertainment groups	1
Sports clubs and promoters	1
Dental laboratories	1
Libraries and information centers	1
Membership organization, n.e.c	1
Engineering and architectural services	2

CASES AND INVESTIGATIONS INSTITUTED IN THE PERIOD JULY 1963 TO JUNE 1973 EXCLUDED FROM THE ATTACHED COMPILATION

SIC code assigned and description		Number of cases and years	Number of investigations and years	Comments
0874	Forestry		1 (1973)	
2020	Dairy products		1 (1964)	3-digit.
2398	Apparel	1 (1964)		
3619	Electric transmission and distribution equipment, not elsewhere classified.		1 (1964)	Industry deleted.
3717	Motor vehicles and equipment	1 (1964)	[1] 9	
4420	Deep sea domestic transportation	1 (1970)		3-digit.
4610	Pipelines, except natural gas		[2] 3	Do.
5060	Wholesale distribution of electrical goods		1 (1968)	Do.
6000	Banking	[3] 2	1 (1969)	2-digit.
6020	Commercial and stock savings banks	[4] 8	[5] 5	3-digit.
6140	Personal credit institutions		1 (1965)	Do.
6309	Insurance carriers		[6] 4	2-digit.
7390	Business services, not elsewhere classified		1 (1964)	3-digit.

[1] 2 in 1964, 2 in 1966, 1 in 1967, 3 in 1969, 1 in 1970.
[2] 1 each in 1963, 1966, 1968.
[3] 1 each in 1965 and 1968.
[4] 1 in 1963, 1 in 1964, 4 in 1966, 2 in 1967.
[5] 3 in 1963, 1 in 1964, 1 in 1965.
[6] 1 each in 1964, 1965, 1966, 1969.

COMMITTEE ON THE JUDICIARY,
April 7, 1976.

Hon. THOMAS KAUPER,
Assistant Attorney General, Antitrust Division,
U.S. Department of Justice, Washington, D.C.

DEAR MR. KAUPER: To further develop the record of the Subcommittee on Monopolies and Commercial Law's initial hearing on Merger Oversight held on March 10, 1976, I would appreciate the following information:

(a) A table from 1955 to date itemizing the frequency of injunctive relief requested and granted in Section 7 cases, stating the name of the case, the relief requested, the industry in which the mergers occurred and the result of the request for relief.

(b) From 1969 to date, for all mergers challenged by the Department of Justice, the date of the acquisition, the date on which the investigation of the merger was opened by your division, and the date of the complaint.

(c) A description of the liaison between the Division and the Federal Trade Commission concerning merger investigations and complaints. Has the Antitrust Division experienced any difficulty obtaining necessary information from the Federal Trade Commission for a merger investigation? What assistance does the Antitrust Division provide to the Federal Trade Commission?

As the Merger Oversight hearings continue, the staff of the Subcommittee will contact you for additional information.

Thank you for your cooperation.

Sincerely,

PETER W. RODINO, Jr., *Chairman.*

MAY 13, 1976.

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

DEAR CHAIRMAN RODINO: This is in response to your letter of April 7, 1976, in which you requested additional material in connection with the merger oversight hearings held by the Subcommittee on Monopolies and Commercial Law.

Enclosed you will find a detailed list of merger cases in which the Department has sought preliminary relief prior to consummation of the challenged transaction. This list is directly responsive to request (a).

With regard to your request for a list of all mergers challenged by the Department of Justice since 1969, members of your staff have indicated that information which the Department supplied to the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary (and which was represented in Part 2 of the Hearings on S. 1284, at pp. 1006–08) is sufficient. Your April 7 letter does request some additional information with regard to those cases, and we are endeavoring to compile it.

The liaison procedure between the Antitrust Division and the Federal Trade Commission operates as follows: If an agency learns of a merger and proposes to conduct an investigation, it will request a "clearance" from the other agency. A "clearance" will ordinarily be granted unless the other agency has contemplated or pending investigations that arguably would conflict or overlap with the "clearance" item. If "clearance" is denied and the requesting agency desires to pursue the matter further, representatives of our Office of Operations and the FTC's Bureau of Competition will discuss the matter.

Sincerely,

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

DEPARTMENT OF JUSTICE—MERGER CASES IN WHICH PRELIMINARY RELIEF WAS SOUGHT

Name of defendant	Date filed	Industry	Disposition of motion for preliminary relief	Final disposition
Brown Shoe Co.: G. R. Kinney Co., Inc., G. R. Kinney Corp.	Nov. 28, 1955	Shoes	Granted (partial).	Judgment for Government, affirmed (Supreme Court).
Continental Can Co., Inc.: Hazel-Atlas Glass Co.	Sept. 10, 1956	Containers	Denied	Judgment for defendant, reversed (Supreme Court), judgment for Government (district court).
El Paso Natural Gas Co.: Pacific Northwest Pipeline Corp.	July 22, 1957	Natural gas	do	Judgment for Government.
Columbia Pictures Corp.: Screen Gems Corp., Universal Pictures Co., Inc.	Apr. 10, 1958	TV feature films	Granted (partial).	Judgment for defendant.
Diebold, Inc.: Herring-Hall-Marvin Safe Co.	Aug. 24, 1959	Bank vaults, vault doors, drive-in and walk-up banking windows.	Denied	Consent decree.
Pabst Brewing Co.: Schenley Industries, Inc., The Val Corp.	Oct. 1, 1959	Beer	Granted	Schenley and Val, dismissed. Opinion dismissing, reversed and remanded (Supreme Court), judgment for Government (district court).
National Homes Corp	Nov. 20, 1959	Prefabricated houses.	Denied	Consent decree.
The Standard Oil Co. (Ohio): Leonard Refineries, Inc.	Dec. 31, 1959	Petroleum products		Dismissed, merger abandoned.
Von's Grocery Co.: Shopping Bag Food Stores.	Mar. 25, 1960	Groceries	Denied	Judgment for defendant, reversed (Supreme Court), judgment for Government (district court).
Gamble-Skogmo, Inc.: Western Auto Supply Co., Bertin C. Gamble.	Apr. 1, 1960	Consumer hard goods.	Granted [1]	Consent decree.

DEPARTMENT OF JUSTICE—MERGER CASES IN WHICH PRELIMINARY RELIEF WAS SOUGHT—Continued

Name of defendant	Date filed	Industry	Disposition of motion for preliminary relief	Final disposition
Aluminum Co. of America: Rome Cable Corp.	do	Wire and cable products.	do	Judgment for defendant reversed (Supreme Court).
Bliss & Laughlin, Inc	June 28, 1960	Steel bars	Denied	Judgment for defendant, remanded (Supreme Court), judgment for defendant.
West Virginia Pulp & Paper Co	Aug. 25, 1960	Envelopes	do	Consent decree.
Phillips Petroleum Co.: Union Oil Co. of California.	Dec. 9, 1960	Crude oil and natural gas.	Granted[1]	Dismissed without prejudice after transfer of Phillip's stock in Union to individual.
Greater Buffalo Press, Inc.: Dixie Color Printing Corp., The Hearst Corp., The International Color Printing Co., Newspaper Enterprises Association, Inc., Southwest Color Printing Corp.	Jan. 6, 1961	Color comic supplements.	do	Hearst, consent decree judgment for defense, remanded (Supreme Court), judgment for Government (district court).
Kaiser Aluminum & Chemical Corp.: Kawneer Co.	Apr. 27, 1961	Aluminum	do	Consent decree.
Aluminum Co. of America: Cupples Products Corp.	do	Architectural aluminum products.	do	Judgment for Government, motion to affirm granted (Supreme Court).
Continental Illinois National Bank & Trust Co. of Chicago: City National Bank & Trust Co. of Chicago.	Aug. 29, 1961	Commercial banking	Dismissed	Dismissed due to bank legislation.
Standard Oil Co. (Indiana): Pan American Petroleum Corp., Tidewater Oil Co., Getty Oil Co., Honolulu Oil Corp.	Sept. 19, 1961	Crude oil	Denied	Getty, dropped; Honolulu, dismissed, remaining dismissed.
America Corp.: Republic Corp	Dec. 6, 1961	Film processing	do	Consent decrees.
Gimbel Brothers, Inc.: Ed. Schuster & Co., Inc., G. & S. Corp.	Mar. 5, 1962	Department stores	do	Dismissed by stipulation.
Parents Magazine Enterprises, Inc., A. C. McClurg & Co.	June 27, 1962	Books	Granted	Consent decree.
Ingersoll-Rand Co.: Goodman Manufacturing Co., Lee-Norse Co., Galis Electric & Machine Co.	Feb. 14, 1963	Coal mining machinery.	do	Do.
Branch River Wool Combing Co., Inc., The French Worsted Co.	May 13, 1963	Wool	do.[1]	Do.
FMC Corp., American Viscose Corp	June 5, 1963	Industrial chemicals	Denied	Dismissed for lack of jurisdiction (CA), dismissed by stipulation (district court).
Crocker-Anglo National Bank: Citizens National Bank, Tranamerica Corp.	Oct. 8, 1963	Commercial banking	do	Opinion and order dismissing.
Allied Chemical Corp.: General Foam Corp.	Apr. 15, 1964	Chemicals (toluene-diisocyanate [TDI]).	Granted[1]	Consent decree.
Chrysler Corp.: Mack Trucks, Inc.	July 30, 1964	Trucks	do	Order allowing dismissal, merger abandoned.
Third National Bank in Nashville: Nashville Bank & Trust Co.	Aug. 10, 1964	Commercial banking	Denied	Judgment for defense, reversed and remanded (Supreme Court), judgment for Government (district court).
Aluminum Limited: Alcan Aluminum Corp., National Distillers & Chemical Corp.	Dec. 30, 1964	Aluminum siding, venetian blind components and awnings.	do	National, dismissed consent decree.
Citizen Publishing Co.: Star Publishing Co., Arden Publishing Co., Tucson Newspapers, Inc.	Jan. 4, 1965	Daily newspapers	Granted[1]	Judgment for Government, affirmed (Supreme Court).
Penick & Ford, Ltd., Inc.: R. J. Reynolds Tobacco Co.	Apr. 6, 1965	Corn starch	Denied	Consent decree.
Mercantile Trust Co., National Association: Security Trust Co.	July 7, 1965	Commercial banking	do	Do.
Falstaff Brewing Corp.: Narragansett Brewing Co.	July 13, 1965	Beer	do	Narragansett, dismissed. Judgment on remand dismissing the complaint.
Pennzoil Co.: Kendall Refining Co.	Aug. 4, 1965	Penn grade crude oil	Granted	Consent decree.
Allis-Chalmers Manufacturing Co.: Simplicity Manufacturing Co.	Sept. 30, 1965	Riding garden tractors and attachments.	do.[1]	Order of dismissal.
Phillips Petroleum Co.: Tidewater Oil Co.	July 13, 1966	Motor gasoline	Denied	Judgment for Government, affirmed (Supreme Court).

DEPARTMENT OF JUSTICE—MERGER CASES IN WHICH PRELIMINARY RELIEF WAS SOUGHT—Continued

Name of defendant	Date filed	Industry	Disposition of motion for preliminary relief	Final disposition
Tidewater Marine Service, Inc.: Twenty Grand Marine Service, Inc., Tidex, Inc., Pan Marine Service, Inc.	Jan. 16, 1968	Charter vessels	do	Consent decree.
Cities Service Co.: Cities Service Oil Co., Chelsea Terminals, Inc., Jenney Manufacturing Co.	Mar. 8, 1968	Petroleum products	Granted (partial).[1]	Do.
Wilson Sporting Goods Co. Nissen Corp.	Mar. 27, 1968	Gymnastic equipment.	Granted	Do.
Diamond International Corp.: Stecher-Traung-Schmidt Corp.	Oct. 17, 1968	Lithographed paper	do.[1]	Dismissed, Merger abandoned.
Atlantic Richfield Co.: Sinclair Oil Corp.	Jan. 15, 1969	Gasoline	do.[1]	Consent decree.
Ling-Temco-Vought, Inc.: Jones & Laughlin Steel Corp., Jones & Laughlin Industries, Inc.	Apr. 14, 1969	Steel and various other industries.	do.[1]	Do.
International Telephone & Telegraph Corp.: Grinnell Corp.	Aug. 1, 1969	Automatic sprinklers.	Denied	Do.
International Telephone & Telegraph Corp.: The Hartford Fire Insurance Co.	do	Insurance	do	Do.
The Wachovia Corp.: American Credit Corp.	Apr. 24, 1970	Banking	do	Do.
Navajo Freight Lines, Inc.; United Transportation Investment Co., Navajo Terminals, Garrett Freightliners, Inc., F. J. Arsenault, L. F. Mattingly.	Aug. 3, 1970	General freight	Never reached	Dismissed, primary jurisdiction with ICC.
White Consolidated Industries, Inc.	Jan. 27, 1971	Farm machinery and equipment.	Granted	Stipulation and order of dismissal, merger abandoned.
Parker-Hannifin Corp.: Purolator, Inc.	Apr. 27, 1971	Functional fuel system components.	do.[1]	Pending.
United Artists Theater Circuit, Inc.: United Artists Eastern Theaters, Inc.	May 20, 1971	Motion picture features.	Denied	Do.
The Fort Worth National Corp.: Mutual Savings and Loan Association.	Sept. 14, 1971	Savings deposits	Granted (partial)[1].	Dismissed after compliance with divestiture stipulation.
Archer Daniels Midland Co.: Kansas Soya Products Co., Inc., Fremont Cake & Meal Co., Inc.	Dec. 13, 1971	Soybean and soybean meal.	Denied	Kansas Soya, dismissed pending.
Amsted Industries, Inc. Glamorgan Pipe Foundry Co.	Dec. 29, 1971	Cast iron pipe	do	Judgment for Defendant.
G. Heileman Brewing Co., Inc.: Associated Brewing Co.	Apr. 17, 1972	Beer	do	Consent decree.
Parker-Hannifin Corp	May 15, 1972.	Automotive replacement parts.	Granted[1]	Pending.
Converse Rubber Corp.: Eltra Corp., The B.F. Goodrich Co.	July 3, 1972.	Footwear	Consent before ruling on PI	Consent decree.
American Ship Building Co.: Litton Systems, Inc.	Aug. 16, 1972.	Shipping	Granted	Do.
The Federal Co	Nov. 13, 1972.	Flour	Granted (partial)[1]	Judgment for defense.
Halliburton Co	Apr. 24, 1973.	Power generating facilities.	Granted	Pending.
American Technical Industries, Inc.	May 7, 1973.	Artificial xmas trees	do	Consent decree.
The Black and Decker Manufacturing Co.: McCulloch Corp.	Sept. 28, 1973.	Gasoline-powered chain saws.	Granted[1]	Pending, In trial.
Hughes Tool Co.: Borg-Warner Corp., Byron Jackson, Inc.	Aug. 30, 1974.	Oil field handling tools.	Denied	Pending.
Amax, Inc. Copper Range Co	Aug. 25, 1975.	Copper	Never reached	Judgment for Government, but a divestiture order denied—on appeal.
Revco Discount Drug Centers, Inc.: Cook United, Inc.	Mar. 22, 1976.	Drug stores and Pharmacies	Granted	Judgment for Government, case pending.

[1] Entry of preliminary relief not contested by defendants.

APPENDIX A

SEC. 7—CLAYTON ACT CASES, 1969 TO DATE

Name of case	Date filed	Result	Terminated	Divestiture not completed, ordered done by—	Divestiture completed
Atlantic Richfield Co., et al.[1]	Jan. 15, 1969	Consent	Aug. 28, 1970		Dec. 29, 1972.
The Virginia National Bank, et al.[1]	Jan. 20, 1969	Merger abandoned	Aug. 4, 1969		
The Idaho First National Bank, et al.[1]	Feb. 13, 1969	Litigated and lost	Apr. 29, 1970		
Western Farmers Association	Feb. 19, 1969	Consent	Dec. 8, 1969		June 19, 1970.
Iowa Beef Packers, Inc., et al.[1]	Feb. 24, 1969	do	Mar. 20, 1970[3]	Oct. 24, 1975	
Crocker-Citizens National Bank, et al.[1]	Apr. 3, 1969	Merger abandoned	May 12, 1969		
Ling-Temco-Vought, Inc., et al.[1 2]	Apr. 14, 1969	Consent	June 10, 1970		Oct. 8, 1971.
Continental Bank & Trust Co., et al.[1]	Apr. 24, 1969	Merger abandoned	June 4, 1969		
International Telephone & Telegraph Corp. (Canteen)[1]	Apr. 28, 1969	Consent	Sept. 24, 1971		Aug. 10, 1973.
The Connecticut National Bank, et al.[1]	May 9, 1969	Merger abandoned	July 14, 1969		
First Virginia Bankshares Corp., et al.[1]	May 14, 1969	do	June 11, 1969		
Northwest Industries, Inc., et al.[1]	May 21, 1969	Additional acquisition abandoned	May 3, 1974		
Gould Inc	Aug. 1, 1969	Consent	Sept. 3, 1969		Oct. 2, 1970.
International Telephone & Telegraph Corp., et al (Hartford)[4]	do	do	Sept. 24, 1971[3]	(5)	(5).
International Telephone & Telegraph Corp., et al. (Grinnell)[4]	do	do	do.[3]	(5)	(5).
The First National Bank of Sunbury, et al.[1]	Oct. 24, 1969	Merger abandoned	June 5, 1970		
The Standard Oil Co. (Ohio), et al.[1]	Dec. 1, 1969	Consent	Jan. 1, 1970[3]	Dec. 21, 1975	
National Bank & Trust Co. of Central Pennsylvania, et al.[1]	Dec. 11, 1969	do	Dec. 7, 1970		Dec. 21, 1970.
The Higbee Co	Dec. 22, 1969	do	Oct. 4, 1971		Jan. 11, 1973.
First At Orlando Corp., et al.[1]	Dec. 23, 1969	do	Aug. 27, 1970		
Crowell Collier, et al	Feb. 4, 1970	Litigated and lost	July 3, 1973		
United Virginia Bank shares Inc.[1]	Feb. 27, 1970	do	May 21, 1973		
The Cleveland Trust Co. (secs. 7 and 8)	Mar. 26, 1970	Sec. 8 pending; sec. 7 dismissed	July 31, 1974		
Healthcare Corp	Apr. 2, 1970	Pending	(6)		
The Wachovia Corp., et al. (American Credit)[1 4]	Apr. 24, 1970	do	(6)		
P. R. Mallory & Co. Inc., et al.[1]	May 18, 1970	Merger abandoned	June 18, 1970		
American Steamship Co., et al	June 22, 1970	Consent	July 29, 1970		July 24, 1973.
First National Bancorporation, Inc., et al.[1]	July 8, 1970	Litigated and lost	Mar. 27, 1973		
Ciba Corp., et al.[1]	July 17, 1970	Consent	Sept. 8, 1970		Feb. 29, 1972.
Movielab, Inc	July 20, 1970	do	June 7, 1974	June 7, 1975	
Navajo Freight Lines, Inc., et al.[1]	Aug. 3, 1970	Litigated and lost	Apr. 3, 1972		
Combustion Engineering, Inc. (Wickes)	Sept. 1, 1970	Consent	Sept. 8, 1971	(7)	(7).
Combustion Engineering, Inc. (Bauer)	do	Dismissed pursuant to stipulation without prejudice	Jan. 17, 1974		
County National Bank of Bennington, et al.[1]	Dec. 5, 1970	Litigated and won	Aug. 23, 1972		(8).
United Banks of Colorado, Inc., et al.[1]	Nov. 25, 1970	Merger abandoned	Aug. 30, 1971		
First National Bancorporation, Inc., et al.[1]	Dec. 2, 1970	Government motion to dismiss granted following Supreme Court decision in Greeley Bank case.	June 1, 1973		

Asiatic Petroleum Corp., et al	Dec. 8, 1970	Consent	Oct. 7, 1971		Apr. 4, 1972.
R. J. Reynolds Tobacco Co., et al.[1]	Dec. 15, 1970	Pending	(6)		
American Building Maintenance Industries	Jan. 8, 1971	do	(6)		
White Consolidated Industries, Inc., et al.[1]	Jan. 27, 1971	Merger abandoned	Nov. 22, 1971		
First National Bank of Atlanta, et al.[1]	Feb. 8, 1971	Dismissed by stipulation on liquidation of stock acquisition.	May 1, 1972		
Parker-Hannilin Corp., et al.[1]	Apr. 28, 1971	Merger abandoned	Aug. 23, 1971		
First National Bank Corporation, Inc., et al.[1]	do	Consent	July 21, 1972		Jan. 8, 1973.
Harvey-Hubbell, Inc	May 14, 1971	do	Jan. 28, 1972	(9)	(9).
Leggett & Platt, Inc	May 12, 1971	Pending	(6)		
United Artists Theatre Circuit, Inc.[4]	May 20, 1971	do	(6)		
Trust Co. of Georgia, et al.[1]	May 24, 1971	Merger abandoned	Aug. 21, 1971		
Washington Bancshares, Inc., et al.[1]	May 25, 1971	do	July 2, 1971		
INSILCO Corp	May 26, 1971	Consent	Feb. 21, 1974		Feb. 21, 1974.
The Connecticut National Bank, et al.[1]	Aug. 23, 1971	Merger abandoned	Dec. 1, 1974		
General Cinema Corp	Sept. 13, 1971	Consent	Aug. 3, 1973		May 16, 1975.
The Fort Worth National Corp., et al.[4]	Sept. 14, 1971	Litigated and won	May 3, 1973		Apr. 30, 1973.
KDI Corp., et al	Oct. 1, 1971	Consent	Nov. 20, 1972	May 20, 1975	
Marine Bancorporation, et al.[4]	Oct. 22, 1971	Litigated and lost, merger abandoned	Aug. 9, 1974		
Citizens & Southern National Blank, et al.[1]	Nov. 2, 1971	Pending	(6)		
Seattle First National Bank, et al.[4]	Nov. 24, 1971	Merger abandoned	Jan. 18, 1972		
Archer Daniels Midland Co., et al.[4]	Dec. 18, 1971	Pending	(6)		
Amsted Industries, Inc., et al.[4]	Dec. 29, 1971	Litigated and lost	Dec. 30, 1974		
Wells Fargo Bank, National Association, et al.[1]	Jan. 17, 1972	Merger abandoned	Nov. 21, 1972		
National Bank of Georgia, et al.[1]	Feb. 8, 1972	do	Mar. 21, 1972		
Texaco Inc., et al	Mar. 27, 1972	Pending			
Trans Texas Bancorporation, Inc., et al.[1]	Mar. 29, 1972	Litigated and lost	June 18, 1973		
County National Bancorporation, et al.[1]	Apr. 7, 1972	do	Feb. 28, 1973		
M. P. M., Inc., et al	Apr. 11, 1972	do	Apr. 25, 1975		
G. Heileman Brewing Co., Inc., et al.[4]	Apr. 17, 1972	Consent	July 13, 1973	June 15, 1975	
Parker-Hannifin Corp.[3]	May 15, 1972	Pending	(6)		
Technical Tape, Inc., et al	June 29, 1972	Consent	Aug. 28, 1973		March 1974.
United Foam Corp., et al	June 29, 1972	do	May 30, 1973	May 30, 1975	
Converse Rubber Corp., et al.[1]	July 3, 1972	do	Aug. 29, 1972	Oct. 25, 1976	
Bankers Trust of South Carolina, et al.[1]	July 11, 1972	do	Oct. 12, 1973		(9).
American Ship Building Co., et al.[2]	Aug. 16, 1972	do	Jan. 3, 1973		September 1974.
The Federal Co	Nov. 13, 1972	Pending	(6)		
The Wachovia Corp., et al. (Bank of Granite)[1]	Dec. 1, 1972	Merger abandoned	Dec. 29, 1972		
Pacific Southwest Airlines, et al.[1]	Dec. 5, 1972	do	Oct. 15, 1973		
Marathon Enterprises, Inc., et al.[1]	Dec. 14, 1972	do	Mar. 22, 1973		
American Television & Communications Corp., et al.[1]	Dec. 20, 1972	do	Apr. 20, 1973		
The First National Bank of Platteville, et al.[1]	Jan. 12, 1973	do	Mar. 29, 1973		
Guardian Industries Corp	Apr. 16, 1973	Pending	(6)		
Halliburton Co.[2]	Apr. 24, 1973	do	(6)		
Blue Bell, Inc et al	Apr. 25, 1973	do	(6)		

APPENDIX A—Continued

SEC. 7—CLAYTON ACT CASES, 1969 TO DATE—Continued

Name of case	Date filed	Result	Terminated	Divestiture not completed, ordered done by—	Divestiture completed
American Technical Industries, Inc.[2]	May 7, 1973	do	(6)		
Norris Industries, Inc	May 9, 1973	Consent	May 5, 1975	May 5, 1978	
Hercules Inc., et al	Mar. 31, 1973	do	July 3, 1973		Oct. 10, 1973.
Texaco, Inc., et al.[1]	June 12, 1973	do	Jan. 25, 1974		(9).
The Goodyear Tire & Rubber Co	Aug. 9, 1973	Pending	(6)		
The Firestone Tire & Rubber Co	do	do	(6)		
The Black & Decker Manufacturing Co., et al.[1,4]	Sept. 28, 1973	do	(6)		
Michigan National Corp., et al. (Saginaw)[1]	Nov. 14, 1973	do	(6)		
Michigan National Corp., et al. (Wyoming)[1]	do	do	(6)		
Michigan National Corp., et al. (East Lansing)[1]	do	do	(6)		
The Merchants National Bank of Burlington, et al.[1]	Nov. 29, 1973	Merger abandoned	Aug. 2, 1974		
Mrs. Smith Pie Co	Feb. 21, 1974	Pending	(6)		
Certain-teed Products Corp., et al	Feb. 27, 1974	do	(6)		
Albertson's Inc., et al	Apr. 19, 1974	do	(6)		
Michigan National Corp., et al. (Valley)[1]	June 13, 1974	do		(6)	
Michigan National Corp., et al. (Central)[1]	June 13, 1974	do		(6)	
Leggett & Platt, Inc	June 28, 1974	do		(6)	
Hughes Tool Co., et al.[1,4]	Aug. 30, 1974	do		(6)	
Chas. Pfizer & Co., Inc., et al (motion to amend to include sec. 7)	(10)	do		(6)	
International Harvester, et al	Mar. 3, 1975	do		(6)	

[1] Proposed merger.
[2] Preliminary injunction obtained.
[3] In trusteeship.
[4] Preliminary injunction denied.
[5] Indefinite.
[6] Pending.
[7] Motion by Government for further relief denied. Ends obligation to divestiture, Dec. 19, 1972.
[8] No divestiture required.
[9] Modified judgment, No divestiture required.
[10] Filed May 31, 1974; granted Nov. 21, 1974.

DEPARTMENT OF JUSTICE,
Washington, D.C., July 7, 1975.

Hon. PHILIP A. HART,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HART: This is in response to your letter of May 15, 1975, asking for responses to several questions dealing with my testimony before your subcommittee on the Antitrust Improvements Act of 1975 (S. 1284).

For sake of clarity, I will respond to each of your questions seriatim.

1. I am authorized to state that the views expressed in this letter, as well as the views contained in my testimony of May 7 as clarified and expanded by this letter, represent the views of the Administration.

2. In order to obtain a preliminary injunction barring consummation of a merger or acquisition transaction pending the outcome of a suit instituted by the Government challenging the transaction under the antitrust laws, the Government must demonstrate only a "reasonable probability" that it will prevail on the merits. See *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. 1962), *aff'd*, 320 F.2d 509 (C.A. 3. 1963); *United States* v. *Crocker-Anglo National Bank*, 223 F. Supp. 849 (N.D. Calif. 1963); *United States* v. *Chrysler Corp.*, 232 F. Supp. 651 (D.N.J. 1964). No separate showing of "irreparable injury" is required, as such is embodied in the policy of the antitrust laws, see, *e.g.*, *United* v. *Ingersoll-Rand Co.*, *supra*, 218 F. Supp. at 544. In *Ingersoll-Rand*, the District Court pointed out that it was not "necessary [for the Government] to demonstrate the precise manner in which violation of the law will result in injury to the public interest. It is sufficient to show only that an act or threatened act is within the declared prohibition of Congress," 218 F. Supp. at 545. However, despite this generally accepted rule, preliminary relief has been denied where a company involved in the transaction was in a severely weakened financial condition, see *United States* v. *G. Heileman Brewing Co.*, 345 F. Supp. 117 (E.D. Mich. 1972), and where economic factors might make consummation at a later date impossible, see *United States* v. *Brown Shoe Co.*, 1956 Trade Cas. ¶ 68244 (E.D. Mo. 1956).

Nonetheless, the essential burden of the Government to obtain preliminary relief is to demonstrate the probability of success on the merits. In a sense, the "probability" standard for preliminary relief is compounded, since the Government's *ultimate* burden in a Clayton Act § 7 case is to show a reasonable "probability" of a substantial lessening of competition, see *United States* v. *Marine Bancorporation*, 94 S. Ct. 2856, 2870 (1974). Thus, as a logical matter, preliminary relief should not be difficult to obtain. In practice, it has frequently been necessary to convince the trial court of the ultimate merits of the case. The material requested is attached as Appendix A.[1]

3. There may well be situations in which a study of a proposed transaction would appear appropriate or desirable at the time of suit, but where changed conditions make reevaluation of that conclusion necessary at some time prior to the completion of the litigation process. It is obviously difficult to delineate all possible factual circumstances which might compel this conclusion, but the most obvious would be where emergency financial circumstances made continued separate operation difficult or perhaps impassable. Assuming that the stay would be automatically imposed, either upon the initiation of a legal challenge or a request from the Department, and assuming further that circumstances could arise in which the Department and the defendants might differ on the appropriateness of a continued injunction, some discretion in the court seems desirable, although this discretion must be limited in order to assure the effectiveness of the procedure.

There are, obviously, a number of ways to deal with this issue. One alternative is language similar to that contained in the Bank Merger Act (12 U.S.C. § 18), which on its face leaves the district court with broad discretion to lift the stay automatically imposed when a proposed bank merger is challenged by the government. Judicial interpretation has sharply circumscribed this apparent discretion, however, and controlling decisions appear to require a court to find that the challenge is "frivolous" before a stay may be lifted.

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[1] Printed under title III.

Another alternative, which we prefer, would be to include within the statute language which would leave limited discretion in the district court, in words which are broad enough to cover any possible circumstances which could appropriately call for lifting of the stay and yet narrow enough so that the stay could not be lifted without an appropriate showing. The following language, added at the end of new Section 23(d) of Title V of S. 1284, would seem to meet this description:

> Such order staying the consummation of the acquisition shall remain in force during the pendency of litigation and any appeals which might be taken, unless the court shall otherwise specifically order. Such an order shall be modified only upon a showing either of irreparable harm resulting from the continuation of the order, in which case the order shall be modified only to the extent necessary to deal with the harm resulting from the total prohibition against consummation, or that the government challenge to the acquisition is wholly without merit and frivolous. A showing of loss of anticipated benefits arising from the challenged acquisition itself shall not be sufficient to meet the standards set forth in this section.

There may well be alternative language formulations which would accomplish the desired result, and my staff stands ready to work with the subcommittee staff on this and other issues.

Sincerely,

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

FEDERAL TRADE COMMISSION,
Washington, D.C., July 10, 1975.

Hon. PHILIP A. HART,
Chairman, Subcommittee on Antitrust and Monopoly,
Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Enclosed are the following supplementary materials concerning S. 1284. These materials were requested by your Subcommittee at the hearings held earlier this year and in subsequent communications:

A statement of reasons for the proposed Amendment to Section 10 of the Federal Trade Commission Act (Title III of S. 2184); [1]

A breakdown by asset size (of the acquiring company) of merger in 1968 and 1972;

A synopsis of the deposition of all FTC merger cases by document number and name since 1950.

Sincerely,

LEWIS A. ENGMAN, *Chairman.*

NUMBER OF LARGE MERGERS,[1] 1968 AND 1972, WITH AN ACQUIRING COMPANY OF $100,000,000 OR MORE IN ASSETS

Asset size of acquiring company	1968	1972
$100,000,000 to $199,000,000	30	8
$200,000,000 to $299,900,000	25	5
$300,000,000 to $399,9?0,000	22	5
$400,000,000 to $499,900,000	10	10
$500,000,000 and above	67	31
Total [2]	154	59
All large mergers (including acquiring companies with assets less than $100,000,000)	213	78

[1] Acquisitions of manufacturing and mining companies with $10,000,000 or more in assets.

[2] This figure includes acquisitions in which both partners publish financial reports and also acquisitions in which 1 or both of the companies was privately held and hence did not publish financial reports. The principal sources of data for acquisitions involving non-public companies were the FTC's premerger notification reports and quarterly financial report files. Since individual company data in those files are confidential, company names and asset values for such acquisitions are suppressed in the more detailed tables.

Source: Federal Trade Commission, Bureau of Economics.

NAMES OF COMPANIES INVOLVED IN ACQUISITIONS, BY HUNDRED MILLION DOLLAR SIZE CLASSES, 1968—Con.

SIC Code—Name of acquiring company	Assets	Name of acquired company	Assets
356X: Rex Chainbelt, Inc	109.0	346X: Racine Hydraulics	17.3
3611: Amphenol Corp	117.9	3773: Bunker Ramo Corp (subsidiary of Martin-Marietta).	68.3
381X: Whittaker Corp	118.0	34XX: Columbus Milpar	10.3
361X: Cooper Industries	123.1	342X: Crescent Niagara	10.9
783X: National General	124.9	271X: Grosset & Dunlap	40.7
361X: I-T-E Circuit Breaker	125.1	34XX: Imperial-Eastman	33.0
324X: American Cement Corp	131.5	3449: Pascoe Steel Corp	11.2
283X: Miles Laboratories	135.7	3291: S.O.S. (division of General Foods Corp.)	55.0
355X: Ritter Pfaudier	138.8	381X: Taylor Instrument	53.9
231X: Hart Schafiner & Marx	143.2	2311: Wile, M., & Co	13.1
651X: Commonwealth United	144.0	365X: Seeburg Corp	82.9
221X: Bangor Punta Corp	144.4	351X: Waukesha Motor Co	35.7
357X: Pitney-Bowes ,Inc	145.8	262X: Monarch Marking	26.9
508X: American Hospital Supply	148.5	251X: Hamilton Manufacturing Co	26.7
316X: Porter, N.K	151.1	147X: Pacific Asbestos	10.6
3821: Rockwell Manufacturing	152.1	3413: Sterling Faucet Co	17.5
331X: Cyclops Corp	157.5	331X: Sawhill Tubular Products	26.9
356X: Automatic Sprinkerl	158.1	355X: Meyer, George J., Manufacturing	50.2
354X: U.S. Industries	162.3	333X: Capital Wire & Cable	11.0
Do	162.3	349X: Wyatt Industries	19.0
Do	162.3	3522: Big Dutchman Inc	28.2
231X: Cluett Peabody	164.4	225X: Van Realte Co., Inc	62.5
151X: Universal Oil Products	183.7	333X: Calumet & Hecia	101.8
356X: Colt Industries	197.1	331X: Crucible Steel Co	285.8
Do	197.1	37XX: Holley Carburetor	22.1
Total: 100 to 200:			
Public (25)			1,094.8
Confidential (5)			79.3
271X: Crowell Collier & MacMillan	207.4	275X: Publication Corp	31.3
521X: Loews Theatres	209.7	211X: Lorillard, P. Corp	375.2
356X: Sunstrand Corp	213.9	356X: Falk Corp	55.7
356X: Colt Industries	224.2	361X: Central Transformer	27.4
354X: Ex-Cell-O Corp	228.5	3541: Greenlee Bros. & Co	28.7
Do	228.5	3544: Atlantic Machine Tool	10.7
162X: Dillingham Corp	246.4	1429: Basalt Rock Co	16.8
361X: Emerson Electric	246.6	356X: Wiegand, Edwin L., Co	32.1
Do	246.6	381X: Therm-O-Disc, Inc	12.3
349X: Crane Co	246.7	241X: Huttig Sash & Door	13.7
358X: Kidde, Walter & Co	253.1	364X: Keystone Lamp Manufacturing	11.2
283X: Squibb, E. R. & Sons	253.3	270X: Beech-Nut Life Savers	172.0
371X: Budd Co	264.5	3715: Gindy Manufacturing Corp	44.0
366X: Lear Siegler	265.1	3544: National Twist Drill & Tool	23.4
231X: Kayser-Roth Corp	269.6	31XX: Commonwealth Shoe	11.2
355X: White Consolidated Industries	277.3	354X: Bullard Co	28.0
Do	277.3	354X: Blaw-Knox Co	129.4
355X: U.S.M. Corp	282.5	355X: Farrell Corp	54.0
314X: Interco, Inc	287.0	2553: Campus Sweater & Sportswear	42.0
321X: Libbey-Owens-Ford	291.7	356X: Aeroquip Corp	74.0
285X: Sherwin-Williams	293.8	398X: Osborn Manufacturing Co	14.3
Total (200 to 300):			
Public (21)			1,209.2
Confidential (2)			137.7
262X: Diamond International Corp	304.2	2621: Groveton Papers Co	17.4
Do	337.7	354X: McKay Co	13.4
Do	337.7	351X: Ryan Aeronautical	142.8
Do	337.7	354X: Landis Machine Co	16.2
Do	337.7	331X: Rodney Metals, Inc	12.6
Do	337.7	356X: Packard-Bell Electronics	34.2
651X: City Investing Co	338.9	275X: World Color Press	14.7
398X: Armstrong Cork	353.2	251X: Thomasville Furniture	49.6
374X: A.C.F. Industries	361.7	306X: Polymer Corp	15.7
314X: Genesco, Inc	363.6	228X: Swift Spinning Mills	10.3
349X: Combustion Engineering	364.2	321X: Mississippi Glass	17.7
281X: Hooker Chemical	366.5	355X: Udylite Corp	29.5
Do	366.5	349X: Sel-Rex Corp	13.5
314X: Genesco, Inc	371.7	231X: Susan Thomas, Inc	11.7
549X: Combustion Engineering	381.8	3481: Tyler, W. S., Inc	38.8
204X: General Mills	382.5	203X: Gorton Corp	28.8
5042: Consolidated Foods Corp	387.8	2011: Bryan Bros. Packing	10.5
Do	387.8	284X: Fuller Brush Co	39.4
Total (300 to 400):			
Public (18)			516.8
Confidential (4)			73.7

NAMES OF COMPANIES INVOLVED IN ACQUISITIONS, BY HUNDRED MILLION DOLLAR SIZE CLASSES, 1968—Con.

SIC Code—Name of acquiring company	Assets	Name of acquired company	Assets
283X: Merck & Co., Inc	400.6	2899: Calgon Corp	55.8
504X: Consolidated Foods Corp	402.5	363X: Electrolux Corp	81.3
331X: Wheeling Steel	401.9	331X: Pittsburg Steel	193.6
371X: Fruehauf Corp	413.9	373X: Maryland Shipbuilding	22.5
283X: Rexall Drug & Chemical	440.7	34XX: West Bend Co	42.5
203X: Hunt Foods & Industries	463.8	209X: Canada Dry Corp	105.6
352X: Dresser Industries, Inc	464.7	358X: Symington Wayne	66.1
221X: Glen Alden Corp	469.7	208X: Schenley Industries, Inc	570.7
271X: Time, Inc	474.9	27XX: Little, Brown & Co	11.0
Total (400 to 500):			
Public (9)			1,148.6
Confidential (1)			
2631: Federal Paper Board Co	109.4	2631: Riegel Paper Corp (Paper and Forrest Prods Div).	102.9
3622: General Signal Corp	144.4	3821: Colorado: Mfg. Corp (Sub of Colorado Interstate Corp.).	43.5
Do	144.4	3569: Mixing Equipment Co., Inc	19.0
7396: Blue Chip Stamps	148.4	2071: Sees Candy Shops, Inc	17.1
3561: Cooper Industries, Inc	172.1	3423: Nicholson File Co	46.9
3323: Amsted Industries, Inc	177.1	3321: Glamorgan Pipe and Foundry Co	15.7
2231: Collins and Aikman Corp	179.7	2272: Tennessee Tufting Corp	10.3
Total (100 to 200):			
Public (7)			255.4
Confidential (1)			
2621: Southwest Forest Industries, Inc	203.7	2442: General Box Co	16.2
2421: Willamette Industries, Inc	203.7	2421: Hunt Lumber Co	10.0
2092: Central Soya Co., Inc	221.3	2906: Filbert, J. H., Inc	14.6
3321: Harsco Corp	230.6	3442: Edwards Mfg. Co	10.3
Total (200 to 300):			
Public (4)			51.1
Confidential (1)			
3312: Cyclops Corp	304.5	3344: Smith,Elvin G. & Co	13.2
3691: Gould, Inc	326.0	3621: Century Electric Co	33.9
3634: Sunbeam Corp	361.6	3585: Bally Case & Cooler, Inc	11.4
Do	361.6	3433: Zink, John Co	18.9
Total (300 to 400):			
Public (4)			77.4
Confidential (1)			
2043: Quaker Oats	423.7	3941: Marx Louis & Co., Inc	36.3
2282: Chromalloy American Corp	426.1	3522: Kewanee Machinery & Conveyor Corp.	10.1
6711: Interco, Inc	437.9	2328: Big Yank Corp	41.4
6153: Amfac, Inc	451.9	2011: Wilhelm Co	15.2
2085: Heublein, Inc	453.6	201X: Spring Valley Foods, Inc	12.7
3622: Emerson Electric Co	457.7	3679: Fusite Corp	11.3
Total (400 to 500):			
Public (6)			97.0
Confidential (4)			72.2

FEDERAL TRADE COMMISSION—MERGER CASES SINCE 1950

FTC docket No. and case name	Merger consummated	Complaint issued	Final order issued	Final order effective (or modified order)	Commission approval of last required divestiture completed
6000—Pillsbury, Mills, Inc.	June 12, 1951—May 10, 1952	June 16, 1952	Mar. 28, 1966	Mar. 28, 1966	Dismissed.
6156—Luria Bros. & Co.	May 4, 1948 to Feb. 1, 1950, 5 mergers.	Feb. 19, 1954	Feb. 19, 1963	Oct. 14, 1968	Feb. 23, 1973.
6180—Crown Zellerbach Co.	Feb. 17, 1953	Feb. 15, 1954	Dec. 26, 1957	June 25, 1962	Apr. 9, 1964.
6388—Farm Journal	June 6, 1955	June 30, 1955	July 17, 1956	Sept. 17, 1956	Feb. 1957, divestiture of trade names subscribe and advertiser lists.
6391—Union Bag & Paper Corp.	June 7, 1954	do	Mar. 23, 1956	May 10, 1956	None required.
6478—A. G. Spalding & Bros.	Dec. 8, 1955	Dec. 8, 1955	Mar. 30, 1960	June 22, 1962	Sept. , 1963.
6495—Foremost Dairies	January 1951—October 1955	June 17, 1956	Apr. 30, 1962	Apr. 5, 1965	Prior to October 1965.
6527—Scovill Manufacturing Co.	Apr. 4, 1955	Mar. 12, 1956	Sept. 14, 1956	Nov. 14, 1956	Feb. 1, 1957.
6557—Brillo Manufacturers	July 5, 1955	May 22, 1956	Jan. 17, 1964	Mar. 17, 1964	Dec. 23, 1974.
6559—Scott Paper Co.	Nov. 9, 1951; Sept. 2, 1954; Oct. 27, 1954.	June 1, 1956	Dec. 16, 1960; modified order May 8, 1964.	Modified order Apr. 23, 1964 by terms of month.	Feb. 18, 1972.
6608—Freuhauf Trailer Co.	1947; 1953; Oct. , 1955; Jan. and Apr. 1956; May 23, 1958.	Aug. 17, 1965	May 28, 1965; modified order Feb. 11, 1966.	Mar. 11, 1966	Jan. 13, 1966.
6646—Vendo Co.	Sept. 18, 1956	Oct. 11, 1956	Sept. 6, 1957	Nov. 6, 1957	Sept. 5, 1968, Patent and trademark divestiture.
6651—National Dairy Products	21 acquisitions 1951–56	Oct. 16, 1956	Jan. 30, 1963	Mar. 30, 1963	Mar. 22, 1965.
6652—Borden	46 corporate and 79 noncorporate 1951–56.	do	Apr. 15, 1964	June 15, 1964	Nov. , 1967. One plant in Saginaw, Mich. which Borden had vacated in 1966 not sold until Dec. 17, 1970.
6653—Beatrice	76 corporate and 98 noncorporate 1951–61.	do	Dec. 10, 1965	July 7, 1967	Mar. 3, 1970.
6670—Erie Sand & Gravel Co.	Mar. 1, 1955	Oct. 30, 1956	Oct. 26, 1959	Jan. 4, 1962	January 1956–August 1961. Some assets still retained but divestiture deemed substantial enough for case to be dismissed as moot.
6676—International Paper	Nov. , 1956	Nov. 6, 1956	July 3, 1957	Sept. 3, 1957	Jan. 1966.
6689—Gulf Oil Corp.	Mar. 2, 1956	Dec. 13, 1956	Jan. 5, 1960	Mar. 5, 1960	Mar. 31, 1956.
6820—Automatic Canteen Co. of America	Feb. 17, 1955; Sept. 30, 1955	June 14, 1957	June 23, 1958	Aug. 23, 1958	Feb. 24, 1960.
6826—Union Carbide	Dec. 31, 1956	Feb. 8, 1957	Sept. 25, 1961	Nov. 25, 1961	Nov. 1, 1963.
6852—National Sugar Refining Co.	June , 1955	Sept. 25, 1957	Feb. 1, 1962	Apr. 1, 1962	June 13, 1963.
6901—Proctor & Gamble Co.	Aug. 1, 1957	Sept. 30, 1957	June 15, 1961; Nov. 26, 1963	Apr. 11, 1967	Mar. 5, 1968. Commission vacated initial decision, remanded and issued 2d order Nov. 26, 1963.
7000—Consolidated Foods	Apr. 12, 1951	Dec. 18, 1957	Mar. 22, 1963	Apr. 28, 1965	Feb. 21, 1966.
7009—Reynolds Metal Co.	Aug. 31, 1956	Dec. 27, 1957	Jan. 21, 1960; modified order May 26, 1966.	Dec. 27, 1962; modified order June 26, 1966.	Feb. , 1967.

FTC docket No. and case name	Merger consummated	Complaint issued	Final order issued	Final order effective (or modified order)	Commission approval of last required divestiture completed
7095—Dresser Industries	Nov. 1, 1955; Feb. 28, 1957; Sept. , 1955.	May 26, 1958	July 24, 1963	July 24, 1963	Dismissed.
7096—National Lead	May , 1956; June , 1956; Aug. , 1956.	Mar. 26, 1958	do	do	Do.
7323—Diamond Crystal Salt Co	Jan. 10, 1957	Dec. 2, 1958	Feb. 4, 1960	Apr. 4, 1960	Aug. 19, 1960.
7453—National Tea Co	Jan. 1, 1951; September 1958	Mar. 26, 1959	Mar. 4, 1966	May 4, 1966	Not available. No divestiture required; only prohibition on future acquisitions.
7464—Kroger	1928–58	Apr. 1, 1959	Oct. 31, 1968	Oct. 31, 1968	Dismissed.
7652—ABC	Oct. 28, 1957; Dec. 5, 1957	Nov. 4, 1959	Oct. 22, 1964	Dec. 22, 1964	Apr. 7, 1970.
7713—Simpson Timber Co	Aug. 17, 1956	Jan. 4, 1960	Jan. 4, 1962	Mar. 4, 1962	Dec. 31, 1968.
7770—Warner Co	Feb. 24, 1956; Feb. 15, 1957	Feb. 18, 1960	May 15, 1963	May 15, 1963	Dismissed.
7833—Crane Co	1958-1960	Mar. 18, 1960	Dec. 28, 1962	Dec. 28, 1972	Do.
7880—Continental Baking	Nov. 29, 1958	May 5, 1960	Apr. 2, 1962	June 2, 1962	Oct. 18, 1963.
7938—Campbell Taggart Associated Bakeries.	Apr. , 1959	June 14, 1960	Apr. 7, 1967	June 7, 1967	Mar. 17, 1970.
7939—Permanente Cement Co	June 30, 1958; Mar. 2, 1959; Apr. 30, 1959.	do	Apr. 24, 1964	May 23, 1965	Oct. 18, 1966.
7946—Union Bag Camp Paper Corp	July 12, 1956; Oct. 31, 1958; Mar. 2, 1959; Apr. 9, 1959; Jan. 10, 1957; Apr. 12, 1960.	June 15, 1960	Feb. 12, 1965	Apr. 12, 1965	Dec. 31, 1969.
7973—Minnesota Mining and Manufacturing Co.	Mar. , 1956; Aug. , 1956	June 24, 1960	Aug. 24, 1961	Oct. 24, 1961	May 28, 1963.
7993—Inland Container Corp	June 30, 1958	do	July 31, 1964	Apr. 1, 1966	Aug. 31, 1966.
8027—Kaiser Steel Corp	May 15, 1958	June 27, 1960	Mar. 16, 1961	Mar. 16, 1961	Not available. Dismissed and superseded by 8341.
8034—Hooker Chemical Corp	Durez 44 Sept. 1, 1958 (Monsanto).	July 28, 1960	Aug. 22, 1961	Oct. 22, 1961	Jan. 19, 1962.
8122—Ekco Products Co	June 30, 1954; May 9, 1958	Sept. 26, 1960	Apr. 21, 1964	Mar. 21, 1965	May 3, 1966.
8220—Leslie Salt Co	Dec. 1, 1958; Jan. 2, 1958	Dec. 14, 1960	Dec. 8, 1961	Feb. 8, 1962	Jan. 4, 1966.
8280—Martin Marietta Corp	July , 1953 to Feb. , 1960, about 30 acquisitions.	Jan. 27, 1961	Mar. 12, 1963	May 12, 1963	Aug. 13, 1968.
8341—Kaiser Industries Corp	May 15, 1958	Mar. 16, 1961	Aug. 2, 1963	Aug. 2, 1963	Dismissed.
8458—Grand Union	June , 1950, December 1960	Jan. 12, 1962	June 10, 1965. See special comments June 21, 1968. (C1350).	Aug. 10, 1965. See special comments Aug. 21, 1968. (C1350).	Sept. 30, 1970. While Grand Union 8458 final order was in compliance enforcement stage, a related case, Grand Union, C-1350, was brought and settled by consent decree on June 21, 1968. For purposes of consistency the 8458 final order was set aside and superseded by the C-1350 decree. Divestiture completed, Sept. 30, 1970.
8572—Diamond Alkali Co	Aug. 31, 1961	May 16, 1963	Oct. 2, 1967	Apr. 24, 1968	Dec. 21, 1967.
8585—Lone Star Cement	Dec. 1, 1959; Aug. 15, 1962	July 15, 1963	Jan. 26, 1965	Mar. 26, 1965	Dec. 31, 1967.
8600—General Foods Corp	Dec. 31, 1957	Sept. 30, 1963	Mar. 11, 1966	May 20, 1968	July 15, 1968.

8606—Frito Lay, Inc.	June 1958; to August 1961. (8 acquisitions.)	Nov. 13, 1963	Aug. 28, 1968	Oct. 28, 1968	Oct. 15, 1970.
8622—American Brake Shoe	Apr. 16, 1963	May 12, 1964	Apr. 10, 1968	Oct. 19, 1970	Aug. 11, 1971.
8654—National Portland Cement	Sept. 23, 1963	Jan. 22, 1965	Mar. 31, 1967	Mar. 31, 1967	Dismissed.
8655—U.S. Steel Corp	May 1, 1964	do	Dec. 2, 1968	Aug. 15, 1973	Apr. 10, 1973.
8656—Texas Industries	Sept. 30, 1963	do	Dec. 3, 1965	Feb. 3, 1966	Nov. 30, 1967.
8657—Mississippi River Fuel	Oct. 18, 1963; Jan. 31, 1964	Jan. 22, 1963	May 20, 1969	July 26, 1972	Oct. 30, 1973.
8674—Dean Foods Co. and Bowman Dairy Co.	Jan. 3, 1966	Dec. 22, 1965	Nov. 14, 1966	June 22, 1967	Nov. 22, 1969.
8678—Ideal Cement Co	Mar. 22, 1965	Jan. 26, 1966	May 19, 1966	July 19, 1966	Sept. 11, 1972.
8680—Lehigh Portland Cement Co	July 1965 to January 1966	Apr. 1, 1966	June 7, 1972	Aug. 7, 1972	Nov. 1, 1974.
8682—Seeburg Corp	Dec. 3, 1963	Apr. 22, 1966	Apr. 10, 1969	Jan. 4, 1971	July 21, 1971.
8685—Marquette Cement Manufacturing Co.	Nov. 16, 1964	May 20, 1966	Jan. 7, 1969	Oct. 8, 1969	Dec. 23, 1969.
8687—Crown Cork & Steel Co., Inc.	Nov. 13, 1963 to Feb. 10, 1966	May 31, 1966	July 22, 1968	July 22, 1968	Dismissed.
8701—Cole National Corp	Mar. 18, 1964	Aug. 4, 1966	July 11, 1967	Sept. 11, 1967	Not available. Assets sought to be divested by complaint had been sold before consent decree issued.
8739—Bendix Corp. and Fram Corp	June 30, 1967	June 29, 1967	June 18, 1970	Jan. 12, 1975	To be completed.
8759—Swingline	Aug. 16, 1965	Apr. 1, 1968	Oct. 16, 1969	Dec. 16, 1969	Jan. 5, 1972.
8760—Stanley Works	Aug. 1, 1966	Apr. 30, 1968	May 17, 1971	June 4, 1973	To be completed.
8763—Maremont Corp	1939–68 (over 40 acquisitions)	July 1, 1968	Jan. 26, 1971	Mar. 26, 1971	May 12, 1975.
8765—Kennecott Copper Corp	Mar. 17, 1957	Aug. 5, 1968	May 5, 1971	Apr. 22, 1974	To be completed.
8767—Allied Chemical Corp. and Jim Robbins Seat Belt Co.	1966 to July 28, 1967	Sept. 3, 1968	Apr. 29, 1970	June 29, 1970	Nov. 24, 1971.
8775—Avnet, Inc	Jan. 31, 1965	Apr. 1, 1969	Feb. 16, 1973		
8778—Litton Industries Inc	Jan. 3, 1969	Apr. 10, 1969	Mar. 13, 1973	May 4, 1975	Not available. Under Apr. 8, 1975, modified order, divestiture not required; 10 years ban on acquisition remains in force.
8779—Papercraft Corp	Dec. 27, 1967	do	June 30, 1971	July 6, 1973	To be completed.
8783—Missouri Portland Cement	Feb. 15, 1965	June 10, 1969	Mar. 12, 1973	May 12, 1973	Nov. 27, 1973.
8785—Ash Grove Cement Co	Aug. 31, 1962 to Nov. 8, 1966, 2 serial acquisitions.	July 8, 1969	Pending before Commission Cross Appeal from Initial Decision of Administrative Law Judge.		
8795—Harbor Banana Distributors, Inc. (formerly United Fruit Co.).	Feb. , 1968	July 28, 1969	Jan. 12, 1973	Dec. 13, 1974	To be completed.
8797—Sterling Drug Inc	June 28, 1966	Aug. 7, 1969	Apr. 7, 1972	Apr. 7, 1972	Dismissed.
8802—OKC Corp. and Oklahoma Land & Cattle Co.	May 26, 1969 to Dec. 15, 1969	Oct. 17, 1969	Oct. 21, 1970	May 14, 1972	To be completed.
8814—Beatrice Foods Co	Dec. 12, 1968	Apr. 30, 1970	Sept. 28, 1972	Sept. 28, 1972	Dismissed.
8826—Eaton, Yale & Towne, Inc	Oct. 31, 1969	Dec. 17, 1970	Final order May 15, 1975		
8835—United Brands	Oct. 25, 1968 to July 2, 1969	Feb. 11, 1971	May 14, 1974	May 14, 1974	Dismissed.
8836—General Mills	Aug. 16, 1968	Feb. 16, 1971	Oct. 5, 1973	Oct. 5, 1973	Dismissed.
8842—North American Rockwell Corp	Aug. 29, 1968	May 10, 1971	July 15, 1974	Sept. 15, 1974	July 25, 1974.
8843—Georgia Pacific Corp	Apr. , 1963 to Aug. , 1969 about 11 acquisitions.	May 26, 1971	Dec. 26, 1972	Feb. 26, 1973	Oct. 16, 1973.
8847—American General Insurance Co	July 1, 1969	June 17, 1971	Pending before administrative law judge pursuant to Dec. 15, 1972. Commission order vacating Mar. 6, 1972. Initial decision and remanding to administrative law judge.		

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FEDERAL TRADE COMMISSION—MERGER CASES SINCE 1950—Continued

FTC docket No. and case name	Merger consummated	Complaint issued	Final order issued	Final order effective (or modified order)	Commission approval of last required divestiture completed
8848—The Budd Co	Oct. 22, 1968	June 18, 1971	Pending before Commission; Respondent's appeal from Mar. 8, 1974. Initial decision.		
8850—Warner Lambert Co	Nov. 13, 1970	June 30, 1971	Appeal from Aug. 2, 1974. Administrative law judge's initial decision pending before Commission.		
8864—Beatrice Foods	July 31, 1969; July 1, 1970	Oct. 1, 1971	Final order issued July 1975.		
8878—Kaiser Steel Corp	Mar. 31, 1970	Mar. 3, 1972	Provisionally settled May 29, 1975.		
8892—St. Joe Mineral Corp	Dec. 29, 1970	June 29, 1972	Mar. 11, 1974	May 11, 1974	Not available. No divestiture required, 5 year acquisition ban required.
8903—Pepsico, Inc	Nov. 16, 1972	Dec. 1, 1972	Jan. 25, 1974	Mar. 25, 1974	To be completed.
8904—Heublein	Feb. 21, 1969	Nov. 17, 1972	Discovery in process		
8905—Associated Dry Goods	Apr. 20, 1972	Dec. 1, 1972	Jan. 21, 1975, matter withdrawn from adjudication for purposes of settlement.		
8920—Retail Credit Co	Information not available except for CB D.C. on Oct. 29, 1970. Many acquisitions involved.	Mar. 9, 1973	Pending before administrative law judge.		
8938—Liggett & Meyers, Inc	Jan 29, 1969	Aug. 14, 1973	Initial decision not yet formally promulgated.		
8951—Deltown Foods Inc. and Kraftco Corp.	November 1973	Jan. 18, 1974	Final order Mar. 14, 1975		
8955—British Oxygen Co	July 25, 1973 to Dec. 10 1973	Feb. 26, 1974	Initial decision pending before Commission.		
8957—Walter Kidde & Co. Inc	Oct. 4, 1971	Mar. 20, 1974	Discovery in process		
8959—RSR Corp	Oct. 26, 1972	Apr. 1, 1974	do		
8972—Fruehauf Corp	Oct. 31 1973	June 21, 1974	do		
8986—Jim Walter Corp	June 29, 1972	July 19, 1974	Pending		
8990—Gifford-Hill & Co., Inc	Dec. 31, 1970	Aug. 7, 1974	do		
8992—Coca-Cola Bottling Co. of New York, Inc.	Dec. 14, 1972	Sept. 10, 1974	do		
8994—Anaconda Co	Dec. 17, 1972	Sept. 17, 1974	do		
9003—Nestle Alimentana S.A., et al.	Mar. 5, 1973	Jan. 7, 1975	do		
9005—Cargill Inc	Dec. 19, 1973	Jan. 21, 1975	do		
9028—Brunswick Corp, et al	Nov. 21, 1972	Apr. 15, 1975	do		

MERGER NOTIFICATION

[¶ 4540] FTC Merger Notification Program

The FTC requires firms undertaking large corporate mergers to give the agency advance notice and to file special reports. The program was initiated by a resolution dated April 8, 1969 and continued and implemented by resolutions in 1972, 1973 and 1974. The texts of the August 15, 1974 resolution and order to file and the current public notices on the matter appear below. The agency's special report forms appear at ¶ 4540.05-.17.

It should be noted that the FTC endeavors to send copies of the order, resolution and forms to "many" companies covered by the report requirement described in the resolution, regardless of whether or not they are considering a qualification transaction at the time, but that the agency states that its official publication of the notice is all that is required to establish the duty to comply. The Bureau of Economics maintains a list of firms that may have to respond.

[Text of Resolution]

RESOLUTION REQUIRING NOTIFICATION AND SUBMISSION OF SPECIAL REPORTS RELATING TO CORPORATE MERGERS OR ACQUISITIONS

Whereas the Commission has statutory responsibilities to enforce Section 7 of the Clayton Act, as amended (15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) with respect to acquisitions and mergers that may substantially lessen competition or tend to create a monopoly in any line of commerce in any section of the country; and

Whereas the Commission is aware of the continuing high rate of such activity and the potential adverse effects it may have on the industrial structure of the American economy; and

Whereas there is continuing concern on the part of the Commission with respect to the long-run consequences of the merger movement and in particular with respect to the growth of conglomerate mergers: Now, therefore, be it

Notification

Resolved, That the Commission, in the exercise of the powers vested in it by Sections 3, 6, 9, and 10 of the Federal Trade Commission Act (15 U.S.C. 43, 46, 49, and 50), and with the aid of all powers conferred upon it by law and all compulsory processes available to it, henceforth requires that companies subject to the jurisdiction of the Federal Trade Commission shall file with the Commission notification of the transaction as prescribed by the attached public notice.

Any such notification shall constitute a part of the public records of the Commission.

Special reports

Resolved, That the Commission in the exercise of the power vested in it by Sections 3, 6, 9, and 10 of the Federal Trade Commission Act (15 U.S.C. 43, 46, 49, and 50), and with the aid of all powers conferred upon it by law and all compulsory processes available to it, henceforth requires that companies subject to the jurisdiction of the Federal Trade Commission file with the Commission Special Reports as prescribed in the attached public notice.

Upon publication of the attached public notice in the Federal Register, this resolution will supersede prior order or resolution relating to the Commission's Pre-Merger Notification Program (April 4, 1972 and February 14, 1973).

By direction of the Commission. (Dated August 15, 1974.)

[Text of Order]

ORDER REQUIRING FILING OF SPECIAL REPORT

Pursuant to a standing resolution of the Federal Trade Commission dated August 15, 1974, entitled "Resolution Requiring Notification and Submission of Special Reports Relating to Corporate Members or Acquisitions," a copy of which is attached hereto and made a part thereof, you are required to file the attached Special Report on or before date designated as "Reporting Date" in the Special Report.

This Order Requiring Filing of Special Report is directed to your company under the authority of Section 6 (a) and (b) of the Federal Trade Commission Act (15 U.S.C. 46 (a) and (b)).

Failure to file the attached Special Report at the requisite time constitutes default; penalties may be imposed under applicable provisions of federal law for failure to file Special Reports or for the filing of false reports.

The attached Special Report must be subscribed and sworn to by an official of the reporting company. By direction of the Commission. (Dated August 15, 1974.)

[Text of 1974 Notice]

1. Introduction

In order to more effectively carry out its statutory duties, the Commission has established a notification program for corporate mergers or acquisitions. This program requires both the acquiring and acquired companies of the requisite size, in most instances, to file notification prior to any merger or acquisition and to file answers to a set of specific questions referred to as a "Special Report."

Therefore, notice is hereby given that the Federal Trade Commission in the exercise of the powers vested in it by sections 3, 6, 9 and 10 of the Federal Trade Commission Act (15 U.S.C. 43, 46, 49 and 50) and with the aid of all powers conferred upon it by law and all compulsory processes available to it, henceforth requires notification and Special Reports as prescribed below for mergers or acquisitions involving companies of the prescribed size and subject to the jurisdiction of the Federal Trade Commission. Upon publication in the FEDERAL REGISTER (October 3, 1974), this notice will supersede prior published notice relating to the Commission's premerger notification program (37 FR 7951, April 21, 1972 and 38 FR 5513, March 1, 1973).

Although the Commission, to the extent practicable, will contact many companies covered by this notice, the publication of this notice in the FEDERAL REGISTER will constitute notice to all covered companies that they must comply herewith.

2. Identification of responsibility for reporting

A. Company.—The responsibility for filing notification and Special Report is upon a company which exercises, or could in principle exercise, control over any party to a covered merger or acquisition. Hence, the term "company" in the case of either the acquiring or acquired entity refers to the pre-transaction ultimate parent company of a party to the transaction together with all its wholly or partly owned subsidiaries or divisions, whether consolidated or unconsolidated, where the parent company has an ownership interest through either (1) holding a majority of the outstanding voting stock, or (2) holding the power to formulate, determine, or veto basic business decisions through the use of dominant stockholding rights, proxy voting, contractual voting arrangements, agents, or other means.

The dollar criteria established below will be met if the total of the sales or assets of the acquiring company and the sales or assets of the entity to be acquired meet or exceed the criteria.

B. Dollar Criteria.—The dollar criteria is met if: (1) a company acquires a manufacturing company with sales or assets of $10 million or more and the combined sales or assets exceed $250 million; or (2) a company acquires a nonmanufacturing company with assets of $10 million or more and the combined assets exceed $250 million.

3. Notification

A. Coverage.—Notice is hereby given that the Federal Trade Commission henceforth requires that for each merger or acquisition within its jurisdiction involving companies meeting the dollar criteria stated in paragraph 2(b) above, prior notification of the transaction, providing the information set forth in paragraph 3(b) below, must be filed with the Commission:

1. Assets: By all companies within 10 days after any agreement or understanding in principle to merge or acquire assets is reached;

2. Stock: By all companies within 10 days after any agreement or understanding in principle is reached to effect a stock acquisition which will result in the acquiring company holding 50 percent or more of the voting stock of another company;

3. Tender Offer: By the offeror company within 10 days after the company makes a tender offer for 10 percent or more of the stock of another company; and

4. Foreign: If the companies involved meet the above criteria for their total (domestic and foreign) sales or assets, notification must be filed by any company with domestic operations.

B. Content of Notification.—Proper notification will consist of a letter by all companies indicating:

(1) The names and mailing addresses of the companies involved in the transaction;

(2) If the notifying entity is in a subsidiary or other affiliate relationship with another company, the name and mailing addresses of the company and the relationship; and

(3) The type of (proposed) transaction, including the terms of the transaction—description of the assets and/or stock being acquired, estimated dollar value of the transaction, date of the agreement, and consummation date of the (proposed) merger or acquisition. In the event that the transaction is not completed, a separate notification of termination of the agreement is required.

This notification will be made part of the public record.

4. Special reports for corporate mergers and acquisitions

Notice is hereby given that the Federal Trade Commission henceforth requires that for each merger or acquisition within its jurisdiction involving companies which meet the dollar criteria stated in paragraph 2(b), the current Pre-Merger Special Report forms as adopted by the Commission must be filed with the Commission, as follows:

1. Assets: By all companies within 10 days after any agreement or understanding in principle to merge or acquire assets is reached;
2. Stock: By all companies within 10 days after any agreement or understanding in principle is reached to effect a stock acquisition which will result in the acquiring corporation holding 50 percent or more of the voting stock of another company;
3. Tender Offer: By an offeror company within 10 days after the company makes a tender offer for 10 percent or more of the stock of another company; and by the subject of the offer within 10 days after more than 50 percent of the stock of such company has been acquired; and
4. Foreign: If the companies involved meet the above criteria for their total (domestic and foreign) sales or assets, a Special Report must be filed by any company on any domestic operation it may have.

5. No approval of transaction required

The establishment of this notification procedure should not be interpreted to mean that companies must request Commission approval prior to the consummation of any transaction or that consummation subsequent to notification constitutes Commission approval of the legality of transaction. However, the Commission will continue to provide advisory opinions as provided by its Rules of Practice and Procedure regarding the legality of particular mergers and acquisitions and invites those contemplating mergers to avail themselves of the program in any situation in which they are uncertain as to the legality of proposed transaction.

Issued: August 15, 1974. By direction of the Commission. (39 *Federal Register* 35717, October 3, 1974.)

Special notice requirements for particular industries are contained in FTC enforcement policy statements for those industries (¶ 4515). The agency's merger clearance procedures are outlined at ¶ 4545. The advisory opinion procedure is explained at ¶ 9732 in Volume 3.

If a merger agreement subject to the advance notice requirement contemplates consummation in fewer than 60 days, notice need be given only "promptly as possible;" the 60-day requirement is not intended to impose a waiting period, according to 1969 statements (.20, .25).

Annotations to ¶ 4540 Appear Topically Below, as Follows:

.05 Acquiring Company Special Form

This report is required by law.—It is mandatory under the authority of the Federal Trade Commission Act (15 U.S.C. 46). On or before the Reporting Date, complete and return one notarized copy of this Special Report to: Director, Bureau of Economics, Federal Trade Commission, Washington, D.C. 20580. Phone (202) 254-7720.

Failure to file this Special Report on or before the Reporting Date subjects the reporting company to liability for penalties authorized by law.

Reporting date.—(1) Assets: By all parties within 10 days after any agreement or understanding in principle to merge or acquire assets of another company is reached; (2) Stock: By all parties within 10 days after any agreement or understanding in principle to effect a stock acquisition which will result in the acquiring corporation holding 50% or more of the voting stock of another company; (3) Tender Offer: By the offeror company within 10 days after a company makes a tender offer for 10% or more of the stock of another company; and by the subject of the offer within 10 days after more than 50% of the stock of such company has been acquired.

INSTRUCTIONS

For purposes of this Special Report, the "reporting company" is the pre-transaction ultimate parent company together with all its wholly or partly owned subsidiaries or divisions, whether consolidated or unconsolidated, where the parent company has an ownership interest through either (1) holding a majority of the outstanding voting stock or (2) holding the power to formulate, determine, or veto basic business decisions through the use of dominant minority stockholding rights, proxy voting, contractual arrangements, agents or other means.

Each answer should identify the question to which it is addressed. If you are unable to answer any question fully, give such information as is available to you, explain why your answer is incomplete, and indicate the source from which a complete answer may be obtained. If books and records which provide accurate answers are not available, enter your best estimates and indicate the sources or bases of your estimates. Estimated data should be followed by the notation "est."

Except where stated otherwise, all inquiries refer to the reporting company's domestic operations. All references to "year" refer to calendar year. If the reporting company does not maintain its records on a calendar year basis, supply the requested data for the company's fiscal year reporting period which most nearly corresponds to the calendar year specified.

This Special Report requests information essentially at two levels—at the establishment level and at the 7-digit product code level.

For purposes of assisting you in preparing this Special Report, "establishment" means:

A single physical location within the United States and its territories where business is conducted or where services or industrial operations are performed. (For example: a factory, mill, store, hotel, movie theater, mine, farm, ranch, bank railroad depot, airline terminal, sales office, warehouse, or central administrative office.) Where distinctly separate activities are performed at a single physical location (such as contract construction activities operated from the same physical location as a lumber yard), each activity should be treated as a separate establishment.

For firms engaged in agriculture, construction, transportation, communications, electric, gas, and sanitary services, and similar types of physically dispersed activities, it is *not* necessary to list separately each individual "site," "project," "field." "network,' "line," or "system." Instead, for these types of activities, "establishments" should be only those *relatively* permanent main or branch offices, terminals, stations, etc., which are either, (a) directly responsible for supervising such activities, or (b) the base from which personnel operate to carry out these activities.

In order to assist you in reporting by "4-digit SIC code," you should refer to the 1972 Edition of the *Standard Industrial Classification Manual* (Appendix B) as published by the Executive Office of the President—Office of Management and Budget.

For purposes of reporting information on SIC-based 7-digit product codes, you should refer to one or more of the following reference publications published by the U. S. Bureau of the Census: (a) *Numerical List of Manufactured Products, 1972 Census of Manufacturers (MC72-1.2)*, (New 1972 SIC Basis), (b) Volume II, "Industry Statistics," 1972 *Census of Manufacturers*, (c) Applicable "Product Reference Lists" appearing in the *Instruction Manual* of the various *Current Industrial Reports* surveys (monthly, quarterly, or annual) conducted by the U. S. Bureau of the Census.

Do not use the 6-digit SIC codes that appear on the MA-100 census form. The sixth digit is only a computer check code and not part of the SIC code listings. However, the first five digits are correct and may be used along with the above mentioned reference publication to assist you in determining a 7-digit breakdown.

Attach additional sheets as necessary.

1. (a) *Reporting company*

Corporate name.

Mailing address.

(Headquarters office).

Date of incorporation.

State.

(b) *Actvie companies included within the reporting company (both domestic and foreign)*

(Use Employer's Identification Number as assigned by IRS for income tax, employment tax, or other federal tax purposes).

Corporate name.

Mailing address.

Date and State of incorporation.

Employer's identification number.

2. *Information on the (proposed) merger or acquisition*

(a) Reporting company for the acquiring company and principal business activities.

(b) Reporting company for the acquired company:

Mailing address.

(Headquarters office).

Principal business activities.

(c) List the firm name(s) and mailing addresses to be acquired if the (proposed) merger or acquisition is only partial.

(d) Date on which the acquiring company has acquired 10 percent or more of the voting stock of the acquired company:

(e) Scheduled consummation date of the (proposed) merger or acquisition.

(f) Describe the manner in which the transaction is to be carried out.

(g) Describe all stock or assets to be transfered and the consideration to be paid.

3. Furnish copies of all annual, quarterly, or other reports (including annual balance sheets and profit and loss statements) and proxy statements made by the reporting company to its stockholders during the most recent three-year period.

4. (a) Total domestic commercial sales for the reporting company (and all subsidiaries listed in Item 1(b) above) for the most recent calendar year.

	Dollar value
Manufacturing	$
Mining	
Construction	
Wholesale and retail trade	
Finance, insurance, and real estate	
Agriculture, forestry, and fishing	
Transportation, communications, electric, gas, and sanitary services	
Hotels, motels, and business, professional, personal, repair and amusement services	
Other industries (describe)	
Total	
(b) Total commercial sales of all foreign subsidiaries and affiliates of the reporting company	
Total commercial sales	

5. List and describe (by 4-digit SIC code and short title) each industry listed in the *1972 Standard Industrial Classification Manual* (Appendix B) as published by the Executive Office of the President—Office of Management and Budget, in which the reporting company operated one or more establishments in 1972 or currently operates establishments. Each manufacturing establishment should be reported by the principal 4-digit SIC code which represents the greatest part of

its value of shipments (including interplant transfers), sales, receipts, revenue or other appropriate value measure of output in the industry. All value of shipments for an establishment should be reported by the principal 4-digit SIC code assigned to that establishment. For establishments engaged in insurance, finance, or real estate activities, provide the additional information described in the Appendix to this Special Report.

Princpal 4-digit industry.
Short title.
Number of establishments operated in 1972.
Value of shipments 1972.
Number of establishments currently operated.
Value of shipments most recent calendar year.

6. (a) Describe and list each product made in manufacturing establishments of the reporting company in 1972. (Include interplant transfers in 1972 Value of Shipments).

7-digit product code.
Product description.
Value of shipments 1972.

(b) For each product which has subsequently been added to the list of products made by the reporting company in 1972, report the Value of Shipments (including interplant transfers) for the calendar year in which it was added and for each subsequent calendar year.

Product 7-digit code.
Product description.
Calendar year added.
Value of shipments, 1973, 1974, 1975, 1976, and 1977.

6. (c) For each product manufactured in 1972 but subsequently dropped from the line of products made, indicate the year and month in which the product was no longer produced by the reporting company and report the Value of Shipments for the calendar year prior to disposal.

7-digit product code.
Product description.
Month/year dropped.
Value of shipments year prior to disposal.

7. Domestic and foreign mergers, acquisitions, or disposals made by the reporting company since January 1, 1961 (for partial acquisitions or disposals, report only the sales and assets involving that part which was merged, acquired, or disposed of). List under Principal 4-Digit SIC Industries, those industries which together comprise at least 75 percent of the Value of Shipments including interplant transfers (or other appropriate revenue measure) in the year prior to merger, acquisition or disposal. The following qualify as mergers, acquisitions or disposals and should be listed accordingly: (1) acquisition or disposal of more than 50 percent of a company with sales or assets greater than one million and less than $10 million, and (2) acquisition or disposal of more than 10 percent of a company with sales or assets of $10 million or more. In each case, specify the percentage acquired or disposed of.

(a) Acquisitions or Mergers.
Company name.
Address prior to acquisition.
Percentage acquired.
Consummation date.
Consolidated sales for year prior to acquisition.
Consolidated assets for year prior to acquisition.
Principal 4-digit industry.
Introduction into industry yes/no.

(b) Disposals.
Company name.
Address prior to disposal.
Percentage disposed of.
Consummation date.
Consolidated sales for year prior to disposal.
Consolidated assets for year prior to disposal.
Principal 4-digit industry.
Company sold to.

CERTIFICATION

This Special Report was prepared under my supervision and is true and correct to the best of my knowledge.

-- ---------------
(Signature and title of company official) (Date)

Subscribed and sworn to before me at the City of ----------------, State of --------------------- this ------ day of --------, 19---- ------------------
Notary Public

My Commission Expires ----------------------

Print or type the name, address, and telephone number of the person to contact regarding this Special Report

--------------------- --------------------- ---------------------
(Name) (Business Address) (Business Telephone Uumber)

.10 Acquired Company Special Report Form

This report is required by law.—It is mandatory under the authority of the Federal Trade Commission Act (15 U.S.C. 46). On or before the Reporting Date, complete and return one notarized copy of this Special Report to: Director, Bureau of Economics, Federal Trade Commission, Washington, D.C. 20580. Phone (202) 254-7720.

Failure to file this Special Report on or before the Reporting Date subjects the reporting company to liability for penalties authorized by law.

Reporting date.—(1) Assets: By all parties within 10 days after any agreement or understanding in principle to merge or acquire assets of another company is reached; (2) Stock: By all parties within 10 days after any agreement or understanding in principle is reached to effect a stock acquisition which will result in the acquiring corporation holding 50% or more of the voting stock of another company; (3) Tender Offer: By the offeror company within 10 days after a company makes a tender offer for 10% or more of the stock of another company; and by the subject of the offer within 10 days after more than 50% of the stock of such company has been acquired.

INSTRUCTIONS

For purposes of this Special Report, the "reporting company" is the pretransaction ultimate parent company together with all its wholly or partly owned subsidiaries or divisions, whether consolidated or unconsolidated, where the parent company has an ownership interest through either (1) holding a majority of the outstanding voting stock or (2) holding the power to formulate, determine, or veto basic business decisions through the use of dominant minority stockholding rights, proxy voting, contractual arrangements, agents or other means. Additional information is requested in Item 8 of the Special Report for partial mergers or acquisitions.

Each answer should identify the question to which it is addressed. If you are unable to answer any question fully, give such information as is available to you, explain why your answer is incomplete, and indicate the source from which a complete answer may be obtained. If books and records which provide accurate answers are not available, enter your best estimates and indicate the sources or bases of your estimate. Estimated data should be followed by the notation "est."

Except where stated otherwise, all inquiries refer to the reporting company's domestic operations. All references to "year" refer to calendar year. If the reporting company does not maintain its records on a calendar year basis, supply the requested data for the company's fiscal year reporting period which most nearly corresponds to the calendar year specified.

This Special Report requests information essentially at two levels—at the establishment level and at the 7-digit product code level.

For purposes of assisting you in preparing this Special Report, "establishment" means:

A single physical location within the United States and its territories where business is conducted or where services or industrial operations are performed. (For example, a factory, mill, store, hotel, movie theater, mine, farm, ranch, bank, railroad depot, airline terminal, sales office, warehouse, or central administrative office.) Where distinctly separate activities are performed at a single physical location (such as contract construction activities operated from the same physical location as a lumber yord), each activity should be treated as a separate establishment.

For firms engaged in agriculture, construction, transportation, communications, electric, gas, and sanitary services, and similar types of physically dispersed activities, it is *not* necessary to list separately each individual "site," "project," "field," "network," "line," or "system." Instead, for these types of activities, "establishments" should be only those *relcatively permanent* main or branch offices, terminals, stations, etc., which are either, (a) directly responsible for supervising such activities, or (b) the base from which personnel operate to carry out these activities.

In order to assist you in reporting by "4-digit SIC code," you should refer to the 1972 Edition of the *Standard Industrial Classification Manual* (Appendix B) as published by the Executive Office of the President—Office of Management and Budget.

For purposes of reporting information on SIC-based 7-digit product codes, you should refer to one or more of the following reference publications published by the U.S. Bureau of the Census: (a) *Numerical List of Manufactured Products, 1972 Census of Manufacturers (MC72-1.2)*, (New 1972 SIC Basis), (b) Volume II. "Industry Statistics," *1972 Census of Manufacturers*, (c) Applicable "Products Reference Lists" appearing in the *Instruction Manual* of the various *Current Industrial Reports* surveys (monthly, quarterly, or annual) conducted by the U.S. Bureau of the Census.

Do not use the 6-digit SIC Codes that appear on the MA-100 census form. The sixth digit is only a computer check code and not part of the SIC code listings. However, the first five digits are correct and may be used along with the above mentioned reference publication to assist you in determining a 7-digit breakdown.

Attach additional sheets as necessary.

1. (a) *Reporting Company*

Corporate name.

Mailing address (headquarters office).

Date of incorporation and State.

(b) *Active companies included within the reporting company (both domestic and foreign)*

(Use Employer's Identification Number as assigned by IRS for income tax, employment tax, or other federal tax purposes).

Corporate name.

Mailing address.

Date and state of incorporation.

Employer's identification number.

2. Information on the (proposed) merger or acquisition

(a) Reporting Company for the Acquiring Company.

Mailing Address (Headquarters Office).

Principal Business Activities.

(b) Reporting Company for the Acquired Company and principal business activities.

(c) List the firm name(s), mailing address(es), and principal business activities to be sold if the (proposed) merger or acquisition is only partial.

Acquired Company.

Mailing Address.

Principal Business Activities (attach additional sheets as necessary).

(d) Date on which the acquiring company has acquired 10 percent or more of the voting stock of the acquired company.

(e) Scheduled consummation date of the (proposed) merger or acquisition.

(f) Describe the manner in which the transaction is to be carried out.

(g) Describe all stock or assets to be transferred and the consideration to be received (attach additional sheets as necessary).

3. Furnish copies of all annual, quarterly, or other reports (including annual balance sheets and profits and loss statements) and proxy statements made by the reporting company to its stockholders during the most reecnt three-year period.

4. (a) Total domestic commercial sales for the reporting company (and all subsidiaries listed in Item 1(b) above) for the most recent calendar year.

	Dollar value
Manufacturing	$
Mining	
Construction	
Wholesale and retail trade	
Finance, insurance, and real estate	
Agriculture, forestry, and fishing	
Transportation, communications, electric, gas, and sanitary services	
Hotels, motels, and business, professional, personal, repair and amusement services	
Other industries (describe)	
Total	

(b) Total commercial sales of all foreign subsidiaries and affiliates of the reporting company	
Total commercial sales	

5. List and describe (by 4-digit SIC code and short title) each industry listed in the *1972 Standard Industrial Classification Manual* (Appendix B) as published by the Executive Office of the President—Office of Management and Budget, in which the reporting company operated one or more establishments in 1972 or currently operates establishments. Each manufacturing establishment should be reported by the principal 4-digit SIC code which represents the greatest part of its value of shipments (including interplant transfers), sales, receipts, revenue or other appropriate value measure of output in the industry. All value of shipments for an establishment should be reported by the principal 4-digit SIC code assigned to that establishment. For establishments engaged in insurance, finance, or real estate activities, provide the additional information described in the Appendix to this Special Report.

Principal 4-digit industry.
Short title.
Number of establishments operated in 1972.
Value of shipments 1972.
Number of establishments currently operated.
Value of shipments most recent calendar year.

6. (a) Describe and list each product made in manufacturing establishments of the reporting company in 1972. (Include interplant transfers in 1972 Value of Shipments).

7-digit product code.
Product description.
Value of shipments 1972.

(b) For each product which has subsequently been added to the list of products made by the reporting company in 1972, report the Value of Shipments (including interplant transfers) for the calendar year in which it was added and for each subsequent calendar year.

7-digit product code.
Product description.
Calendar year added.
Value of shipments 1973, 1974, 1975, 1976, and 1977.

(c) For each product manufactured in 1972 but subsequently dropped from the line of products made, indicate the year and month in which the product was no longer produced by the reporting company and report the Value of Shipments for the calendar year prior to disposal.

7-digit product code.
Product description.
Month/year dropped.
Value of shipments year prior to disposal.

7. Domestic and foreign mergers, acquisitions, or disposals made by the reporting company since January 1, 1961 (for partial acquisitions or disposals, report only the sales and assets involving that part which was merged, acquired, or disposed of). List under Principal 4-Digit SIC Industries, those industries which together comprise at least 75 percent of the Value of Shipments including interplant transfers (or other appropriate revenue measure) in the year

prior to merger, acquisition or disposal. The following qualify as mergers, acquisitions or disposals and should be listed accordingly: (1) acquisition or disposal of more than 50 percent of a company with sales or assets greater than one million and less than $10 million, and (2) acquisition or disposal of more than 10 percent of a company with sales or assets of $10 million or more. In each case, specify the percentage acquired or disposed of.

(a) Acquisitions or Mergers.

Company name.

Address prior to acquisition.

Percentage acquired.

Consummation date.

Consolidated sales for year prior to acquisition.

Consolidated assets for year prior to acquisition.

Principal 4-digit industry.

Introduction into industry yes/no.

(b) Disposals.

Company name.

Address prior to disposal.

Percentage disposed of.

Consummation date.

Consolidated sales for year prior to disposal.

Consolidated assets for year prior to disposal.

Principal 4-digit industry.

Company sold to.

8. In the event this Special Report is prompted by a partial merger or acquisition, provide the following additional information:

(a) For the latest complete accounting year prior to the (proposed) merger or acquisition, indicate the book value of the assets and the volume of sales involved.

Book value of assets.

Fiscal year ending.

Volume of sales.

(b) Use, as appropriate, the SIC-based 7-digit product codes and definitions, as discussed in Item 6, and indicate for each product involved in the merger or acquisition, the 1972 Value of Shipments (including interplant transfers). In the case of a partial merger or acquisition of a non-manufacturing company, use, as appropriate, the SIC-based 4-digit industry codes and definitions, as discussed in Item 5 and indicate the 1972 Value of Shipments (including interplant transfers).

SIC Code.

Short title.

Value of shipments—1972.

CERTIFICATION

This Special Report was prepared under my supervision and is true and correct to the best of my knowledge.

(Signature and title of company official) (Date)

Subscribed and sworn to before me at the City of -----------, State of -------- this ----------------- day of ---------------, 19----. ---------------------
(Notary Public)

My Commission Expires--------------------------------.

Print or type the name, address, and telephone number of the person to contact regarding this Special Report.

--------------------- --------------------- ---------------------
(Name) (Business address) (Business Telephone Number)

.15 Appendix to Special Report: Insurance, Finance, and Real Eestate. Question 5:

1. Insurance Establishments.

This includes carriers of all types of insurance, insurance agents, and brokers (2-digit SIC codes 63 and 64).

5–I *Life Insurance.*

A. Provide for the year 1972 and the most recent complete year prior to merger or acquisition the amount of premium receipts (calculated on an accrual basis) for each of the following lines:

1. Life Insurance:

a. Ordinary life insurance.

b. Group life insurance (including Federal Employees' Group Life Insurance and Servicemen's Group Life Insurance, but excluding credit life insurance).
c. Industrial life insurance.
d. Credit life insurance.
2. Annuity Considerations:
a. Individual annuity considerations.
b. Group annuity considerations.
3. Health Insurance:
a. Individual health insurance.
b. Group health insurance.
B. Provide for the most recent complete year prior to merger or acquisition the amount of new life insurance business issued in the United States during the calendar year (exclusive of revivals, increases, dividend additions and reinsurance ceded) for each of the following lines:
1. Ordinary life insurance;
2. Group life insurance (including Federal Employees' Group Life Insurance and Servicemen's Group Life Insurance, but excluding credit life insurance);
3. Industrial life insurance; and
4. Credit life insurance.
5–II *Property—Liability Insurance.*
For the year 1972 and the most recent complete year prior to merger or acquisitions:
A. Provide the amount of direct premiums written during the calendar year in the United States for each line of insurance specified in Part 2 of the Underwriting and Investment Exhibit of your company's annual convention statement;
B. Provide the amount of net premiums written during the calendar year in the United States for each line of insurance specified in Part 2 of the Underwriting and Investment Exhibit of your company's annual convention statement.
5–III *Title Insurance.*
For the year 1972 and the most recent complete year prior to merger or acquisition:
A. Provide the amount of net direct title insurance premiums written in the United States during the calendar year;
B. Provide the amount of direct title insurance premiums earned in the United States during the calendar year.
2. Finance Establishments.
This includes banks and trust companies, credit agencies other than banks, investment companies, brokers and dealers in security and commodity contracts, and security and commodity exchanges (2-digit SIC codes 60, 61, 62, and 67). Provide for the year 1972 the combined total or gross income for all such establishments.
3. Real Estate Establishments.
This includes owners, lessors, lessees, buyers, sellers, agents, and developers of real estate (2-digit SIC code 65). Provide for the year 1972 the combined total and gross income for all such establishments.

.20 Notification period—60 days or promptly as possible.

"This is in answer to your letter of June 20, 1969, on behalf of the Trade Regulation Committee of The Association of the Bar of the City of New York raising a question concerning the Commission's 'Resolution Requiring Notification of and Submission of Special Reports Relating to Large Corporate Mergers.'

"You point out that the resolution requires a special report pursuant to Section 6 of the Federal Trade Commission Act to be submitted to the Commission in certain cases 'no less than 60 days prior to the consummation of the merger or acquisition.' You then ask if it is the Commission's intention by this resolution to impose a 60 day waiting period before a merger or acquisition can be consummated.

"It was not the intention of the Commission to impose any waiting period upon the consummation of a merger or acquisition. The Commission presently lacks authority to enjoin merger negotiations and agreements to merge, and was not attempting to do indirectly what could not be done directly. In requiring a special report no less than 60 days prior to consummation, it was contemplated that we would only receive such p. notification when the particular merger or acquisition schedule permitted. If the time schedule does not so permit, the special report should be submitted as promptly as possible.

"By obtaining this information the Commission, and the Antitrust Division, with whom the information is being shared,. will have adequate time for a careful evaluation of the particular matter. (Letter, signed by Chairman Dixon, released July 16, 1969.)

.25 Notification procedure when shorter than 60 days.

"The Federal Trade Commission announced today that, when the time schedule of a particular merger or acquisition does not permit the filing of a special report 60 days prior to its consummation, a letter stating that fact, setting forth the reasons why the deadline canont be met and stating when the special report will be filed must be submitted to the Commission's Division of Mergers within 10 days after the agreement or understanding in principle is reached. The Commission had announced on July 16, 1969 the exception to the requirement of submitting special reports no less than 60 days prior to the consummation of a particular merger or acquisition, stating that where the time schedule of such merger or acquisition does not permit timely filing, the special report should be submitted as promptly as possible. Today's announcement specifies the manner in which the Commission's Division of Mergers must be notified in these exceptional circumstances." (*FTC Release*, August 28, 1969.)

.60 Summary, fiscal 1972.

The Premerger Notification Program completed its third full year of operation in fiscal year 1972. Under this program all corporations subject to FTC jurisdiction and having total assets of $250 million or more are required to file a special report whenever an acquisition of a firm with $10 million or more in total assets is made. The acquisition itself may be either of assets or of 10 percent or more of the voting stock. At the discretion of the Commission, a special report may also be required when a firm with less than $250 million in total assets merged with another firm, resulting in a corporation with assets of $250 million or more. During fiscal year 1972, special reports were received concerning 90 mergers or acquisitions, of which 5 were cleared to the Department of Justice. Six, after filing, were subsequently called off. Of the remaining 79, FTC investigated further into approximately 25 mergers. Fifteen of these resulted in the opening of a formal investigational file.

During fiscal year 1972, special reports were also retroactively obtained from all acquired companies or their successors from the date of the inception of the program. Reports are now being routinely required from all firms which are acquired under the program. Not only are the special reports received under the Premerger Notification Program invaluable as a screening tool for discerning possible violations of Section 7 of the Clayton Act, but they are also being processed to yield useful information relating to the economic impact on individual industries of large mergers and in evaluating trends in mergers and acquisitions involving large corporations. The information which has been received in the Premerger Notification Program to date has been coded and is being stored in punch cards. (From *Annual Report of the Federal Trade Commission*, 1972; p. 41.)

[¶ 4545] FTC Pre-Merger Clearance and Approval Under Merger Orders

The FTC's procedure for handling pre-merger clearance requests and applications for approval of divestitures, acquisitions, or similar transactions subject to review under outstanding agency cease and desist orders calls for publicizing and affording opportunity to object to the action before final approval.

The Commission will make and publicize provisional decisions of approval of such matters, together with a statement of supporting reasons. At the same time the FTC will also make public the application for approval together with supporting materials, except for such information which (a) the applicant has requested to be classified as confidential, showing justification therefor, and (b) the FTC, with due regard to statutory restrictions, its rules, and the public interest, has determined should not be made public. Within thirty days after the date of publication, any interested member of the public may file written objections or comments with the Secretary. If substantial questions of fact are involved which should be resolved before the request or application can be finally approved, the FTC will take appropriate action to resolve the issues presented.

In the event the FTC determines to deny an application for premerger clearance, it will make public its action by publication of its advisory opinion deleting the names of the applicant and the other company subject to the application and any other confidential information contained in the opinion letter. In the event the disapproval is based upon a request subject to FTC review under outstanding orders, the action together with a statement of supporting reasons will be made public.

The purpose of these procedures is to enable the public, and interested persons, to be informed about Commission actions and the basis therefor. With respect to provisional approvals, the new procedure will permit interested persons to raise objections to the proposed actions which may not have been considered by the Commission.

The Commission is of the opinion that these procedures may assist it in continuing to serve the public interest. (*FTC Release*, May 23, 1969.)

CONGRESS OF THE UNITED STATES
COMMITTEE ON THE JUDICIARY,
Washington, D.C., April 14, 1976.

Hon. CALVIN COLLIER,
Chairman, Federal Trade Commission,
Washington, D.C.

DEAR MR. CHAIRMAN: To assist the Subcommittee on Monopolies and Commercial Law in the development of its Merger Oversight Hearings, I would very much appreciate obtaining from the Commission the following information:

a. For each merger challenged by the Federal Trade Commission since 1969, the date of acquisition, the date the staff investigation was begun, indicating dates on which both preliminary and "seven digit" investigations were opened, the date on which the pre-merger notification form was received, and the date of the filing of the complaint, if any.

b. An assessment of the probable effect of expanding the Commission's premerger notification program to include acquisitions by firms with $100 million in sales or assets, of firms with assets or sales of $10 million or more. Under such a standard, how many additional premerger notification forms would you expect to be filed, and how many additional competitively significant mergers would be detected?

c. A description of the liaison arrangements between the Antitrust Division of the Department of Justice and the Federal Trade Commission, concerning merger investigations and complaints. Please describe how many Federal Trade Commission investigations were the result of investigations dropped by, or forwarded by the Department of Justice? Has the Federal Trade Commission experienced any difficulty, and if so with regard to what cases, obtaining the necessary information from the Antitrust Division in connection with a merger investigation?

As our merger oversight hearings continue, the staff of the Subcommittee will be in contact with you for further information.

We wish to thank you for your continued cooperation, and look forward to your reply.

With kind regards,
Sincerely,

PETER W. RODINO, Jr., *Chairman.*

FEDERAL TRADE COMMISSION,
Washington, D.C., June 14, 1976.

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

DEAR MR. CHAIRMAN: This is in further reference to your letter of April 14, 1976, requesting information with relation to the Federal Trade Commission's enforcement efforts in challenging mergers and acquisitions, its pre-merger notification program and its liaison arrangement with the Antitrust Division of the Department of Justice, as it pertains to mergers and acquisitions. The information is requested in order to assist the Subcommittee on Monopolies and Commercial Law in the development of its Merger Oversight Hearings.

Our responses to the requests for information are preceded by your requests for information.

a. For each merger challenged by the Federal Trade Commission since 1969, the date of acquisition, the date the staff investigation was begun, indicating dates on which both preliminary and "seven digit" investigations were opened, the date on which the premerger notification form was received, and the date of the filing of the complaint, if any.

As a result of exchange of information between the staffs of the Committee and the Federal Trade Commission, it was agreed that this request should encompass those mergers and acquisitions as to which the Commission issued complaints, charging violation of Section 7 of the Clayton Act and/or Section 5 of the Federal Trade Commission Act.

Attachment A is a schedule listing the mergers and acquisitions challenged by the Federal Trade Commission during the period January 1, 1969, to date. For each challenged merger and acquisition, the schedule lists (1) date complaint issued, (2) FTC Docket Number, (3) name of the challenged company (the acquiring), (4) name of the acquired company(s), (5) date of merger or acquisition, (6) date preliminary investigation initiated, (7) date 7-digit investigation initiated, and (8) date pre-merger notification form was received by the FTC. (Pre-merger notification is required only when the combined assets of the merging companies equal or exceed $250 million.)

b. An assessment of the probable effect of expanding the Commission's premerger notification program to include acquisitions by firms with $100 million in sales or assets, of firms with assets or sales of $10 million or more. Under such a standard, how many additional pre-merger notification forms would you expect to be filed, and how many additional competitively significant mergers would be detected?

The Commission's Pre-Merger Notification Program, which has been developed without the benefit of specific legislation, has been in effect since 1969. In its present form, the lower limit for requiring notification is, in effect, combined assets or sales of $250 million. The present FTC program, effective as of August 15, 1974, provides for (1) a notification, prior to consummation of a merger or acquisition meeting the dollar size criteria, and (2) the filing of special reports by the acquiring and acquired firms meeting the dollar size criteria.

Prior to the Commission's adoption of the current Pre-Merger Notification Program, the staff studied mergers occurring between February 1972 and November 1973, in an effort to determine whether lowering the acquiring firms limit to $150 million would have resulted in the reporting of an increased number of economically significant mergers and acquisitions. The study disclosed that the lower limit would have resulted in notification in a total of 15 additional transactions. Of the 15 additional transactions, only 3 appeared to raise substantial antitrust questions. In any event, the 3 transactions were examined under established merger screening and evaluation procedures.

In addition to the above study, the staff, after receipt of the Committee's request, checked the mergers and acquisitions completed by companies having assets of between $100 million to $250 million, during each of the years 1972 through 1974. Only acquisitions of companies with $10 million or more in assets or sales were included in the staff search. On the basis of the staff's analysis, if the premerger notification program's dollar size criteria were lowered to $100 million in sales or assets, the total number of additional mergers and acquisitions which would require reporting, would be as follows: 1972, 61; 1973, 38; and 1974, 35.

The above totals for each of the calendar years represent acquisitions or mergers by all companies, with exception of mergers or acquisitions by banks, transportation and communications companies. On the basis of the staff's search, there is no information as to the number of "additional competitively significant mergers" which would be detected if the dollar size criteria were lowered to the $100 million level. In any event, such additional mergers and acquisitions would have been examined under the established merger screening and evaluation procedures.

In our view, a limit of $100 million of assets or sales for notification and reporting purposes may be lower than is necessary to cover most objectionable and economically significant mergers or acquisitions. Moreover, inflationary forces in the past few years appear to negate the need for lowering the $250 million assets or sales size criteria.

c. A description of the liaison arrangements between the Antitrust Division of the Department of Justice and the Federal Trade Commission, concerning merger investigations and complaints. Please describe how many Federal Trade Commission investigations were the result of investigations dropped by, or forwarded by the Department of Justice? Has the Federal Trade Commission experienced any difficulty, and if so with regard to what cases, obtaining the necessary information from the Antitrust Division in connection with a merger investigation?

Both the Antitrust Division and the Federal Trade Commission have statutory responsibility in the antitrust area. To carry out the dual enforcement responsibility, the Federal Trade Commission and the Antitrust Division set forth their coordination procedures in a memorandum of June 1948, and supplemented it by exchange of correspondence. Essentially, before initiating an investigation of a restraint of trade or antitrust charge of any nature, one agency informs the other that it proposes to conduct the investigation described thereon. If a question arises as to which agency is to handle a specific matter, the conflict is discussed and differences resolved through conferences between representatives of the two agencies.

A similar procedure is followed with respect to proposed investigations of mergers and acquisitions. Since, however, most of the reports of mergers and acquisitions are obtained through reports in newspapers and other public sources, the agencies commonly effectuate liaison by telephoning information regarding proposed Section 7 investigations and follow-up by exchange of file cards.

Copies of the basic materials setting forth the Federal Trade Commission-Antitrust Division liaison arrangement are attached as Attachment B.

With respect to the request for the number of Federal Trade Commission investigations which were the result of investigations dropped by, or forwarded by the Department of Justice, our records indicate only one such recent matter. This matter involved the acquisition by Warner-Lambert Co. of Parke, Davis & Co., FTC Docket 8850. The Antitrust Division received a clearance to investigate the acquisition on August 13, 1970. Thereafter, the Antitrust Division, following review of its investigation, declined to take action to halt the merger and determined to refer the matter to the Federal Trade Commission for consideration as to whether Section 7 of the Clayton Act was violated. The Federal Trade Commission received a clearance on November 13, 1970, from the Antitrust Division, to conduct an investigation of the acquisition. On June 30, 1971, the Commission issued its complaint, charging violation of Section 7 of the Clayton Act. On May 12, 1976, the Commission ruled that the merger substantially lessened competition in five specific submarkets of the overall drug manufacturing business.

It is generally the practice of the Federal Trade Commission and the Antitrust Division to grant mutual access to any data and information which the Commission or the Department might have secured during investigation or trial of a civil matter, to the extent permitted by law. Information secured by the Department through its grand jury investigations is not made available to the Commission for examination. Mergers and acquisitions, however, are handled as civil matters by the Department and are not commonly subjects of grand jury investigations. In addition, under the Antitrust Civil Process Act of September 19, 1962, 15 U.S.C. 1311, the Federal Trade Commission is not authorized access to documentary materials, etc., produced under a civil investigative demand served by the Antitrust Division. As originally introduced in 1962, the proposed Antitrust Civil Process Act would have granted authority to the Federal Trade Commission to examine documentary materials without the consent of the person who produced such documentary materials. However, the Act, as finally passed by Congress, deleted the reference to the Federal Trade Commission (or its employees) as having specific authority to examine documentary materials produced under the civil investigative demand.

The advisability of permitting such access, in civil matters, is apparent since the Commission and the Antitrust Division have concurrent merger law enforcement jurisdiction. It would be burdensome upon both the public and the business community if one agency had information which could not be made available to the other, resulting in a duplicate demand upon a party. Therefore, it is in the public interest for each agency to have available to it for examination the investigational material secured by the other agency, recognizing, of course, the necessity for protection of grand jury proceedings. Thomas E. Kauper, Assistant Attorney General, Antitrust Division, Department of Justice, has stated in hearings before the Subcommittee on Antitrust and Monopoly on S. 1284, as follows: "Finally, we believe that all information obtained through a CID should be available to the FTC, subject to the same limitations placed on the use of the information by the Division. The Appendix contains language to accomplish this purpose." (Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, Ninety-Fourth Congress, 1st Sess. on S. 1284, May 7 and 8, June 3, 4 and 12, 1975).

If the Antitrust Civil Process Act is amended to broaden the Antitrust Division's pre-complaint investigative authority, the Antitrust Division may, in the future, conduct more of its civil investigations under the Antitrust Civil Process Act (as proposed for amendment). Thus, an increasing number of Antitrust Division files will be foreclosed from FTC access under present laws. Without specific provision for FTC access, the terms of mutual availability of investigative material will have little actual meaning. The Commission, therefore, would urge appropriate amendments in order to authorize access to employees of the Federal Trade Commission.

We trust that this information will be useful to the Committee's considerations. Should the Committee require additional information in this matter, please do not hesitate to contact me.

By direction of the Commission.

CALVIN J. COLLIER, *Chairman.*

ATTACHMENT A

ACQUISITIONS CHALLENGED BY THE FEDERAL TRADE COMMISSION, 1969–76

Date of complaint and docket number	Company challenged (acquired company)	Date of acquisition	Date preliminary investigation initiated	Date 7-digit investigation initiated	Date premerger notification special report form received
Jan. 2, 1969, C–1473	Burlington Industries, Inc		None	Sept. 19, 1963	None.
	(Erwin Mills, Inc., Fabrex Corp., James Lees)	Jan. 19, 1962, 1964			None.
Mar. 11, 1969, C–1501	General Mills, Inc		None	Feb. 6, 1964	June 1, 1969 re David Crystal, Inc.; Feb. 4, 1976 re Salutos Foods.
	(Morton Foods, Inc.)	Feb. 28, 1964			None.
	(Tom Huston)	Aug. 27, 1966			Do.
Apr. 1, 1969, D–8775	Avnet, Inc		None	May 5, 1967	Do.
	(International Products and Manufacturing Co.)	Jan. 31, 1965			Do.
	(Valley Forge Products, Inc.)	July 31, 1974			Do.
April 10, 1969, D–8779	Papercraft Corp		None	Dec. 18, 1967	Jan 2, 1975 re Sale of CPS under FTC divestiture order.
	(CPS Industries)	Dec. 27, 1967			None.
Apr. 10, 1969, D–8778	Litton Industries, Inc		None	Nov. 5, 1968	Do.
	(Triumph-Adler)	Oct. 30, 1968			Do.
June 10, 1969, D–8783	Missouri Portland Cement Co		None	May 19, 1967	Dec. 4, 1975 re Chromalloy American Corp.
	(Bostford Ready-Mix Co.)	February 1965			None.
July 8, 1969, D–8785	Ash Grove Lime & Cement Co		None	May 19, 1967	Do.
	(Union Quarries Lees Summit)	January 1966			Do.
		August 1962: ½			Do.
		January 1966: rest			
July 28, 1969, C–1567	Chemetron Corp		None	Dec. 5, 1968	Do.
	(Welding Products)	Jan. 6, 1969			Do.
Aug. 7, 1969, D–8797	Sterling Drug, Inc		None	Apr. 15, 1966	Do.
	(Lehn & Fink Products Corp.)	June 30, 1966			Do.
Oct. 17, 1969, D–8802	OKC Corp		None	Mar. 4, 1969	Do.
	(Jahncke Service, Inc.)	Subsequent to September 1968.			Do.
Apr. 30, 1970, D–8814	Beatrice Foods Co		None	Aug. 7, 1968	July 13, 1971 re Peter Erlich & Sons, Inc.; July 21, 1975 re Bottling companies.
	(John Sexton Co.)	C-Dec. 20, 1968			None.
June 30, 1970, C–1749	Occidental Petroleum		None	Mar. 29, 1968	July 28, 1970 re Vahlco Corp. & Vahlsony Inc.
	(Udylite Corp.)	Jan. 2, 1968			None.
	(Sel-Rex Corp.)	July 28, 1968			Do.
Sept. 22, 1970, C–1794	Hercules, Inc		None	Oct. 18, 1975	July 23, 1973 re Polak's Frutal Works, Inc.
	(Columbian Rope Co.)	Oct. 1, 1965			None.
Dec. 17, 1970, D–8826	Eaton Yale & Towne, Inc		None	Aug. 13, 1969	July 31, 1969.
	(McQuay-Norris Manufacturing Co.)	Oct. 31, 1969			None.

ACQUISITIONS CHALLENGED BY THE FEDERAL TRADE COMMISSION, 1969–76—Continued

Date of complaint and docket number	Company challenged (acquired company)	Date of acquisition	Date preliminary investigation initiated	Date 7-digit investigation initiated	Date premerger notification special report form received
Feb. 11, 1971, D-8835	United Brands Co.		None	Sept. 11, 1969	May 29, 1972 re Foster Grant Co., Inc.
	(Earl Myers Co.)	Oct. 15, 1968			None.
	(Nunes Bros. of California, Inc.)	Nov. 7, 1968			Do.
	(Peter & Stollich Co., Inc.)	Feb. 14, 1969			Do.
	(Monterey County Ice & Dev.)	Feb. 14, 1969			Do.
	(Jerome Kantro Enterprises)	Mar. 13, 1969			Do.
	(Salinas Valley Vegetable Exporters)	Mar. 15, 1969			Do.
	(Consolidated Grocer, Inc.)	July 2, 1969			Do.
	(Toro Farms)	Nov. 1, 1968			Do.
Feb. 12, 1971, C-1860	United Industrial Syndicate, Inc.		None	Feb. 6, 1968	Do.
	(Wells Mfg. Corp.)	Dec. 20, 1967			Do.
Feb. 16, 1971, D-8836	General Mills, Inc.		None	Apr. 3, 1968	June 1, 1969 re David Crystal, Inc.; Feb. 4, 1976 re Salutos Foods.
	(Gorton Corp.)	Aug. 16, 1968			None.
May 10, 1971, D-8842	North American Rockwell Corp.		None	June 20, 1968	Nov. 2, 1972 re H.T. Golde GmbH & Co. K.G.
	(Textile Machine Works)	Aug. 29, 1968			None.
May 26, 1971, D-8843	Georgia Pacific Co.		None	Sept. 16, 1968	June 2, 1969–July 11, 1969–Sept. 9, 1969.
	(Fordyce Lumber Co.)	April 1963			None.
	(American Timber Prod. Co.)	Sept. 1, 1965			Do.
	(Jeffreys, Spaulding Mfg. Co., Inc. & Spaulding Lumber Co., Inc.).	October 1965			Do.
	(Barrow Mfg. Co.)	November 1966			Do.
	(Barrow Land & Timber Co.)	November 1966			Do.
	(Reynolds & Manley Lumber Co.)	February 1966			Do.
	(Williams Furniture Corp.)	Oct. 20, 1967			Do.
	(Southern Coatings & Chemical Co.)	Oct. 20, 1967			Do.
	(Tommy Reynolds Lumber Co.)	December 1967			Do.
	(Urania Lumber Co., Limited)	September 1968			Do.
	(Sledge Lumber Corp.)	April 1969			Do.
	(Reynolds & Draper Lumber Co.)	August 1969			Nov. 4, 1970.
	(Reynolds-Wilson Lumber Co.)	August 1969			Nov. 4, 1970.
June 17, 1971, D-8847	American General Insurance Co.		None	Mar. 19, 1969	None.
	(Fidelity & Deposit Co. of Maryland)	July 1, 1969			Do.
June 18, 1971, D-8848	The Budd Co.		None	June 17, 1968	Do.
	(Gindy Mfg. Corp.)	Oct. 22, 1968			Do.
June 30, 1971, D-8550	Warner Lambert Co.		Aug. 1, 1970	Nov. 25, 1970	Aug. 17, 1970.
	(Parke, Davis & Co.)	Nov. 13, 1970			Aug. 10, 1970.
Oct. 1, 1971, D-8864	Beatrice Foods Co.		Sept. 25, 1970	Oct. 2, 1970	July 13, 1971 re Peter Erlich & Sons, Inc.; July 21, 1975 re bottling companies.
	(Tip Top Brush Affiliates)	July 31, 1969			None.
	(Essex Graham Co.)	July 1, 1970			Do.

Mar. 3, 1972, D-8878	Kaiser Steel Corp		None	Mar. 4, 1970	Feb. 5, 1970.
	(MSL Tubing & Steel Corp.)	Mar. 31, 1970			None.
June 29, 1972, D-8892	St. Joe Mineral Corp		Dec. 1, 1970	Mar. 15, 1971	Jan. 23, 1976; Aug. 15, 1975.
	(Quemetco, Inc.)	Dec. 29, 1970			Aug. 15, 1975.
Nov. 27, 1972, D-8904	Heublein, Inc			Feb. 12, 1969	June 27, 1972 re Spring Valley Foods, Inc.; May 4, 1973 re Davis Food Service, Inc.
	(United Vintners, Inc.)	C-Feb. 21, 1969			None.
Dec. 1, 1972, D-8903	Pepsico, Inc	Oct. 24, 1972	None	May 22, 1972	Nov. 22, 1972.
	(Rheingold Corp.)	Filed with SEC a tender offer to purchase common stock.			None.
Dec. 1, 1972, D-8905	Associated Dry Goods Corp		None	Mar. 22, 1972	Feb. 2, 1972.
	(L. S. Ayres & Co.)	C-Apr. 20, 1972			None.
Mar. 8, 1973, C-2360	ARA Services, Inc		None	Nov. 27, 1970	July 25, 1972 re Eurovend, N.V. June 21, 1974; re Geriatrics, Inc.
	(District News Group)	September 1968			None.
	(Golden Gate Magazine Group)	April 1969			Do.
	(Sunset News Co.)	April 1969			Do.
	(Downs News Agency)	September 1969			Do.
	(Inter-City Group)	October 1969			Do.
	(Northwest Magazine Distribution Group)	January 1970			Do.
	(Pioneer News Co.)	March 1970			Do.
	(Davinray News Agency)	April 1970			Do.
	(Harris Co. News, Inc.)	September 1970			Do.
	(Blue Ridge News Agency)	June 1970			Do.
	(San Diego Periodical Distributors)	September 1970			Do.
	(Mid-Continent Group)	April 1971			Do.
Mar. 9, 1973, D-8920	Retail Credit Corp		None	Mar. 26, 1971	Do.
	(Credit Bureau of—				
	West Coast	January 1970			Do.
	District of Columbia	Oct. 29, 1970			Do.
	Portland)	Jan. 2, 1971			Do.
Mar. 26, 1973, C-2370	Illinois Central Industries, Inc		None	Nov. 4, 1971	Sept. 30, 1971.
	(Midas-International Corp.)	Jan. 25, 1972			Nov. 29, 1971.
Apr. 4, 1973, C-2375	Holderbank Financier Glaris		None	Aug. 3, 1971	None.
	(BASF Wyandotte)	Jan. 16, 1971			Do.
Apr. 16, 1973, C-2381	American Cyanamid Co		Jan. 25, 1971	Feb. 3, 1971	Oct. 7, 1969 re Midland Ross Corp. Jan. 11, 1971; re same transaction.
	(Shulton, Inc.)	C-Apr. 15, 1971			Jan. 2, 1971.
May 9, 1973, C-2400	ARA Services, Inc	Between Aug. 31, 1967 and 1972.	None	Dec. 22, 1967	June 21, 1974 re Geriatrics, Inc.
	(98 Corporations)				None.
Aug. 14, 1973, D-8938	Liggett & Myers, Inc		None	Oct. 6, 1970	Do.
	(Perk Foods Co., Inc.)	Jan. 29, 1969			Do.
Sept 18, 1973, C-2456	Amerada Hess		None	Dec. 31, 1970	Sept. 7, 1973 re Berkshire Oil Co.
	(Clarco Pipe Line Co.)	Jan. 15, 1971 (purchased 35 percent—right to vote 70 percent); Aug. 31, 1971 (purchased remaining 30 percent).			None.

ACQUISITIONS CHALLENGED BY THE FEDERAL TRADE COMMISSION, 1969-76—Continued

Date of complaint and docket number	Company challenged (acquired company)	Date of acquisition	Date preliminary investigation initiated	Date 7-digit investigation initiated	Date premerger notification special report form received
Jan. 18, 1974 D-8951	Deltown Food, Inc.		None	Nov. 21, 1973	None.
	(New York City assets of Kraftco Corp.)	Nov. 11, 1973			Sept. 28, 1973 re Aluminum Specialty Co.
Feb. 26, 1974 D-8955	British Oxygen Co.		Feb. 12, 1973	Aug. 9, 1973	None.
	(Airco)	C-Dec. 10, 1973			Apr. 5 1974.
Mar. 20, 1974, D-8957	Walter Kidde & Co.		None	Nov. 12, 1971	None.
	(Arrow Lock Corp.)	Oct. 4, 1971			Do.
Apr. 1, 1974, D-8959	RSR Corp		Dec. 29, 1972	Feb. 6, 1973	Do.
	(Quemetco, Inc.)	Oct. 26, 1972			Do.
June 21, 1974, D-8972	Fruehauf Corp		None	Aug. 17, 1973	May 26, 1969 re Jacksonville Shipyards, Inc.
	(Kelsey-Hayes)	Oct. 31, 1973			None.
July 29, 1974, D-8986	Jim Walter Corp		None	Oct. 30, 1969	May 19, 1972.
	(Panacon Corp.)	Apr. 17, 1972 (bought 89 percent, thereafter bought remaining 11 percent).			None.
Aug. 7, 1974, D-8989	Gifford-Hill & Co		July 1, 1970	Mar. 30, 1971	Do.
	(Concrete Materials, Inc.)	Dec. 15, 1967			Do.
	(Southern Equipment Corp.)	Sept. 14, 1970			Do.
	(H. L. Cabel Co.)	Sept. 15, 1970			Do.
	(Becker Sand & Gravel Co.)	July 1, 1972			Do.
	(Concrete Supply Co.)	Sept. 15, 1970			Do.
Sept. 10, 1974, D-8992	Coca-Cola Bottling Co. of New York, Inc.		None	Sept. 29, 1973	Sept. 19, 1974 re Coca-Cola Co.
	(Franzia Brothers Winery)	Dec. 14, 1973			None.
Nov. 6, 1974, D-8994	The Anaconda Co.		None	Apr. 24, 1973	Feb. 13, 1976 re Tenneco.
	(Systems Wire & Cable, Inc.)	Dec. 27, 1972			None.
Jan. 7, 1975, D-9003	Nestle Alimentana S.A.		None	Mar. 20, 1972	Do.
	(Stouffer Corp.)	Mar. 5, 1973			Do.

Jan. 12, 1975, D-9005	Cargill, Inc	C-Dec. 19, 1973 filed "Invitation for Tenders."	None	Mar. 18, 1974	Jan. 24, 1975 re Ralston Purina.
	(Missouri Portland Cement Co.)	Apr. 30, 1974: owned 18 percent of common stock.			Dec. 4, 1975 re Acquisition by Chromalloy American Corp.
July 22, 1975, D-9046	SKF Industries, Inc		None	Sept. 1, 1972	None.
	(Federal-Mogul Corp.)	Jan. 11, 1972			Do.
Aug. 20, 1975, C-2716	Borg-Warner Corp		None	Dec. 6, 1972	Feb. 7, 1974 re Hughes Tool Co.
	(Unit Parts Co.)	Sept. 29, 1972			None.
Dec. 19, 1975, C-2770	Standard Oil Co. of Indiana		None	Apr. 29, 1975	May 22, 1975.
	(Pasco, Inc.)	May 1, 1975			July 18, 1975.
Apr. 15, 1975, D-9028	Brunswick Corp., et al		None	Sept. 10, 1974	Mar. 26, 1974 re Ozite Corp.
	(Sanskin)	Oct. 21, 1972			None.
Mar. 8, 1976, C-2805	Bird & Son, Inc		None	Dec. 2, 1975	Do.
	(Logan-Long Co.)	Mar. 31, 1976			Do.
Mar. 11, 1976, D-9076	Reichhold Chemicals, Inc		Oct. 15, 1974	Apr. 15, 1974	Dec. 15, 1975.
	(Corrulux Corp.)	Aug. 19, 1974			Dec. 16, 1975.
Jan. 23, 1976, D-8994	The Anaconda Co		Jan. 22, 1973	Apr. 24, 1973	Sept. 4, 1973 re Nytronics Inc.; Feb. 11, 1976 re Tender Offer by Tenneco; May 24, 1974 re Harvard Industries, Inc.; Nov. 13, 1975 re Wolworth/Aloyco Div. of Value Systems North America, Inc.
	(Systems Wire & Cable, Inc.)	Dec. 27, 1972			None.
July 28, 1969, D-8795	Harbor Banana Distributors, Inc., et al	Feb. 2, 1968		Jan. 17, 1968	Do.
	(Charles C. McCann Co., Inc.)				Do.
	(Tradewinds Produce, Inc.)				Do.
Oct. 26, 1971, C-2067	The Kroger Co	May 22, 1970		June 10, 1970	Do.
	(3 Gold Circle Stores)				Do.
Nov. 19, 1971, C-2106	EZ Painter Corp	Apr. 28, 1970	Sept. 25, 1970	Oct. 2, 1970	Do.
	(Masterset Brushes, Inc.)				Do.
	(American Brush Corp.)	Mar. 19, 1969			Do.
Jan. 21, 1972, C-2137	The Gates Rubber Co	Mar. 16, 1970		May 6, 1970	Do.
	(H. K. Porter Nephi Works)				Do.
Mar. 22, 1972, C-2175	Imperial Chemical Industries, Ltd	July 20, 1971		May 5, 1971	Do.
	(Atlas Chemical Industries, Inc.)				May 10, 1971.

Attachment B

MEMORANDUM

Re Details of proposed liaison arrangement of Federal Trade Commission with Antitrust Division of the Department of Justice.

In a conference authorized by the Commission held June 21, 1948, between Assistant Chief Trial Counsel Everette MacIntyre and Assistant Chief Examiner L. Garland Kendrick for the Federal Trade Commission, and Assistant Attorney General Herbert A. Bergson, Mr. Holmes Baldridge, Chief of the Litigation Section of the Antitrust Division, and Mr. Edward P. Hodges, Chief of the Complaint Section of the Antitrust Division, for the Department of Justice, a proposal was presented by Mr. MacIntyre for the establishment of a systematic mutual exchange of information regarding pending anti-monopoly investigations and of each new investigation at the time it is directed.

At the said conference it was agreed that such a system be instituted. The details thereof were discussed and agreed upon by Mr. MacIntyre, Mr. Kendrick and Mr. Hodges in conference on the same day. These were as follows:

A card system will be inaugurated in the Office of Assitant Chief Examiner Kendrick for the Commission, and in the office of Mr. Edward P. Hodges, Chief of the Complaint Section of the Antitrust Division for the Department of Justice. These cards are to be made in duplicate, exchanged between the two offices, and a file of such exchange cards retained in each office. The information to be shown on the said cards will include the following for each pending investigation and each new investigation at the time it is directed; the file number, the title, specification of product or products involved, and a statement of the charges involved.

The agreement arrived at provides that the information concerning Federal Trade Commission investigations will be transmitted from the office of Assistant Chief Examiner L. Garland Kendrick to the office of Mr. Edward P. Hodges, Chief of the Complaint Section of the Antitrust Division of the Department of Justice, and information concerning Department of Justice anti-monopoly investigations will be transmitted from the office of Mr. Hodges to the office of Mr. Kendrick. The information thus exchanged will be designated "confidential".

Upon receipt of a card disclosing information that a new investigation has been directed by either agency, information is to be conveyed back by telephone from the recipient of the card, as to whether or not any matter is pending in his agency concerning the specific party or parties, commodity, and charges. Should there be no matter pending in the opposite agency, investigation of the submitting agency can proceed without further liaison. If, on the other hand, a matter is pending, further liaison is to be effected before the new investigation is undertaken. However, nothing herein contained shall in any way limit either agency in making an independent decision as to what investigation it will undertake.

The representatives of the two agencies have signified their agreement to the details of this arrangement by signing this memorandum.

Everette MacIntyre,
Assistant Chief Trial Counsel.
L. Garland Kendrick,
Assistant Chief Examiner for the Federal Trade Commission.
Edward P. Hodges,
Chief of Complaint Section of the Antitrust Division, Department of Justice.

Federal Trade Commission,
Washington, D.C., April 29, 1963.

MEMORANDUM

Re Liaison Between the Federal Trade Commission and the Department of Justice.

There are attached hereto copies of a letter dated March 8, 1963, from Assistant Attorney General Lee Loevinger (Antitrust Division) to Chairman Dixon and the reply of Chairman Dixon dated April 11, 1963.

This exchange of letters is self-explanatory regarding existing Liaison arrangements between the Federal Trade Commission and the Department of Justice.

JOHN N. WHEELOCK,
Executive Director.

MARCH 8, 1963.

Hon. PAUL RAND DIXON,
Chairman, Federal Trade Commission,
Washington, D.C.

DEAR RAND: Conferences have been held periodically between representatives of the Antitrust Division and the Federal Trade Commission on the subject of liaison since 1938. A notification plan originated in 1938 was reduced to writing in 1948 by Mr. MacIntyre of the FTC and Mr. Hodges of Antitrust. In essence, the plan provides that each agency will make out a duplicate card for each investigation undertaken. The cards show the file number, title, specification of products and companies involved, and the charges involved. Before an investigation is instituted, one of the duplicate cards is sent to the other agency. Thereafter, information is conveyed by telephone from the recipient to the sender as to whether or not any matter is pending in the former concerning the proposed investigation. If not, the investigation proceeds without further liaison. If a matter is pending, further liaison is effected to minimize duplicate effort. Nothing in the arrangement limits either agency in making its own decision as to the investigations it will undertake.

It is further understood, as a result of correspondence between us, that if no response to a card is received within 24 hours, the sender shall assume that there is no overlapping or conflicting investigation or proceeding.

This procedure has been followed for many years, and certain aspects might well be refined for more efficient utilization of the resources of both agencies. On occasion, full information is not exchanged, and the scope of a proposed investigation is not fully known to the other agency. Also, on occasion, a proposed investigation is reported with a considerably different scope than that actually involved, through error or because of change as the investigation progresses. Finally, it appears that there is occasionally unnecessary overlapping and duplication of effort between the agencies, and even prejudice to the enforcement activity of one or the other by virtue of immunities granted in particular investigations.

All this suggests the desirability of some general agreement on the areas of primary responsibility of each agency. In order to deal with these matters the following suggestions are offered for the approval of the Commission.

The staffs of each agency should be instructed that notice to the other agency of a proposed investigation is not merely a formal requirement, but is intended to permit a full exchange of information with respect to the subject matter of the notice. If the recipient has further questions as to any proposed investigation, the initiating agency shall give as much information as is available to it upon request.

When an investigation is proposed, the initiating agency shall make a fair attempt to specify its purpose and scope, and shall fully advise the other agency of the proposed purpose and scope, including the probable charges involved. If it subsequently appears that the scope of the investigation is significantly broadened or changed, the investigating agency shall notify the other agency promptly.

The undertaking of a broad scale study of an economic field by either agency shall not preclude the other either from utilizing information thus gathered or from initiating a specific investigation or prosecution within the same general economic field.

As to the general character of the effort of such agency, it is recognized that by virtue of their respective statutory mandates there is an inescapable area of overlapping. Violation of the Sherman Act may constitute violation of Section 5 of the FTC Act, and unfair competitive activity may constitute restraint of trade or monopolization. Nevertheless, it must be recognized that Congress has given the FTC exclusive responsibility for enforcing the FTC Act and has given the Department of Justice exclusive responsibility for enforcement of the Sherman Act. Accordingly, matters involving *per se* violations of the Sherman Act, or primarily concerned with Sherman Act violations, shall be referred by FTC to Antitrust. Antitrust shall, upon such reference, assume responsibility for such matters. Matters involving primarily violations of Section 5 of the FTC Act, matters with a primary thrust of unfair competitive practices, or unfair or deceptive practices affecting consumers, and matters involving discriminatory pricing or other practices within the scope of the Robinson-Patman Act (except Section 3 thereof) shall be recognized as being the primary responsibility of FTC and shall be referred by Antitrust to the FTC. Upon such reference FTC shall assume responsibility for handling such matters. Matters involving violation of Section 3 of Robinson-Patman, because of the criminal nature thereof, shall be recognized as the responsibility of Antitrust and shall be referred to it. References to the other agency shall be made as soon as the nature of the matter is ascertained.

It is recognized by both agencies that investigations cannot always be clearly categorized. Nevertheless, the staffs of the respective agencies shall be instructed to observe these lines of responsibility and to cooperate with each other in seeking to avoid duplicitous effort in order to permit each agency to function within the area of its greatest effectiveness. The staffs of the respective agencies shall be instructed to exchange information and evidence between the agencies freely and promptly and each shall fully inform the other of the scope, substance and disposition of proposed or pending investigations and cases whenever any question between the agencies arises.

It shall be understood that each agency retains full responsibility and authority for the discharge of its statutory duties, and that the understanding between the agencies is for the purpose of cooperation and efficiency in the enforcement of the laws. Any issue with respect to the matters referred to herein which cannot be otherwise determined shall be referred to the Chairman of the Commission and the Assistant Attorney General in charge of the Antitrust Division, who shall confer and seek a resolution of the issue.

I will appreciate it if you will consider the foregoing and let me know whether it meets with the approval of the Commission. If there are any questions about this, or if you have any suggestions as to a further improvement or refinement in either the principles or the statement suggested, I would be very happy to have these from you.

Sincerely yours,

LEE LOEVINGER,
Assistant Attorney General, Antitrust Division.

FEDERAL TRADE COMMISSION,
Washington, D.C., April 11, 1963.

Hon. LEE LOEVINGER,
Assistant Attorney General, Antitrust Division,
Department of Justice, Washington, D.C.

DEAR JUDGE LOEVINGER: In your letter of March 8, 1963, you have accurately reflected the liaison arrangements which have existed between the Antitrust Division of the Department of Justice and the Federal Trade Commission since 1948. We at the Commission wish to join with you in working toward a refinement of our relationship in order that there may be a more efficient utilization of the resources of both agencies. We believe that in the main our arrangement has served the public well in view of our respective statutory mandates.

It is agreed that the staffs of each agency should be instructed that notice to the other agency of a proposed investigation is not merely a formal requirement but is intended to permit a full exchange of information with respect to the subject matter of the notice. If the recipient has further questions regarding the scope or nature of any proposed investigation, it is agreed that the initiating agency upon request shall submit all available information in answer to such questions.

It is further agreed that when notice of a proposed investigation is given, the initiating agency shall fully advise the other agency of the purpose and scope of the proposed investigation, including the probable charges involved. If it subsequently appears that the scope of the investigation is significantly broadened or changed, the investigating agency shall notify the other agency promptly.

Subject to applicable law and public policy, it is further agreed that the undertaking of a broad-scale study of an economic field by either agency shall not preclude the other either from utilizing information gathered by the investigating agency or from initiating a specific investigation or prosecution within the same general economic field.

We recognize here that by virtue of the respective statutory mandates to both agencies there is an inescapable area of concurrent jurisdiction. Violation of the Sherman Act may constitute violation of Section 5 of the Federal Trade Commission Act, but the converse is not necessarily true. There are many unfair methods of competition and unfair practices that do not assume the proportions of a Sherman Act violation. In this connection, Congress gave to the Federal Trade Commission exclusive responsibility for enforcing the Federal Trade Commission Act and to the Department of Justice exclusive responsibility for enforcement of the Sherman Act. In those rare instances where we would not have jurisdiction under Section 5 of a Sherman Act violation because of the necessity of establishing that the activities were carried on "in commerce," the matters would be referred to the Department of Justice.

In our letter of March 8, 1963, you suggest that the Federal Trade Commission refer to the Antitrust Division all matters involving *per se* violations of the Sherman Act, matters primarily concerned with Sherman Act violations, and matters within the scope of Section 3 of the Robinson-Patman Act. In line with this suggestion, but by way of a modification thereof, we propose the following: When a matter is before the Commission and the Commission determines prior to the issuance of a complaint that the facts appear to warrant consideration of possible criminal action against the parties involved the Commission by written notice will inform the Antitrust Division of the investigaton and will make available to the Division the files of the investigation for determination by the Division as to whether it desires to present the matter to a grand jury. Such determination shall be made by the Antitrust Division within a period of thirty days, within which time the Division will inform the Commission of its position. If the Division desires to present the matter to a grand jury, it will request the Federal Trade Commission to transfer the matter to it for such purpose. If, on the other hand, the Antitrust Division within this period of time informs the Commission that it does not intend to present the matter for grand jury consideration, then the Commission will proceed under its regular procedures.

We believe that we can and will conduct our investigations in such a way as to avoid the danger of deterring the effectiveness of the Department of Justice, by improvidently granting immunization to witnesses where the Department desires to proceed against them for criminal sanctions.

With respect to all of the laws under which the Commission and the Department have concurrent jurisdiction, it is our feeling that except where criminal prosecution is preferable, no changes should be made in the liaison procedures now in effect as described in the first paragraph of your letter.

Except in rare instances, neither the Antitrust Division nor the Commission can predict with certainty the totality of facts which may develop during the course of an investigation. Because of this difficulty, I think the greatest public service that we can perform for our respective agencies is to respect each other and act together to use the best procedure available in individual instances in order to guarantee that the public interest is fully served.

We at the Commission laud you for your resolve to use more effectively the criminal sections of the law. In this respect, we want to cooperate fully with the Department. We believe that we can best do this through use of the suggested procedures we have outlined.

We accept your suggestion that any matters referred to herein which cannot be otherwise determined shall be resolved by the Assistant Attorney General in charge of the Antitrust Division and the Chairman of the Commission, who shall obtain the approval of the Commission.

With kind personal regards, I am

Sincerely,

PAUL RAND DIXON, *Chairman.*

APRIL 18, 1963.

Hon. PAUL RAND DIXON,
Chairman, Federal Trade Commission,
Washington, D.C.

DEAR MR. DIXON: Thank you for your letter of April 11, 1963, stating the response of the Commission to my letter of March 8, 1963. I appreciate the consideration the Commission has given to the problems discussed and the agreement stated in your letter of April 11 with statements and suggestions contained in my March 8 letter. I shall distribute copies of these letters to the Antitrust Division staff and advise the staff that these letters represent the present arrangement and understanding between the agencies.

Recognizing the inescapable area of concurrent jurisdiction referred to in your letter, I would still hope that it might be possible to delineate more specific areas of primary responsibility for these agencies. In any event, the Department of

Justice will work with the Federal Trade Commission toward effective enforcement of the laws constituting the respective responsibilities of these agencies and will expect to have further discussions of these matters in the future.

With best personal regards, I am

Sincerely yours,

LEE LOEVINGER,
Assistant Attorney General, Antitrust Division.

APRIL 26, 1963.

Hon. LEE LOEVINGER,
Assistant Attorney General, Antitrust Division, Department of Justice, Washington, D.C.

DEAR LEE: In response to your letter of April 18, this is to advise you that I shall distributet a copy of your letter of March 8, 1963 to the Commission, as well as the Commission's letter of April 11, 1963 in response thereto, to the staff of the Bureau of Restraint of Trade with the instruction to the staff that these letters represent the present arrangement and understanding between the agencies.

We here at the Commission assure you that we shall continue to work with the Department of Justice toward more effective enforcement of the laws constituting the respective responsibilities of both agencies.

With kindest personal regards, I am

Sincerely,

PAUL DIXON RAND, *Chairman.*

THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., February 19, 1976.

Hon. PHILIP A. HART:
Chairman, Subcommittee on Antitrust and Monopoly, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: When the Subcommittee on Antitrust and Monopoly held hearings on S. 1284 during the spring and summer of 1975, the Administration expressed support for the major provisions of the bill, although it generally opposed Title VI. There has been division within the Administration, however, regarding the desirability of Title V, and the Administration position has been reconsidered in light of the scheduled consideration of the bill by the full Judiciary Committee.

Although the Administration adheres to its previously expressed position on other provisions of S. 1284, and particularly Title II of the bill, this letter is to inform you that the Administration does not now support Title V in its present form.

The Administration does not support enactment of the premerger stay provision of Title V, preferring instead to rely upon existing decisional and statutory law to govern the issuance of preliminary injunctions in merger actions filed by the Department of Justice and the Federal Trade Commission.

The Administration continues to support enactment of a premerger notification provision, providing that the waiting period and extension period are reduced to 30 days and 20 days respectively. Furthermore, to assure that challenges to pending mergers are considered on an expedited basis by district courts, the Administration would encourage enactment of a provision directing the Chief Judge of the appropriate United States Court of Appeals to assign a District Court judge who is able to proceed on an expedited basis with the case, and further to direct that a hearing on the government's motion for a preliminary injunction be held at the earliest possible time, taking precedence over all matters except older matters of the same character and trials pursuant to 128 U.S.C. § 3161.

If I may be of any assistance to the Subcommittee or the Committee, please do not hesitate to contact me.

Sincerely,

HAROLD R. TYLER, Jr.

THE SECRETARY OF THE TREASURY,
Washington, D.C., March 13, 1976.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: I am writing to clarify the Administration's position on the premerger stay provision of Title V of S. 1284. I hope this clarification will assist the Committee in its consideration of this provision during markup.

The Administration does not support enactment of any premerger stay provision. We believe that existing procedures for staying proposed mergers challenged by the government, together with S. 1284's provision for premerger notification, are adequate. Furthermore, we believe that enactment of any premerger stay provision would produce adverse effects on the economy that would outweigh the benefits of any possible improvement in anti-trust enforcement.

In our view, any premerger stay provision would discourage healthy, efficient, competitive change in ownership of businesses in response to economic conditions, and promote inefficient allocation of capital resources. A premerger stay provision would give the Government the power to hold up proposed mergers for extensive periods of time without having to make any showing in court that it has a meritorious case. When coupled with the proposed premerger notification requirement of S. 1284, even a 60-day premerger stay provision would allow the Government to hold up a merger for over 135 days without effective judicial review. The mere existence of this discretionary power in the anti-trust enforcers could significantly deter lawful mergers to the detriment of the economy. More importantly, by exercising this discretionary power, the Government could prevent—not merely delay—proposed mergers since the economic reasons for such transactions could well pass during the period of delay.

The Government considered various formulations of a premerger stay provision in an effort to arrive at a suitable time period beyond which the stay could not be extended unless the Government demonstrated to the court that it had a meritorious case. However, we concluded that any time limit short enough to avoid unduly delaying or deterring mergers would not add significantly to the Government's arsenal in challenging their legality.

We therefore, concluded that the most effective tools that could be provided are the premerger notification provisions coupled with the investigatory powers contained in Title II. These would assure an adequate base in information on which to act, and a provision calling for expedited judicial consideration would guarantee all parties a prompt judicial determination of the issues.

Sincerely yours,

WILLIAM E. SIMON.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,
Washington, D.C., May 19, 1976.

Hon. ROBERT McCLORY,
Subcommittee on Monopolies and Commercial Law, Committee on Judiciary, House of Representatives, Washington, D.C.

DEAR BOB: Thank you for the opportunity you gave our witnesses on H.R. 13131, the Premerger Notification bill, to propose amendments to this legislation.

We have reexamined H.R. 13131 and remain strong in our conviction that any form of premerger notification is unacceptable. There has been no showing that the institution of an elaborate system of reporting and delay will in any way assist in preventing violations of Section 7 of the Clayton Act. Rather, it is our belief that this type of legislation may well jeopardize mergers that are necessary for national growth.

To alter the burden of proof in merger cases will simply make the Federal Trade Commission and the Department of Justice virtual licensors of corporate mergers. We submit that information on mergers is widely reported in the business media and is usually available to the government. Assistant Attorney General Kauper has testified before this Subcommittee that his office has been able to gain information dealing with pending mergers.

Business is always willing to work with the governmental agencies and does not, in most instances, follow a pattern of concealment or conspiracy. All that this bill would do is make it more difficult for the healthy process of business entry and exit to continue within the framework of our private enterprise system.

I hope you'll consider these points when the Subcommittee starts markup on H.R. 13131.

Cordially,

HILTON DAVIS,
General Manager, Legislative Action.

LAW OFFICES OF TIMOTHY J. SHEARER,
Washington, D.C., June 1, 1976.

TOM SHERLOCK RUNGE, Esq.,
Judiciary Committee, U.S. House of Representatives,
Washington, D.C.

DEAR TOM: As you know, I have been a close observer of developments in antitrust law over the past two years of my legal career. At the same time, I am not a plaintiffs' antitrust attorney seeking large contingent fees, nor am I indebted to those business interests which might seek to avoid the full impact of our nation's long-standing policy of free and open competition.

Specifically, I would like to express my support for H.R. 13131, a bill to amend the Clayton Act to provide for premerger notification and stay agreements.

Time does not allow me to state my position on H.R. 13131 with reference to each relevant portion of the voluminous record already compiled in support of such legislation. Therefore, I would like to express my views with reference to a portion of the minority views of the report of the Committee on the Judiciary of the United States Senate to accompany S. 1284, "The Antitrust Improvement Act of 1976." Title V of S. 1284 is identical to H.R. 13131.

At the outset of their discussion of premerger notification and stay amendments (p. 205, Part II—Minority Views of the Report of the Committee on the Judiciary, United States Senate, to accompany S. 1284), Mr. Thomas E. Kauper, Chief of the Antitrust Division, Department of Justice, is quoted as testifying that "many mergers are procompetitive . . ." Perhaps in an excess of zeal arising from their opposition to the parens patriae concept, contained in S. 1284, the Senate Judiciary Committee minority fails to note that Mr. Kauper's statement is valid only within the context of an environment of limited competition. It simply stands to logic that mergers cannot be as procompetitive as internal expansion of a company or new entry into an industry unless one is forced to assess the potential pro-competitiveness of a merger within the context of already concentrated industries. Only in the latter case could a merger be considered "precompetitive".

The Senate Judiciary Committee minority views also state that "In sum, there is no showing that there is *any* need for *any* such antimerger legislation today." However, that statement is true only if we are to accept the large number of concentrated industries existing in our society today as a fait accompli.

The Senate Judiciary Committee minority goes on to assert that automatic stay provisions in the proposed premerger notification legislation "are contrary to fundamental concepts of fairness and due process." Assuredly, those fundamental concepts must be a focus of our attention more today than perhaps any other time in our history. However, we should not dilute the significance of those concepts by seeking to apply them to companies, which, after all, are creatures of the state.

The Senate minority report says that the automatic stay provisions would practically result in totally preventing an acquisition questioned by enforcement authorities. However, this concern fails to take into account the possibility that companies seeking to merge or make acquisitions, if faced with such automatic stay provisions, would avoid dilatory tactics and thereby hasten resolution of any dispute with enforcement authorities. Also, those advancing the merger or acquisition normally would have had as much time as they deemed necessary to study the antitrust consequences of their proposed action prior to announcing such an action. Meanwhile, should H.R. 13131 fail to become law, enforcement authorities would continue to learn of such transactions only after the fact and be faced with the almost insurmountable burden of showing, in the midst of a well-prepared defense, that the transaction would be anticompetitive or may tend to lessen competition.

Perhaps the minority report states my case in noting that the issue of legality may often require close judgments—especially in antitrust cases. Thus, I am not offended by the concept of providing a defense to a government action against a merger only to the extent of proving that the Government had no reasonable probability of ultimately prevailing on the merits. Even if H.R. 13131 is enacted, the initiative will remain with those proposing a merger or acquisition.

The minority report also objects to the provision of the premerger notification legislation which does not allow defendants to show loss of "anticipated financial benefits" if the transaction under question is not allowed. Thus, the minority implies that taking away such a defense could drive some prospective merger partners out of business. However, what the minority fails to recognize is that allowance of such a defense would also allow an increase in concentration and a corresponding loss of innovation, ultimate evils which I presume this legislation is designed to attack.

The minority report makes much of the 1974 Expediting Act amendments allowing intermediate appeals regarding antitrust injunction applications. However, notwithstanding the availability of appeal, the Government under present procedures simply does not have the time to marshall sufficient evidence for a successful application for a preliminary injunction or restraining order, and, necessarily, for successful appellate review—at least in any case where the proposed merger is not blatantly unlawful.

I am distressed by the minority's citation of testimony by Professor Milton Handler. He objected to the automatic stay concept as "violat[ing] every precept of fairness." However, I question why, with regard to corporations, the Government should be deaf, dumb and blind until the moment before a merger is consummated, and why it might seem fair—to any party—to force the Government to decide on its enforcement action and successfully argue its case while operating with limited resources to meet an unrealistic deadline set in practicality by those being investigated.

Professor Handler also is quoted as stating that "only in Alice in Wonderland do we proceed with verdict first and trial afterwards." I submit that passage of H.R. 13131 would take us out of the "Wonderland" we currently are in by recognizing that a judgment against further concentration of our industries has been made and requiring that those who seek to further concentrate prove that their activities will lead to greater competition.

The minority report goes on to claim that the basic fallacy of the premerger notification legislation is "its transformation of all American business into a regulated industry with respect to capital allocation." However, the minority fails to recognize that regulated industries came about because of unrestrained concentration and attendant difficulties in capital allocation. The minority fails to recognize that a "free market" is one in which economic decisions are made according to the demands of the market, not according to the decisions, however well-intended, of small, closely-knit groups of businessmen.

The minority report makes much of the possible deadly effect on "perishable financial transactions" of the provision that the Government may extend the waiting period for an acquisition by requesting additional information. However, this fear is plausible only to the extent that a potential defendant has not anticipated Government requests for information, even though that defendant has presumably engaged in extensive study of the proposed transaction and is in a position to best know what information is available and how it can most rapidly be transmitted to the Government.

The possible effect on tender offers of waiting periods proposed by the legislation is criticized by the minority report because "entrenched inefficient management" could not be ousted. However, if inefficient management is to be ousted, let normal competitive forces do so. The midnight raids of tender offers simply are not appropriate as the size of acquisitions and their attendant effects on our economy become larger. The buying and selling of large businesses might become more difficult or at least more subject to principles of a free and competitive economy. But the formation of new businesses or expansion of existing ones would not be affected in the least by the waiting periods contained in this premerger notification legislation.

Finally, the minority report makes much of a Conference Board study to refute the claim that concentration has "rapidly increased" and refers to studies indicating the significant overloads which our judicial system now faces. Although the Conference Board study was published just recently, it is based on data that is four years old. Also, I question the assumption that because concentration has not increased (and this simply cannot be proved one way or the other because of the lack of significant data), that we should not make some effort at avoiding further concentration or seeking reduced concentration.

In much the same vein, while in sympathy with the plight of our judges, I simply do not think it is relevant to the issues at hand. We can hardly deny justice and allow the continued fettering of our economy for a lack of judicial resources. Because a perceived evil is either no worse than before or will require our expansion of judicial resources is no excuse for doing whatever we can to rid ourselves of that evil in the first instance.

I had not meant to go on so long in this letter, but the significance of H.R. 13131 simply cannot be over-estimated. Favorable action on this legislation will constitute a conscious decision of the Congress to take those steps toward diversity in our economy which would allow the development of a truly competitive business environment. Also, I have no doubt that those mergers which can be deemed pro-competitive will evolve in any event, notwithstanding questioning by the Government.

One small step in achieving a competitive economy open to innovation in technology and efficiency is to develop procedures allowing us to become aware of those anticompetitive practices which we must prohibit as they are occurring. H.R. 13131 is essential to taking such a step.

Sincerely,

TIMOTHY J. SHEARER.

LAW OFFICERS OF WEISMAN, CELLER,
SPETT, MODLIN, WERTHEIMER & SCHLESINGER,
Washington, D.C., May 20, 1976.

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

DEAR MR. CHAIRMAN: I am writing to respond to questions put to me by Representative McClory when Mr. Celler testified on May 13 before the Subcommittee on Monopolies and Commercial Law on H.R. 13131, a bill to provide for premerger notification.

First, Mr. McClory asked whether the bill should be amended to limit the duration of the waiting period. An ambiguity apparently arises because sections 7A(c)(1) and (2) of the bill authorize the Government to request additional information from the merging parties and to extend the waiting period for an additional twenty day period following the Government's receipt of such information. At the hearing I suggested that it would appear to be in the best interest of the merging parties to furnish the additional information requested by the Government as promptly as possible so as to speed up the process. It should also be noted that the expressed legislative intent of the Senate Judiciary Committee (reporting on title V of S. 1284) is that the Government must conscientiously seek whatever additional information and documentary material it requires as promptly as possible (S. Rept. No. 94–803, fn. 29). However if this Committee believes that the waiting period still is too "open-ended", it may consider amending H.R. 13131 to provide that in no event shall the waiting period exceed (90) days from the date of the initial filing.

Second, Mr. McClory asked my views with respect to the provisions of the bill which would shift a burden of proof to the merging parties when the Government seeks a preliminary injunction to restrain consummation. It is true, as Mr. McClory suggested, that the premerger notification bill favorably reported by the Committee on the Judiciary in 1957 did not alter the burden customarily placed on the moving party. Nevertheless, as Mr. Celler noted in his testimony, H.R. 13131 has been significantly amended from the 1957 bill and now focuses on a narrower range of mergers. The $100/$10 million jurisdictional standard will pinpoint the notification and waiting period mechanism on much larger combinations. For example, it is estimated that under the provisions of H.R. 13131 fewer than 100 transactions would have been covered during each of the last five years. In these circumstances, and in the interest of fair and effective enforcement of antitrust policy, the reasons advanced by the Senate Judiciary Committee for shifting the burden to the merging parties appear to be persuasive. See S. Rept. No. 94–803 at 69–75. I would add that if the Government has to retain the burden of proof to obtain a preliminary injunction, the teeth are drawn from the effectiveness of the bill. This provision is the very nuts and bolts of the legislation.

Finally, I wish to reiterate a point discussed during Mr. Celler's testimony that suggested that the bill appropriately may be amended to permit confidential treatment of information submitted by the merging parties pursuant to the notification procedure. A provision calling for confidential treatment already is contained in the Senate version of the bill as reported by the Senate Judiciary Committee, see sec. 7A(b)(3)(B) of S. 1284.

I hope these comments are responsive and are helpful to the Committee in its deliberations.

Sincerely yours,

BENJAMIN L. ZELENKO.

AMERICAN BANKERS ASSOCIATION,
Washington, D.C., May 27, 1976.

Hon. PETER W. RODINO,
U.S. House of Representatives,
Washington, D.C.

DEAR MR. RODINO: The American Bankers Association is an organization with a membership of about 13,500 banks or 92% of all banks in the United States. Approximately 4,000 of the bank members have trust powers which would be impacted by H.R. 13131.

The attached statement is submitted for inclusion in the record of the hearings on H.R. 13131, a bill to amend the Clayton Act to provide premerger notification and stay agreements.

Sincerely,

GERALD M. LOWRIE.

STATEMENT OF THE AMERICAN BANKERS ASSOCIATION

The American Bankers Association is an organization with a membership of 13,500 banks or 92% of all banks in the United States. Approximately 4,000 of these banks have trust powers.

The Association opposes the inclusion of acquisitions of stock by a bank in a fiduciary capacity in H.R. 13131. Such inclusion would unduly constrain the ability of corporate trustees to perform their fiduciary services. Bank trust departments acquire stocks as trustee, executor, guardian, conservator and in other fiduciary capacities. The stocks may be purchased for an account by the trust department or they may be received, in kind, when a trust, estate or other account is established or when a trust, estate or other account is transferred to the trust department from another fiduciary, either corporate or individual. The bank trust department invests and trades in stock as a service to its customer and not in an effort to gain corporate control or economic advantage in its own right.

In roughly 70% of the estates and personal trusts administered by trust departments there is a co-executor or co-trustee with whom the bank shares investment and voting authority. A substantial percentage of pension trusts are invested under the direction of outside investment managers or committees and the stocks held by these trusts would normally be voted by the person directing investments. In some pension trusts, the voting authority is passed through to the employee.

Regardless of the capacity in which the trust department serves, it only holds legal title to shares. The beneficial interest always belongs to someone else. The Glass Steagall Act, with limited exceptions, prohibits banks from buying or holding securities for their own interest.

The above background is offered to underline the appropriateness of excluding all stock acquisitions by bank trust departments in a fiduciary capacity from the coverage of H.R. 13131. A pertinent provision of the Clayton Act states that its coverage shall not apply to a person or persons acquiring the stock or other share capital or the assets of another person or persons solely for investment and not uing the same by voting or otherwise to control such other person.

The bill, H.R. 13131, does exempt acquisitions solely for investments purposes where the securities being acquired do not exceed 10 per centum of outstanding voting securities and most banks seldom hold in excess of 10% of the voting securities of a publicly-owned company. While the actual incidence of a notification burden will therefore be small, the very existence of an objective 10%

cut-off will require the establishment of an elaborate monitoring system to assure that no acquisition either by purchase or by receipt in hand would result in a holding above the limit. In view of the fact that bank trust department investment transaction in a fiduciary capacity have never been subjects of antitrust concern, even this monitoring burden seems ill-designed for the purpose of H.R. 13131.

Additional problems are presented with closely-held companies. Banks sometimes serve as executors of estates or as trustees of trust that contain a sizable portion, maybe even all, of the stock of a closely-held company. In fact, the decedent or grantor picks the bank trust department for the particular purpose of managing the company after his death until the beneficiaries are ready to assume responsibility. Such arrangement would still be possible but the bank would be unable to qualify as executor during the 30 day prenotification period. This could impose substantial burdens on the family of the decedent and leave the business without management for 30 days.

In recent years, many persons have turned to the use of revocable trusts rather than wills for testamentary disposition of their property. In such a case, the bank as trustee of the revocable trust might have legal title but no voting power during the grantor's life but on the grantor's death, the voting power would immediately pass to the bank. Here, again, the trust could provide for someone, other than the bank, to vote the stock upon the death of the grantor but the grantor has probably made a specific choice of the trust department to manage the business for his family because of its qualifications. The notification requirement, again, could unduly interfere with the grantor's right to choose the bank trust department to manage his business.

An additional adverse impact of subjecting bank trust investments to premerger notification with only a 10% exemption will be to restrict the ability of fiduciaries to broaden the range of their investments to include more medium-sized and small publicly-held corporations. For example, the research costs of investment analysis for a $10 million company will be prohibitive if the dollar amount of the securities which can be acquired for various trust accounts under their management is limited to $1 million. Such a restriction will tend toward concentration of institutional investment which has been strongly criticized by many public policy makers.

The duties and legal responsibilities imposed upon a bank acting as fiduciary in the management of the assets of a trust, estate, etc., require management in the sole interest of beneficiaries and prevent the use of any control over a company to benefit the bank or other accounts. Therefore, we again suggest that an exemption of all acquisitions of stock by a bank trust department in a fiduciary capacity is appropriate and would, in fact, enhance the public good by allowing better management of trust assets without infringing upon the protections to be provided by premerger notification.

BREED, ABBOTT & MORGAN,
Washington, D.C., May 28, 1976.

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

DEAR MR. CHAIRMAN: Pursuant to conversations with members of the Subcommittee's staff, I am writing to suggest amendments to H.R. 13131 which would alleviate the very grave disruptive effects which the bill as now drafted would have on existing mechanisms for the efficient allocation of capital resources.

So far as I am aware, the record—both before the Subcommittee, and before the Senate Judiciary Committee with respect to a similar proposal in the other body—is unanimous and uncontradicted to the effect that mergers and acquisitions are not *per se* anticompetitive, or even suspect. Indeed, they play many positive roles. They allow firms which are failing or in competitive difficulties to be strengthened and preserved as viable competitors in the market. They allow firms to transfer operations which do not fit their particular pattern of operations to others who may be able to operate them more effectively. They provide an incentive for entrepreneurs to make new entries into the competitive arena. And, particularly through the device of the tender offer, they provide a mechanism for the ousting of entrenched inefficient management, and hence afford a special incentive to management to stay on their toes. They thus provide an important means for the most efficient allocation of the capital resources of the country—an especially important consideration in view of current concerns over the capital needs of the economy during the next several years.

Hence, each merger or acquisition must be judged on its own merits. Any change in present law which would indiscriminately inhibit merger and acquisition activity would have a clearly detrimental effect on the free market economy as a whole. H.R. 13131 as presently drafted would seriously hobble this vital free mobility of economic resources.

1.

In addition to the rather long waiting periods for the consummation of acquisitions and mergers of more than minimum size which the bill would prescribe, subsection (d) of the bill would in effect confer on the FTC and the Department of Justice the power to *kill*—not merely to *delay*—any merger, regardless of size, and regardless of whether or not the merger had any anticompetitive features.

Under subsection (d)(1), any such merger could be stayed for up to 60 days simply by the filing of a complaint in the appropriate district court. And subsection (d)(3) is an even more drastic "automatic stay" provision, and one which is essentially unlimited as to duration. It provides that when such a complaint is filed, a preliminary injunction lasting throughout the trial of the case—which might well be a matter of years—would have to be granted by the court, again without any showing by the enforcement agencies that the merger had any illegal features. While subsection (d)(3) does purport to allow two defenses to such a preliminary injunction, neither of these is realistic as a practical matter. With respect to both, the burden of proof would be placed on the defendant—dramatically reversing the fundamental principle of jurisprudence under which enforcement agencies are normally required to prove that activity is *illegal*, rather than requiring defendants to prove their *innocence*. Especially in such a field as antitrust, where cases are often close and depend on a nice balance of judgment, it will hardly be possible for a defendant to prove at the outset that the government has no reasonable probability of ultimately prevailing; yet this is one of the illusory defenses held out by subsections (d)(3). The other is irreparable injury to the defendant as a result of issuance of a preliminary injunction; and this defense too is rendered illusory, by the exclusion of "loss of anticipated financial benefits" from such a showing—for "financial" injury is normally the only relevant "injury" in the economic field. Seldom if ever will a defendant be able to prove either of these defenses as a practical matter. Hence, subsection (d)(3) is essentially an automatic stay provision which is unlimited as to duration.

To confer on the enforcement agencies power to secure such automatic stays is to confer on them the power to thwart any merger or acquisition at will. For it is universally recognized that such deals simply do not hold together once they are stayed. Economic conditions change; asset values are revised; accounting periods for tax purposes expire; bank commitments cannot be held indefinitely. As Judge Friendly said in a recent case, "the grant of a temporary injunction in a Government antitrust suit is likely to spell the doom of an agreed merger." *Missouri Portland Cement Co.* v. *Cargill*, 498 F. 2d, 851, 870 (2d Cir. 1974). These two automatic stay provisions would thus in effect give the enforcement agencies power to prevent and destroy any merger or acquisition, merely on their own say-so, without any showing of illegality. Accordingly, before consummation of any merger or acquisition, businessmen would have to seek assurance from the enforcement agencies that they would not kill the transaction by obtaining such a stay. The whole American capital market would thereby in effect be turned into a regulated industry—and one with no standards to govern the regulators. This would be a giant step backward from the fundamental antitrust philosophy that competing forces, rather than the government, should rule a free market economy.

Finally, it is important to note also that no real *need* has been shown for conferring these extraordinary powers on the enforcement agencies. All available statistics show that merger and acquisition activity has substantially declined in recent years, and that there is no significant likelihood of any resumption of the frenzied activtiy of the late 1960's. Nor has there been any satisfactory showing that the weapons presently available to the enforcement agencies are inadequate. Indeed, those weapons have been greatly strengthened by recent legislation conferring on the FTC the power to seek preliminary injunctions, and allowing an immediate appeal by the government of any denial of preliminary relief in an antitrust case.

Accordingly, subsection (d) should be deleted from the bill.

2.

A kindred problem is presented by the waiting period which subsections (b)(1) and (c)(2) would require before the consummation of a transaction. As presently drafted, this would provide a waiting period of 30 days, *plus* the necessary time to gather any additional information requested by the enforcement agencies, plus a further 20 days after receipt of such information by the enforcement agencies. Undue prolongation of such a waiting period would kill an acquisition just as effectively as an automatic stay order issued by a court. Accordingly, the enforcement agencies should receive every incentive to proceed expeditiously in such matters. Most importantly, there should be a safeguard against undue prolongation of the waiting period by burdensome requests for additional material. Accordingly, a provision should be inserted in section (c)(2) to the effect that in no event shall the waiting period be extended more than 60 days after the original submission of material. Such a 60-day limitation would also recognize the fact that under the Williams Act, persons tendering their stock pursuant to a tender offer have the right to withdraw the tender after the expiration of 60 days.

3.

In addition to the foregoing changes, subsection (g) should be deleted from the bill. In its present form, this subsection preserves the remnants of certain extremely drastic provisions in the original form of the bill as first offered last year in the Senate. Under those provisions, whenever the government filed an action against a merger the court would have required, upon the government's request, to enter a hold separate order; to establish the "price" of the acquired assets; and, if the government ultimately prevailed, to require mandatory divestiture at the price that had thus been fixed by the court—perhaps years before—at the outset of the action. These draconian provisions were deleted from the Senate bill at an early stage. Subsection (g) is the residual remnants of these abandoned provisions. The Senate Majority Report points out that subsection (g) is now no more than declaratory of existing law. Since this subsection is not intended to change existing law, but nevertheless contains the seeds of great confusion if misinterpreted, it should be stricken from the bill.

4.

The foregoing comments reflect the most important shortcomings of the bill as presently drafted. There are others with which this letter does not deal. The views of the minority of the Senate Judiciary Committee with respect to the corresponding provisions of S. 1284, embodied in pages 205–219 of Senate Report No. 94–803, Part II, analyze all these provisions at length, set forth important relevant data, and advance cogent arguments as to the undesirable features of this proposed legislation. Since H.R. 13131 and Title V of S. 1284 are so similar, I respectfully suggest that the Subcommittee make the cited extract from the Senate minority report on S. 1284 a part of the record of this bill.

Yours sincerely,

THADDEUS HOLT.

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK,
New York, N.Y., May 25, 1976.

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

DEAR CHAIRMAN RODINO: This letter is submitted to you pursuant to the request of your counsel, on behalf of the Association of the Bar of the City of New York, Committee on Trade Regulation, for the purpose of providing the Committee on the Judiciary with our views on H.R. 13131.

Because substantial comment has already been given to Congress regarding the substance of the proposals contained in H.R. 13131, we do not propose a full review of each and every issue which the legislation presents. Rather, we wish to provide our views with respect to a number of the policy issues which the Committee feels are of central importance in the bill.

The Committee generally favors the concept of pre-merger notification with respect to merger transactions which may present substantial antitrust issues. However, as set forth below in more details, the Committee has serious reservations as to the need for appropriateness of the provisions of the bill relating to injunction procedures and other court procedures.[1]

SECTION 7A(a): DOLLAR LEVEL REPORTING STANDARDS

The Committee endorses the concept of dollar level reporting standards, recognizing that although a dollar limit standard for reporting may be imperfect, alternative approaches do not appear as practical. However, the Committee believes that a $250 million level of sales or assets for the acquiring company is more appropriate, because we believe that the legislation is intended to obtain premerger information with respect to transactions of substantial and major proportions. Similarly, the Committee believes that flexibility should be included in the legislation to permit the Federal Trade Commission and Assistant Attorney General in charge of the Antitrust Division (herein referred to as "the government") to raise the dollar levels for reporting by the acquiring and acquired entities, should it become appropriate to do so. It should be noted that the Federal Trade Commission currently has exercised authority to provide specific premerger requirements of differing dollar levels in individual industries where the FTC believes such different reporting levels are appropriate.[2]

SECTION 7A(b): 30-DAY WAITING PERIOD

The Committee recognizes that the purpose of premerger notification can best be effected if provision is made for reporting prior to the consummation of the transaction and, consequently, a majority of the Committee supports the 30-day waiting period. However, the Committee does not believe that a refusal by the government to waive the 30-day waiting period should automatically prevent consummation of the transaction. In certain instances, economic, commercial and financial conditions dictate prompt action, and such delay could substantially interfere with the exercise of legitimate business opportunities. Consequently, the Committee proposes that companies subject to the 30-day waiting period be specifically permitted to challenge a refusal by the government to waive the 30-day waiting period by application to the Federal courts.

SECTION 7A(C)(2): EXTENSION OF 30-DAY WAITING PERIOD

The Committee opposes the provision of H.R. 13131 which could permit the government to extend the waiting period an additional 20 days. If after 30 days the government has not ascertained facts which would support a temporary restraining order or preliminary injunction, the Committee believes that further delay in consummating the transaction, at the discretion of the government, is inappropriate. The Committee also notes that as presently worded, H.R. 13131 would permit the government to request voluminous information on the 29th day of the waiting period and extend that waiting period until 20 days after receipt of such information. This provision, and the ability of the government to extend the waiting period, could result in an extended waiting period far in excess of the apparent 30 plus 20 day period provided in the bill.

SECTION 7A(d)(3): REVERSAL OF BURDEN OF PROOF

The Committee most strongly opposes the provision of the bill which would in effect reverse the burden of proof in a preliminary injunction proceeding by *directing* the district court to enter a preliminary injunction, unless the defendant can show that the government does not have a reasonable probability of ultimately prevailing or that the defendant will be irreparably injured by the injunction. The Committee does not believe that an automatic presumption of illegality, reflected in the reversal of the burden of proof, should adhere to a

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[1] Because of these reservations some members of our Committee question whether additional federal legislation is required simply to codify the essential elements of the Federal Trade Commission premerger notification program which has been in effect since 1969 and which has not received any substantial criticism of which we are aware.

[2] FTC Merger Notification Program, 39 Federal Register 35717 (October 3, 1974); Vol. I CCH Trade Reg. Rep. ¶ 4540, ¶ 4520, ¶ 4525, ¶4530 and ¶4532.

merger which the government chooses to attack. Courts, including the Supreme Court, have sometimes disagreed with the position of the government in merger cases. The mere fact that the government chooses to sue should not give rise to a presumption of illegality. The automatic reversal of the burden of proof in granting a preliminary injunction is inappropriate. This is particularly true where, as a practical matter, a preliminary injunction may have the effect of terminating the transaction prior to adjudicaton on the merits.

SECTION 7A(d)(1): AUTOMATIC TEMPORARY RESTRAINING ORDERS

For the reasons set forth above with respect to the reversal of the burden of proof in a preliminary injunction hearing, the Committee similarly opposes the automatic granting of a temporary restraining order.

SECTION 7A(g): AUTOMATIC HOLD SEPARATE ORDER

The Committee recognizes that in certain circumstances a hold separate order preventing commercial integration of the acquired entity may be appropriate to permit effective relief should the transaction ultimately be determined to be unlawful. However, the Committee opposes legislation directing the court automatically ("unless the interests of justice require otherwise") to issue a hold separate order. Such a provision reflects an apparent presumption of illegality and may result in substantial economic waste by requiring commercial entities to operate in a commercial configuration which does not make economic sense.

PLACING PROFITS, STOCK OR ASSETS IN ESCROW

The Committee also opposes the provision of the bill which would permit a requirement that the profits, stock or assets of the acquired firm be placed "in an escrow account" pending the outcome of the case. This provision again may require the merged entities to operate in a commercially unrealistic manner and interfere with legitimate and necessary business opportunities. Similarly, there is a substantial danger of economic waste in the escrow concept, particularly if profits are withheld from the merged entity. The escrow concept could also produce an anticompetitive effect in that it would discourage the acquiring company from maintaining the competitive viability of the merged entity by providing necessary capital investment. Such withholding could result in a dissipation of the value of the assets of the acquired entity and may make any subsequent divestiture difficult or impossible.

DEPRIVING A VIOLATOR OF ALL BENEFITS

The Committee recognizes that the court has discretion to enter remedial injunctive orders with respect to a merger violation. However, the Committee does not believe that it is necessary or appropriate to specifically include in legislation a provision which may be viewed as a mandate from Congress to apply penalties. Appropriate relief in a merger case may vary depending on many factors. Consequently the Committee believes that the courts should not be encouraged to apply specific relief, particularly relief which appears punitive. Rather, the Courts should be free to fashion relief based upon all relevant facts and circumstances surrounding the particular merger.

As noted at the outset, the Committee has limited its comments to what it believes to be the major policy issues with respect to the proposed legislation. The Committee will be pleased to provide additional views on other issues regarding H.R. 13131 if requested and appreciates this opportunity to present its views on this legislation.

Respectfully submitted.

ELEANOR M. FOX,
Chairperson.
PETER D. STANDISH,
Chairperson.
WATT H. DENISON, Jr.,
VICTOR FRIEDMAN,
BARRY HAWK,
ROBERT M. HELLER,
THOMAS V. HEYMAN,
MALCOLM A. HOFFMAN,

ROBERT N. KAPLAN,
LOUIS LAUER,
J. PAUL MCGRATH,
JOSEPH RUSKAY,
MYRA SCHUBIN,
HERBERT F. SCHWARTZ,
ASA D. SOKOLOW,
LAURENCE T. SORKIN,
GEORGE J. WADE,
LAURA WORSINGER,
Committee on Trade Regulation.

JUNE 17, 1975.

DISSENTING REPORT OF THE SECTION 7 (CLAYTON ACT) COMMITTEE OF THE ANTITRUST SECTION, ABA, ON TITLE V OF S. 1284 BY COMMITTEE MEMBER LAWRENCE J. SLADE

INTRODUCTION

I must respectfully dissent from the ABA Clayton Act Committee proposed report on Title V of the Antitrust Improvements Act of 1975, S. 1284. In so dissenting from the position of eminent members of the antitrust bar, with their extensive experience in litigating (and earning fees thereby) the multiple, cumbersome issues posed by the present antitrust laws including Section 7 of the Clayton Act, I must rely in part upon my own experience and observations,[1] recalling that, to paraphrase Holmes, "the life of the law is not logic but experience"!

I

PRELIMINARY ANALYSIS

BURDEN OF PROOF AND SPECIFICITY OF PROCEDURAL AND SUBSTANTIVE LEGAL STANDARDS

The congenial vagueness of Section 7 lends to assertion by plaintiff and defendant of an expanding, infinite, judicially unmanageable array of possible relevant lines-of-proof and arguments as each litigant attempts to anticipate and overcome the other.

In consequence Government and private antitrust suits often become hopelessly entangled in a "rule of reason" bramble bush which precludes prompt decisive determination of the legality of a contested merger or acquisition. E.g., *Marine Bancorp; General Dynamics; cf. United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953) (district court aided by "diligent seven year search [document discovery] . . . by Government counsel").

What practical remedy may be found?

LESSONS FROM THE INTERNAL REVENUE CODE

Analysis of the succesful legislative and judicial techniques embodied in the Internal Revenue Code can be helpful. For despite possible disagreement with the substance, the unremitting length, and technical-verbal complexity of the Revenue Code, it like the Sherman, Clayton, and Robinson-Patman Acts, goes right to the innards of our business and other economic activities. The Revenue Code—unlike the Sherman, Clayton, or Robinson-Patman Acts—*has been* pervasively implemented; the Federal Government and its programs have been provided with revenue.

The success of the Revenue Code rests upon at least two principles: (1) applicable legal standards have been spelled out for the most part with great

[1] During my four years with the Antitrust Division of the Department of Justice I have participated in or been responsible for litigating both price fixing and merger cases; I investigated, prepared, and filed the complaint and preliminary injunction materials in *United States* v. *Pacific Southwest Airlines*, Civil No. 72–2901 (C.D. Cal. 1972) (PSA abandoned its attempt to acquire Air California). I have also relied upon my formal *Magna Cum Laude* training in macro-, micro-, and international economics at the University of Utah. My time spent observing other governments and economic systems (one year in the Far East with the United States Navy and two years as a Mormon missionary in England) have left their imprint on my thinking. (I am also an Eagle Scout.)

Before joining the Department of Justice, I was employed as a Senior Staff Attorney with the Maricopa Legal Aid Society, Phoenix, Arizona, where I had frequent litigation before various judicial and administrative forums.

precision—almost all rules are *per se* rules; and (2) in civil cases the taxpayer-defendant has the burden of proving that he has complied with the law. For such economic regulation this all makes good sense; palpably the Federal Government would be bankrupt if the IRS had to shoulder the proof burdens analogous to those thrust upon antitrust plaintiffs by the Clayton and Sherman Acts.

Perhaps here is the answer: why it is that for the larger part of the American economy the law of such cases as *Vons* and *Brown Shoe* has as much practical reality as does the Russian Bill of Rights (which I understand as written, is superior to our own in expressing a charter of liberty) to the practicalities of life in the Soviet Union, where a citizen reputedly bears the burden of proof in vindicating those rights. My point is that to be effective, whether regulating public or private action, a legislative scheme must be adequately supported procedurally.

Phillip A. Areeda, Harvard Law Professor, Antitrust expert, and Assistant to President Ford has succinctly put it thus:

> * * * [*W*]*hoever* has the *burden* of proving anything about these matters *will* usually *lose*.

P. A. Areeda, Antitrust Analysis 518 (1967) (emphasis added).

CONTRASTING THE "RULE OF REASON"

The majority report, from which I dissent, seeks to protect the stultifying procedural and evidentiary burdens resting upon antitrust plaintiffs and to cultivate the "rule of reason" bramble bush by preserving present time and legal-resource consuming ambiguities and deficiencies in the Clayton and Sherman Acts.

On one hand asserting the need for full blown proof that a merger is unlawful before permitting it to be stayed, the majority on the other side argues that the time period to be granted Government lawyers to prepare for such "rule of reason" proceedings, should be shortened. The majority would limit or, for small mergers, abolish notice periods. They take this position despite the established rule that a relatively small community of 10,000 people may constitute a "section of the country", *Brown Shoe*, 370 U.S. 339, within which the impact of a merger may be measured under § 7 of the Clayton Act.

CLAYTON 7 POLICIES

American antitrust policy, in addition to promoting important economic interests such as efficiency and equitable distribution of income, includes also the protection of fundamental political interests in maintaining a pluralistic structure and operation of Government and Society.

The Bill of Rights including the First Amendment Free Speech and Fifth and Fourteenth Amendment Due Process provisions, our constitutional federal organization of state and national governments and the tripartite separation of powers at various levels of government, were all designed to institutionalize pluralism as part of the American way.

Excessive economic size or power may undermine or make onesided the dynamics of this pluralism. A giant corporation, or group of such corporations, by overwhelming *de jure* government, to which the corporation is nominally subservient, may in practical effect become "private government". Put more formally:

> Excessive concentration of economic power, resources, or assets in a group of corporations or a single corporation creates undesirable opportunity and tendency toward use of such power, resources, or assets, to improperly interfer with or affect the desirable balance, freeplay, and plurality of expression inhering in due process of law, as ought to be expressed in public and private debate, and in government legislating, policy and rule making, and enforcement activities.

Memorandum from L. J. Slade to R. P. Hernacki, U.S. Department of Justice, April 16, 1975, re: proposed additional "finding" to be made in proposed S. 1284.

Section 7 of the Clayton Act was intended to thwart the "rising tide of concentration" in its incipiency. See, e.g., *Brown Shoe Company*, 370 U.S. 294 (1962); Fox, *Antitrust, Mergers, And The Supreme Court: The Politics Of Section 7 Of The Clayton Act*, 26 MERCER L. REV. 389 (1975).

INCREASING AGGREGATE CONCENTRATION

Notwithstanding the importance of antitrust political-sociological policy interests, the impact of America's largest manufacturing companies increased quite significantly between 1948 and 1968. The aggregate manufacturing asset concentration shares of the top 100 and top 200 largest manufacturing corporations rose approximately 25% in that period from 40.2% to 49.2% for the top 100 firms and from 48.2% to 60.8% for the top 200 firms.[8]

Unquestionably much of the increase in aggregate concentration in this country has resulted from large and small acquisitions taking place at all levels of the economy. *See* 60 A.B.A.J. 979 (1974); *cf.* Talley, *The Impact Of Holding Company Acquisitions On Aggregate Concentration In Banking*, staff economic study, Board of Governors of The Federal Reserve System (1974). Presumably, however, in terms of economic free-market theory, the preferred and most defensible method of firm expansion is by growth through internally generated profits resulting from superior firm efficiencies.

ANTITRUST "POLITICAL" ANTICONCENTRATION STANDARDS AUTOMATICALLY PROTECT EFFICIENCY

An antitrust focus on correcting the political-concentration problems resulting from mergers and acquisitions, will in most instances preserve superior economic efficiencies. What I am saying here is that if we calibrate our antitrust prohibition trigger points on normative political-sociological bench marks, the diffusion of concentration and removal of diseconomies accompanying that concentration will follow.

THE MAJORITY REPORT INCORRECTLY VIEWS EFFICIENCY AS THE ONLY APPROPRIATE LEGAL STANDARD

The majority report, in addition to being protective of the "rule of reason" procedures, implicitly adopts the monoscopic "efficiency" antitrust standard, to the exclusion of maintaining proper procedural and substantive safeguards for protection of political-sociological national policy interests in economic fragmentation. To the extent the Clayton Act has been deficient in protecting these interests, enactment of S. 1284 as written will be a desirable step toward correcting past inadequacies.

II

DISCUSSION OF SPECIFIC PROVISIONS OF S. 1284

PREMERGER NOTIFICATION

The proposed S. 1284 merger reporting system will emphasize the importance of large or small mergers and acquisitions occurring only after the parties thereto have preliminarily demonstrated the probable lawfulness of their proposed transaction by plenarily exposing all details thereof to the scrutiny of enforcement authorities (and possible private plaintiffs); rather than leaving those authorities to their present practice of reading the newspapers for such notice—when it is to be found there.

* * * I therefore dissent from the majority report and support S. 1284 Title V provisions for premerger notification for all mergers, tender offers, and acquisitions in or affecting commerce, as presently written.

The majority report asserts that as written S. 1284 would prevent one large company from selling to another, parcels of real estate, bonds and so forth; and that the test should be the dollar value of the assets transferred. The majority observes that companies might breakup their package into small parcels to avoid reporting under the "assets transferred" test.

As written the S. 1284 notice provision will publicly point up those instances in which *two large companies* meeting the statutory test contemplate transferring from one to the other productive assets or capital. Given this information authori-

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[8] Penn, *Aggregate Concentration: A Statistical Note*. David W. Penn is an economist at the Nuclear Regulatory Commission. Mr. Penn wrote this paper while at the Federal Trade Commission where he served as Acting Chief of the Division of Financial Statistics.

ties will have adequate opportunity to undertake an antitrust investigation or do nothing as may be appropriate.

Also contrary to the majority report, I believe that notice of pending mergers or tender offers should be made public to permit *all* interested parties other than the vendor or vendee, including the public at large to assess the proposed transaction. Given such notice to the community at large, perhaps an occasional appropriate private antitrust suit might be forthcoming.

THE 100 MILLION DOLLAR MERGER WAITING PERIOD

The 100 million dollar merger (combined sales or assets) waiting provisions constitute a specific instance of shifting the burden of proving rectitude to the merging companies. Very large companies ought to properly demonstrate the propriety of their interdealing in capital assets. Alternative methods of disposing of property exist: spin off the disposable property to shareholders, sell to a small company, split the parent-vendor or vendee into two smaller companies to avoid S. 1284 restrictions.

This provision may even encourage deconcentration.

* * * I concur with the S. 1284 100 million dollar merger waiting period provision as presently written.

AUTOMATIC PRELIMINARY INJUNCTION

* * * I concur with the Bill as presently written regarding automatic granting of preliminary injunctions, for the burden is shifted to the merging companies to demonstrate the desirability of their proposed action. The Government often considers, in deciding whether to file a case, the likelihood of obtaining a preliminary injunction against a merger—as opposed to prevailing at trial; for practical purposes the battle is won or lost at the preliminary injunction stage. Time, resource scarcity, difficulty of implementing effective relief, all militate against waiting for trial to resolve antitrust problems arising from an executed merger.

The merging companies want the benefits of merging; we should let them bear the cost of vindicating the public interest in that merger. Government has been, with few outstanding exceptions, an ineffectual enforcer under past antitrust procedures. If the evidence of a violation is thin as the majority argues will be on occasion, the companies will be motivated to expeditiously proceed to trial to acquit their proposed union.

This specific and procedurally precise automatic injunction provision will also conserve judicial and legal resources. The courts, government lawyers, and private bar will be freed for other important matters.

AUTOMATIC HOLD SEPARATE ORDERS, MANDATORY DIVESTITURE, LIMITATION OF SALES PRICE, AND DISGORGEMENT OF PROFITS; ADDITIONAL RECOMMENDATION REGARDING MANDATORY "SPINOFFS"

The Section 23(g) provisions properly deny corporations illegally acquiring stock or assets the possible benefits of the forbidden transaction *before the acquisition is even made*. Incentive to attempt illegal acquisitions of stock or assets greatly diminishes upon this provision taking effect.

* * * I support S. 1284 as written in these provisions. This portion of the Bill provides a most effective procedural deterrent to illegal acquisitions. The absence of such safeguards in presently existing law effectually creates a "loophole" for large companies to exploit. The ITT-Avis example alone defeats the majority argument for altering these provisions; perhaps this example explains their opposition.

MINORITY RECOMMENDATION REGARDING MANDATORY "SPINOFFS"

* * * I dissent from the majority reports refusal to recommend a mandatory "spinoff" provision in S. 1284.

I recommend that an additional provision relating to divestiture of illegally acquired assets be added to S. 1284. The new provision would require that when antitrust divestiture of a once-independent corporation constitutes appropriate relief: such divestiture *shall* be accomplished by "spinning off" the stock of the company divested, to form an operating independent business not subject to ownership or control by another corporation. (In instances where assets are to be divested a corporation could be formed taking control of the assets and then "spun off".)

The "spinoff" proposal goes directly to concentration of assets in the top 100, top 200, and top 500 companies in the American economy. See discussion *supra*. At present when a top 500 corporation is ordered to divest a previously independent corporation, the customary judicial decree contemplates *sales* of the acquired company to a third company.

The corporation purchasing the divested corporation is often also a top 500 corporation. Given that circumstance *no net decrease in concentration occurs* resulting from the divestiture; we merely have a shuffling of assets among the "biggies".

CONCLUSION

For the reasons stated I have dissented from the majority report. I have not addressed in detail every issue addressed by the majority, nor have I engaged in comparable detailed analysis. I even agree that necessity exists for limiting the proposed discretion to be given the FTC for exempting premerger reporting requirements. I am happy that these questions are being debated by the Congress, finally! With respect to such defect as may exist in my dissenting report my one extenuation is that I had but three days in which to read and respond to the majority report, having received it the 13th day of June 1975. I thank the Chairman of the Merger Standards Committee, the full committee and the ABA for providing me this opportunity to express my thoughts on these paramount issues.

[From the Journal of Law and Economics, vol. XII(1), April 1969]

THE ANTIMERGER LAW: PYRRHIC VICTORIES?*

(By Kenneth G. Elzinga)

I. INTRODUCTION

A decade ago, writing on the federal antimerger law and a recent Supreme Sourt interpretation of that statute, Harbeson raised the question: Has the Clayton Act, specifically its antimerger provision, been the "sleeping giant of antitrust?"[1]

Today there are many who would answer that question in the affirmative. Section 7 (as amended in 1950),[2] to judge from legal periodicals, economics journals, and the business press, is widely considered to be a "giant" who is, for the better or for worse, very much "awake." The federal antimerger law has not been subjected to sufficient judicial scrutiny to yield

> . . . a feeling among many antitrust lawyers that the rules now established by the courts give Section 7 such broad scope that the extent of its application to conventional horizontal and vertical mergers will in large part depend upon work-allocation and policy decision in the Antitrust Division and the Federal Trade Commission.[3]

In other words there seems to be the general impression in both the legal and business communities that the present antimerger law has become a "stronger" law than anyone would have predicted, that the Government agencies enforcing the antimerger law have ample precedent to emerge victorious from any antimerger suit they bring, that any firm's decision to merge hinges not so much on the question of "is it legal?" but rather "will it be prosecuted?" and finally that

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*This paper is based on part of my Ph. D. dissertation, The Effectiveness of Relief Decrees in Antimerger Cases, Department of Economics, Michigan State University, 1967. I am indebted to Walter Adams, my thesis adviser, for his encouragement and comments, the staffs of the Federal Trade Commission and the Antitrust Division for their assistance in providing data, and the Ford Foundation for financial support.

[1] Robert H. Harbeson, The Clayton Act: Sleeping Giant of Antitrust? Am. Econ. Rev. 92 (1958).

[2] ". . . no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock . . . 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." 64 Stat. 1125 (1950).

[3] Bureau of National Affairs, Antitrust and Trade Reg. Rep. No. 162, Analysis. The Supreme Court's Merger Opinions, B-4 (1964). The Antitrust Trade Reg. Rep. are hereinafter cited as BNA ATRR.

this law offers new hope for those who have long argued the wisdom of a strict application of the antitrust laws to interfirm collusion and consolidation.[4]

The Government's enviable and, at times surprising record of victories in antimerger suits necessitates the enactment of *relief*. In nontechnical terms, relief is simply the action designed to prevent or undo the unlawful effects of a merger, that is, an action to maintain or bring about a state of compliance with the law. In a litigated case, relief follows the finding that a merger either will or has violated the law. When the respondent elects to settle the suit by a consent decree, the relief is simply that action, flowing from the settlement, which will satisfy the Government that the purposes of the statute are being met.

The relief that has been obtained by the Government in antimerger cases is the object of study in this paper. In short this is an economic study of the "back-side" of the antimerger law—what has happened *after* a merger has been found in violation of the law or the respondents have decided no longer to fight the suit and instead to submit to a consent decree. Its concern will be with the economic effectiveness of relief and the obstacles to the formulation of satisfactory relief.

The study rests on the logical notion that an effective antimerger statute requires effective relief; that, if mergers which violate the standards of the law are not subjected to meaningful relief, two results will follow: first, competition will not be restored in those markets where antimerger cases have been brought and, second, the law will not be a bar to those potential mergers which might have a deleterious effect on competition. Or, as Justice Jackson put it, a court victory *sans* effective relief means the government "has won a lawsuit and lost a cause."[5]

II. THE THEORY OF EFFECTIVE RELIEF

The legal standards of Celler-Kefauver enforcement have been essentially *structural* in their thrust, that is, involving the determination of the relevant market and examining the merger's impact upon the number of firms, their market shares, and the trend of concentration in the market.[6] This has important implications for the type of relief which should follow antimerger cases. For once the structural standard is accepted as the proper method of predicting the anticompetitive effects of an acquisition, the type of relief required for violations of this standard is hereby determined.

The structural enforcement standard *requires* structural relief; indeed it could not be otherwise. Adopting the structural standard means that an anticompetitive acquisition is not condemned because of the "intent" of those making the acquisition; nor is it condemned because of some demonstrated or predicted impact on the firms' performance. It is condemned because the acquisition will (or is likely to) afford the acquiring firm additional market power through its controlling a larger share of a particular market or its gaining the ability to exert leverage in other markets. Since the offense stems from a change in the structure of a market, the relief must endeavor to change that structure.

Whenever an anticompetitive increment in market power is attained by merger, structural relief requires the restoration of the acquired firm through a divestiture order. Only this sort of relief strikes at the very structure of the markets involved. Injunctive relief, that is, some form of order directing the acquiring firm to behave *as if* it did not gain this market power, is clearly unacceptable. Indeed placing such a regulatory role on the government is repugnant to the whole concept of antitrust. Equally repugnant would be to do nothing—to allow the increased market power to remain untouched. To repeat: If all markets prior to an anticompetitive acquisition were, by structural standards, workably competitive and subsequent to the acquisition are not, these standards require divesture of the acquired firm so that the markets affected are returned to their premerger, workably competitive status.

But disgorging the acquired firm from its acquirer is only a necessary, not a sufficient condition, for enacting effective relief. Along with reestablishing the acquired firm, it is also necessary that this "new" firm be made *viable;* a mere

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[4] For example see Paul W. Cook, Merger Law and Big Business: A Look Ahead, 40 N.Y.U.L. Rev. 710 (1965); Sidney Fish, Antitrust Landmark Cases, J. of Comm. 8 (June 21, 1965); Milton Handler, Mergers in Recent Antitrust Developments, 63 Mich. L. Rev. 67 (1964); The Government Always Wins, editorial in the Wall Street Journal, June 16, 1966, at 16, cols. 1, 2.

[5] International Salt Co. v. United States, 332 U.S. 392, 401 (1947).

[6] See Brown Shoe Co. v. United States, 370 U.S. 294, 343 (1962); United States v. Philadelphia National Bank, 374 U.S. 321, 363 (1963).

shadow of its former self is not acceptable. Indeed, reestablishing "new" firms that are unable to stand on their own would make any relief efforts farcical.

A theory of effective antimerger relief would enable one to predict whether the harmful effects of an acquisition would in fact be nullified, post-relief. When the acquired firm is reestablished as an independent, viable firm such a prediction can be made.

A *pure* theory of effective relief might add a third condition to the above. As long as an anticompetitive acquisition remains consummated, the incremental market power can be used by the acquiring firm. Consequently, effective relief is also a function of the *time* required to reestablish the independent, viable firm. The faster the independence and viability of relief criteria are met in a given anticompetitive acquisition, the more satisfactory is the relief. Relief which immediately reestablished the acquired firm as a viable independent without its acquirer ever having the opportunity to exert his newly-gained market power would be effective relief in its purest form. Of course stopping an anticompetitive acquisition before consummation would be an example of relief *par excellence.*

If the effectiveness of relief is predicted from these three factors—independence, viability and time—the methodology of a study of the effectiveness of relief under the Celler-Kefauver antimerger law would seem quite simple. A random sample of successful Government antimerger cases would be selected, analyzed and the relief judged effective if the acquired firm were now operating again; if it were independent, that is, rechartered as a "new" corporation, free of all interlocking directorates, financial ties and managerial relations with its former parents; if it were viable; and, for the purist, if the acquiring firm were unable to exert its incremental market power for any significant time period.

Those familiar with research in antitrust realize that the field seldom lends itself to such neat research patterns. Antimerger relief is no exception to this general rule. As it turns out, relief decrees seldom result in truly independent firms. And without independent firms and their profit statements, there can be no easy viability tests.

III. THE METHODOLOGY OF THIS STUDY

Since the main concern in relief is the fate of the acquired assets, and since, as it turns out, this fate takes on different forms and shapes in almost every relief order, the data seem to dictate a case-by-case approach. To draw the cases together and to provide the basis for analysis, a *continuum* of relief has been developed to give an overview of antimerger relief. The cases to be examined will be dropped into the categories on the continuum; the criteria which determine placement on the continuum are the centralizing influences tying the cases together.

The sample

The sample of merger cases to be evaluated is drawn from the universe of all *amended* section 7 cases filed by the Government since the law's inception through the calendar year 1960, which have been settled either by consent order or decided for the Government by the end of calendar year 1964 (See Appendix A). The Government had filed eighty-one antimerger cases by 1960. Forty-two of these were either still pending by 1965, were dropped or settled for the defendant, or were eliminated because of data problems or regulatory aspects. Thirty-nine cases, then, constitute the sample.

IV. THE RESULTS

These thirty-nine cases have been placed on two four-category continuum in Tables 1 and 2. Table 1 differs from Table 2 in one important respect. In Table 1, only the criteria related to structure and viability are considered in the evaluation. If the relief took place X number of years after the anticompetitive acquisition was consummated, no weight is given this factor in the construction of Table 1.

But in Table 2, the time required to attain structural relief is taken into account in evaluating the sample cases. In a sense then, Table 2 is for the purist. Including the third element of the tripartite relief criteria, the time span from acquisition to relief, will lower the classification of some cases. For example, the *Owens-Illinois* case, *deficient* by the relief standards of Table 1, becomes *unsuccessful* in Table 2 due to the lengthy time the merger remained intact.

The successful relief category

For a relief case to qualify for the *successful* category, the acquired firm must be reestablished as an independent firm, or the anticompetitive effects of the acquistion must be stopped in their incipiency so that no restoration is necessary. Since our concern here is with the source of control of a bundle of assets, the criteria for a *successful* classification in an anticompetitive stock acquisition is similar: the stock must be divested in such a manner that the bundle of assets it represents is no longer controlled by the original acquirer nor sold to another purchaser with similar anticompetitive effects.

In this category it was sometimes possible to obtain profit and loss data to check on the viability of the divested firm. But at times it was necessary to rely on some other indicator of viability such as a Dun & Bradstreet rating of financial strength.

What constitutes an independent purchaser? For the purposes of the *successful* category, a purchaser of the divested firm, a satisfactory independent, must be some individual, group, or corporation able to provide adequate financing and who (or which) has (have) no ties, either in a horizontal or vertical sense, with the industry of the firm being acquired in compliance with the relief order. The general principle for classification in this category is that a viable center of initiative be reestablished with no loss of competition, actual or potential, in the process.

I would add another requirement to this category which would deem certain divestiture orders as less than *successful* even though no loss of actual or potential competition can be shown. Certain conglomerate divestitures present the case in point.

TABLE 1[1]

Successful relief	Sufficient relief	Deficient relief	Unsuccessful relief
American Radiator.	Anheuser-Busch (A).	American Cyanamid (F).	Automatic Canteen (L).
Bethlehem Steel.	Brown Shoe (D).	Continental Baking (G).	Brillo (L, O).
National Sugar.	Gamble-Skogmo (D).	Continental Can (E).	Diamond Crystal (L).
Spalding	Leslie Salt (C).	Crown Zellerback (E).	Diebold
Standard Oil of Ohio.		MMM (F).	Farm Journal (J).
Union Bag & Paper		National Dairy (G).	General Shoe (L).
		Owens Illinois (G).	Golf Oil (L, M).
		Union Carbide (E, G).	Hertz (J).
			Hilton (G, M).
			Hooker Chemical (J, O).
			International Paper (L).
			Jerrold Electronics (I, K).
			Lucky Lager (H).
			Maremont (I, K).
			Reynolds Metal (H).
			Ryder (J).
			Schenley (I).
			Scott Paper (L).
			Scovill (L).
			Simpson Timber (K).
			Vendo (H).

[1] The letters above which follow each case of less than successful relief enable the reader to broadly determine the eventual relief in each case. The letters correlate with those which enumerate the relief criteria in the text. Thus Anheuser-Busch is a case of sufficient relief, (A) referring to a sale to a "small" horizontal competitor. Similarly, Vendo is classed as unsuccessful, (H) referring to the fact that no relief was ever taken in this case. The letters refer to the relief that was actually taken, not to that which was ordered.

In a very real sense *every successful* structural relief order results in a conglomerate acquisition. For the restoration of a once-required firm requires that someone buy and own the bundle of assets acquired in the anticompetitive acquisition. In order to purchase this "new" firm, the purchaser must already have assets in some (assumedly) income-producing endeavor. In the *successful* category, the purchaser does not, by definition, have monetary interests in some field related horizontally or vertically to the "new" firm. Therefore the purchase will be a conglomerate one.

But some would argue there is a significant difference between Individual X whose money is in, say, paper converting buying a to-be-divested brewery and Corporation XYZ, one of the largest manufacturing corporations in the country (but not engaged in brewing) buying the same to-be-divested brewery, and others would argue that there is no meaningful difference between the two purchasers since divestiture to either one would not affect competition in brewing.[7]

I am more impressed with the arguments against conglomerate divestiture to "large" corporations—particularly in the context of Section 7, a statute intended to arrest industrial concentrations. There is not a great deal known about the impact on competition of large conglomerate firms. But until evidence is presented which indicates that conglomerates do not possess leverage, *sui generis*, in the study divestitures to large conglomerates will be placed in the *sufficient* category.

How does one delineate between conglomerate divestiture to the eligible independent of the *successful* category and the ineligible conglomerate of the *sufficient* category? No easy answer can be given other than "by the size of the conglomerate." For example, any divestiture order which is met by restoring the acquired firm into the conglomerate folds of an occupant of Fortune's top 200 manufacturing or top 50 merchandising firms would be *sufficient.*

The sufficient category

In this category are placed those cases where the relief orders probably satisfy those charged with enforcing Section 7; only the purist would loudly clamor for more. Basically what drops a case from *successful to sufficient* is a degree of difference in the independence criterion. The viability criterion for the restored firm is assumed to be the same for either category. But in the *sufficient* category a true independent center of initiative has not been restored. Instead the unlawfully acquired firm has been divested in one of four ways:

A. sold to a "small" horizontal competitor
B. sold as a vertical acquisition but with no foreclosure problems
C. sold as a market or product extension acquisition with no obvious loss of potential competition
D. sold as a conglomerate acquisition to a "very large firm."

There are obvious problems with the indefinite nature of the above. As a general guide, a "small" horizontal competitor would never be one of the ten largest, by assets or sales, in a relevant geographical market. Absence of vertical foreclosure should, at a minimum, meet the requirement that the acquirer has less than ten percent of the vertical market. No divestiture of a market or product extension variety is *sufficient* where the acquirer of the "restored" firm has ever shown any intent of making such a move internally or is a sizable firm in the industry, financially capable of making such a move internally.

The deficient category

This category essentially includes those cases with one "hole" in the relief decree. The "holes" are:

E. assets are sold in such manner that an obvious loss of potential competition resulted.
F. structural relief borders on *sufficient* but a complex marketing order, if enforced, leaves a "hole" in the case condemning it to a lower rung[8]
G. Government secures only a partial divestiture of the unlawfully acquired firm (or firms).

In short, the *deficient* category is basically for cases where the government secured structural relief, but where it was either incomplete or the assets fell into less than desirable hands. Again, as in the previous two categories, viability of the "restored" firm is assumed for inclusion in this category.

The unsuccessful relief category

The category of *unsuccessful* cases includes the following:

H. no relief whatsoever
I. no structural relief, only a ban on future acquisitions
J. insignificant or *de minimus* divestiture, not striking at the heart of the restraint

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[7] For good statements of the two divergent viewpoints, compare Corwin D. Edwards, Conglomerate Bigness as a Source of Power, in Business Concentration and Price Policy, 331 (1955) and George J. Stigler, Mergers and Preventive Antitrust Policy, 104 U. Pa. L. Rev. 178 (1955).

[8] The concept of the marketing order will be taken up later.

K. relief takes the form of a marketing order
L. relief is a combination of J and K
M. divestiture to a significant horizontal competitor
N. vertical divestiture with foreclosure problems
O. divestiture of a non-viable firm.

In the *deficient* category, "partial divestiture" was mentioned; in this category the term "*de minimus* divestiture" was used. What differentiates a full divestiture from a partial from a *de minimus?* For the present time this issue of what constitutes a satisfactory or unsatisfactory partial divestiture will be put off to section V. Suffice it to say at this point that there can be *structural* relief which does *not* fully strike at the restraint or else does so to an insignificant degree.

In a general sense, what conclusions can be drawn from the continuum in Table 1? The main feature is surely the predominance of *unsuccessful* and *deficient* decrees. Of the 39 cases, 21 relief orders are *unsuccessful* and 8 *deficient*. For those cases in the sample for which the data are available, the Government issued complaints against acquisitions worth 1.13 billion dollars; 327.9 million dollars worth of assets were divested from this group.

Turn now to Table 2. Remember that the time criterion has now been added as a further evaluative measure. Here those cases in which structural relief took at least three years to be enacted from the time of the acquisition have been dropped one rank from their classification in Table 1 and marked with an asterisk. Those cases in which five years or more elapsed since the date of consummation to the date of dissolution have been dropped two categories and branded with a double asterisk. Of course, there were some cases already in the *unsuccessful* category which would be further condemned by adding the time criteria—eight in all—but there is no lower category in which to drop them.

A glance at this Table provides no gray area. The first three ranks of the continuum have been decimated, now holding less than one quarter of the cases. The last category is full to the brim. Of the four cases remaining in the *successful-sufficient* categories, three involved acquisitions stopped in their incipiency *before* full consummation so that no divestiture was actually necessary; the other was a stock acquisition. This points to the difficulty of unraveling acquisitions after their consummation.

TABLE 2

Successful relief	Sufficient relief	Deficient relief	Unsuccessful relief
Bethlehem Steel.	Gamble-Skogmo.	American Radiator.[1]	American Cyanamid.[1]
Standard Oil of Ohio.		Anheuser-Busch.[2]	Automatic Canteen.
Union Bag & Paper.		National Sugar.[1]	Brillo.
		Spalding.[1]	Brown Shoe.[1]
			Continental Baking.[1]
			Continental Can.[1]
			Crown Zellerbach.[1]
			Diamond Crystal.
			Diebold.
			Farm Journal.
			General Shoe.
			Gulf Oil.
			Hertz.
			Hilton.
			Hooker Chemical.
			International Paper.
			Jerrold Electronics.
			Leslie Salt.[1]
			Lucky Lager.
			Maremont.
			MMM.[1]
			National Dairy.[1]
			Owens Illinois.[1]
			Reynolds Metal.
			Ryder.
			Schenley.
			Scott Paper.
			Scovill.
			Simpson Timber.
			Union Carbide.[1]
			Vendo.

[1] Case dropped 2 ranks (where possible) when structural relief was enacted 5 or more years after the date of acquisition.
[2] Case dropped 1 rank where structural relief took at least 3 yr, but less than 5, from the date of acquisition.

Average time spans

The Federal Trade Commission (FTC) cases in the sample had an average of 19.0 months from the acquisition to the FTC's complaint. For those FTC cases which ended with some form of divestiture, the average duration from acquisition to divestiture was 67.5 months!

The Antitrust Division of the Department of Justice fared somewhat better. For those cases in the sample, the average time span from the acquisition to the complaint was 10.6 months. Where the Antitrust Division secured some form of divestiture in these cases, the average period from the acquisition to the structural relief was 63.8 months!

In short, for those cases represented on the continuums for which the Government secured some structural relief, the average number of months from the acquisition to the divestiture was 66.0—or five and one-half years.[9] Tables 1 and 2 indicate that Section 7 relief, at least for this sample, could not be branded a glowing success by the criteria of the first continuum and could not be branded anything but a failure by the criteria of the second.

To find that the Government has been unable to obtain effective relief in many of its antimerger cases is unlikely to surprise those acquainted with the history of the relief obtained in antimonopoly enforcement. In 1955, Dewey stated that "it is commonplace in antitrust work that the government wins the opinions and the defendants win the decrees."[10] This position seems well documented. Note the interesting parallel between the results of this study and Adams' 1951 study on the efficacy of antimonopoly relief.[11] Those who feel the past is but a sample of the future would have predicted the case for securing effective relief under the 1950 antimerger law would be, *prima facie*, quite weak.

V. REASONS FOR INEFFECTIVE RELIEF

Asset restoration

One of the greatest problems in relief is restoring the assets of a firm after they have been consumed by a merger. Whenever one firm absorbs another, even if their locations are geographically separate, the personnel remain separate and unchanged, and the assets involved continue in their general premerger usage, separating the two firms will present problems. At the minimum, certain financial functions will have been centralized such as the firm's billing or its payroll; more than likely, various marketing activities will have been coordinated or some centralized direction taken as to the dispersal of sales personnel or the shipment of goods. The promotional program might be combined or centrally developed. All of these present some obstacle to removing the acquired firm in one viable part.

But the problems mentioned above are minor compared to those so often encountered in trying to restore a once viable firm. In fact, in a merger falling within the pattern outlined in the preceding paragraph, the obstacles are only procedural. In some cases the firm to be restored, quite literally, no longer exists.

In 1955 the leading agricultural magazine, Farm Journal, acquired its principal rival, Country Gentleman. Essentially what was acquired was a subscription list and the right to solicit the substitution of Farm Journal for unexpired Country Gentleman subscriptions. Most of these solicitations were successful. A year later when the FTC adopted the decision of the Hearing Examiner's divestiture order, there was little left to divest. In the words of the Examiner:

> . . . as a practical matter divestiture of the subscribers' list now will accomplish nothing. Respondent has, by now, extracted all the juice from that fruit as well as from the list of current Country Gentleman advertisers.[12]

He then added, in language refreshing for a legal decision:

> Country Gentleman is dead and the "assets" which it turned over to respondent are now without value to any newcomer or, indeed to any farm publication now in the field. When his corn is taken from him and the horse dies, it is the height of vanity to strew the bare corncobs over his grave. All that can be accomplished, then, is simple divestiture of the 2 trade names and the 2 lists, although . . . this at most may only disturb, but will not diffuse the coalescence which has taken place.[13]

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[9] See Elzinga, *supra* note [9] at 281, Appendix C for a breakdown of these figures.

[10] Donald Dewey, Romance and Realism in Antitrust Policy, 63 J. Pol. Econ. 93 (1955).

[11] Walter Adams, Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust, 27 Ind. L.J. 1 (1951).

[12] Farm Journal, 53 F.T.C. 26, 50 (1956).

[13] *Id.* at 51.

The *Schenley* case also is illustrative of the restoration problem. This case, settled by consent, had no divestiture provision because Park & Tilford, under Schenley's stock control, had become a mere shell; its stock was of no value.[14]

The time factor

The one factor which works against asset restoration in all antimerger cases is the time factor. As a general rule, one could safely say that the unscrambling problem is a function of the time span from the time of the acquisition to the time of the relief order. The longer this span, the less likely are the chances for unscrambling. Industries which are especially dynamic present greater problems than those less dynamic in their production and marketing technology.

The average time span in antimerger cases was discussed earlier. Suffice it to say that one could hardly expect to reestablish the premerger status in a market five or more years after the absorption took place.

The problem of the partial divestiture

The problem of establishing a viable independent competitor often goes beyond the difficulties of unscrambling the eggs some time after the acquisition. The problem of physically extracting the acquired firm can be a barrier to effective relief. Closely allied to this is the problem of *which assets should constitute the new firm*. These problems are interrelated, but can differ in nature. The first was: Is it *possible* to disgorge a new firm? The second, considered in this section is: If so, *what* assets do we disgorge?

This problem can be best understood by following a hypothetical example. Firm A produces products X and Y. It acquires Firm B which produces products Y and Z. Assume all three products are sufficiently different so as to be in different relevant markets for Section 7 purposes. Thus, the only area of competitive overlap occurs in Product Y. If the acquisition violates Section 7 in market Y, the criteria of relief developed earlier would require only the divestiture of the Y business, that is, the reestablishment of a viable independent firm producing Product Y. If only the divestiture of Y were ordered, this would be an example of a "partial divestiture." Defined roughly, partial divestiture is the divestiture of fewer assets or fewer product lines than acquired in an acquisition attacked by the government. Full divestiture then would be the divestiture of a business as acquired—that is, any and all product lines of the acquired company including those which, if purchased separately by the acquiring firm, would not violate Section 7.

There have been many cases where the relief decree has ordered divestiture of less than the offending acquisition, in the way of assets and/or product lines. The partial divestiture is fairly common; and theoretically, as was explained above, there might be no objection to this. But in practice, the results of partial divestitures have often been so defective as to indicate that this sort of relief order should be avoided whenever possible.

A partial divestiture, since it consists of a "line of commerce" as opposed to the operations of a once-going business, generally is not conducive to reestablishing a viable independent firm. If, in the hypothetical example, Firm A is ordered to divest itself *only of the assets* used in producing Y, the chances are that the set of potential purchasers of these assets will be other producers of Y who have the ability to purchase these assets and put them to use without "starting from scratch." The true independent purchaser would have to buy this cluster of assets, quite possibly devoid of a home, *and* perhaps without even the human capital which normally accompanies a full divestiture. All too often in the case of a partial divestiture, the assets to be divested make their way into the hands of unacceptable purchasers—and very seldom into the hands of an independent purchaser.

The relief decree in the *Hooker Chemical* consent order directed such a partial divestiture.[15] Hooker had purchased Durez Plastics & Chemicals, Inc., the largest producer of phenolic molding compounds, then purchased the phenolic molding assets of Monsanto Chemical Co. The consent order called for the divestiture of the machinery and equipment purchased from Monsanto. In addition, an attempt was made by the FTC to enhance the possible success of this partial divestiture by ordering Hooker to aid the purchaser with engineering assistance, customer lists, and a six-months supply of lump resins at Hooker cost.

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[14] Testimony of Emanuel Celler, Hearings on Legislation Affecting Sections 7, 11, and 15 of the Clayton Act Before the Subcomm. on Antitrust and Monopoly of the House Comm. on the Judiciary, 85th Cong. 2d Sess., at 154–155 n. 4 (1958).

[15] Hooker Chemical, 59 F.T.C. 254 (1961).

But "mothering clauses" such as this are poor substitutes for directing Hooker to divest a going phenolic molding compounds business of sufficient size and adequate personnel to enable its survival. In this case, the assets were parceled out to a small company with insufficient backing, which dropped from the business. The phenolic molding machines are now in the hands of Union Carbide. Thus Hooker acquisitions eliminated two phenolic molding compound producers and the relief failed to reestablish even one of the independents.

Gulf Oil's acquisition of Warren Petroleum also was settled by a consent order allowing Gulf to dole out several packages of assets (roughly thirty per cent of the Warren properties) to ten different purchasers.[16] On the surface there is a *prima facie* case that such a relief order would be inadequate. In this case, it was Warren Petroleum, as a medium size independent firm in the petroleum industry (at times a thorn to the majors), has disappeared; W. K. Warren, its able leader, now sits on the board of Gulf. The partial divestiture enabled Gulf to retain key personnel which resulted in Gulf's foothold in natural gas and its achieving an above-industry-average discovery rate for natural gas as well as a most successful marketing program in natural gas.[17]

Of those assets divested, one petrohcemical plant went to Jefferson Chemical Corporation, Inc., a firm fifty percent owned by Texaco. The cluster of assets which commanded the largest price in the divestiture order, oddly enough, a group of tank cars which Gulf may have been glad to sell, went primarily to General American Transportation, one of the largest lessors of railroad cars (GATX buying over 85 percent of these cars). Almost half of these were then leased back to Gulf. The three butane gas properties to be divested commanded the second largest price in the sale; they went to the Thermo-Gas Company which has since been acquired by Mid-American Pipeline Co. The Midland Gasoline processing plant at Conroe, Texas, was purchased by Champlin Oil & Refining Co., later absorbed by the Celanese Corporation. The remaining assets, less than four percent of the original Warren properties, went to small independents in the petroleum industry. No part of the order resulted in another independent center of initiative being added to the petroleum industry to replace Warren.

Perhaps the extreme example of neatly carving out *only* those assets of competitive overlap came in the *Scovill* consent settlement.[18] Among the general hook, pin, and eye products produced by DeLong Hook & Eye, the acquired firm, were safety and common pins. Specifically these were the *only* notions also produced by Scovill. Hence, Scovill argued it should retain all of the assets and personnel of DeLong, including its manufacturing plant, but divest those DeLong machines capable of producing common and safety pins and not use the DeLong plant in the future to produce such pins. The FTC accepted their argument. Since the sale was to be made in ninety days, it was unlikely that anyone would or could purchase these pin machines unless they were already in the pin business and had a roof to put over them. In fact, the Star Pin Company bought the handful of machines, the value of which amounted to less than five percent of the purchase price of the DeLong business.

After the *Scovill* settlement the FTC fought a long legal battle with the Brillo Manufacturing Company (since acquired by Purex Corporation) over its 1955 acquisition of Williams Company, a manufacturer of industrial steel wool.[19] Brillo was and is a manufacturer of both industrial and household steel wool. Using the *Scovill* settlement as an example, Brillo's counsel was able to convince the FTC that, since Scovill could retain the DeLong factory as long as it did not manufacture the specified pins therein, Brillo should be able to retain the Williams' factory as long as it refrained from producing industrial steel wool therein—since industrial steel wool was the only area of competitive overlap twixt Brillo and Williams. The FTC agreed: their order of January, 1964, called for a partial divestiture limited to all the Williams' assets, customer lists, and trade marks but with the exception of the plant, machinery, and fixed assets.[20]

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[16] Gulf Oil Corp., 56 F.T.C. 388 (1960).

[17] See 1962 Gulf Oil Corp. Ann. Rep. 7; 1965 Gulf Oil Corp. Ann. Rep. 8

[18] Scovill, 58 FTC 260 (1956).

[19] Brillo Mfg. Co., Docket No. 6657 (FTC, July 31, 1963)

[20] Respondent's Proposed Order, (Sept. 26, 1961) Brillo Mfg. Co., Docket No. 6557 (FTC, July 31, 1963). This order is described in BNA ATTR 134: A-12. If it was an intended purpose of the decree to keep Brillo's capacity in industrial steel wool constant, this was not accomplished by the order since the manufacturing facilities are interchangeable between household and industrial steel wool.

As in the case of Scovill, this type of order probably precludes divestiture to anyone except those who already have manufacturing facilities ready to handle the Williams' business; that is, the order in effect necessitates a horizontal divestiture to someone with excess steel wool production ready to take over the marketing function. That is what happened.

Partial divestiture has been ordered on the theory that the anticompetitive effects of the acquisition are eliminated if the acquiring firm does not use the acquired firm to produce products in the area of competitive overlap. But unfortunately, in practice, partial divestiture generally seems to preclude the establishment of an independent firm. All too often, divesting only the assets of some line of commerce necessitates their sale in a horizontal manner.

As a result there is much to be said for establishing as a general relief principle the divestiture of all the lines of commerce acquired in an acquisition which violates Section 7 in any particular line. The point is well taken that

> . . . preservation of competition depends on the survival of effective competitive units, not on isolated products in isolated geographical markets.[21]

At least the burden of proof should rest upon the respondent to demonstrate that his proposed partial divestiture order will result in a viable independent company. The respondent purchased a company, not a series of isolated lines of commerce any one of which can be readily divorced from the going concern. The test is whether the order is likely to restore a viable firm producing in that relevant market where the violation was found. This test does not eliminate the possibility of partial divestiture—but practice indicates that disgorging the firm, as it once operated, better assures the chances of its viability and independence.

Another disturbing aspect of partial divestiture bears mention. Not infrequently, a partial divestiture will be of *de minimis* proportions. Whether this is an intended or an unforeseen result is uncertain. At any rate *de minimis* divestiture not only does not extract enough assets to establish the desired new entrant, it has no procompetitive effect at all relative to the acquisition challenged by the Government. Usually these settlements of *de minimis* proportions are found in consent decrees.

For example, the Scovill divestiture consisted of $47,000 worth of pin machines from an acquisition costing almost $1.8 million. The Antitrust Division frowned upon Hertz's acquisition of thirty-seven motor vehicle renting agencies costing approximately $40 million. The complaint called for divestiture. Yet, in the 1960 consent settlement, Hertz was only to sell up to 1,000 of its 5,000 cars in the Miami area (it finally sold 162) and 900 of the 6,000 trucks it operates in the New York metropolitan area (which were sold and then reverted to Hertz in a bankruptcy case).[22] Jacobs, the Hertz president, was indeed correct when he stated the divestiture would have a "minimal effect" on Hertz earnings.[23]

Ryder System, Inc., another motor vehicle leasing company, also was blessed with a *de minimus* divestiture order after attaining the rank of number two in the truck leasing business—largely due to the merger route, having acquired some 8,700 trucks from 1955 to the time of the antimerger complaint.[24] The divestiture order called for the sale of four hundred trucks in total: 100 trucks to be sold in both Atlanta and Chicago, 75 trucks to be sold in both Dallas and Nashville and 50 trucks to be sold in Memphis. This was *less than five percent* of the number mentioned in the complaint—and even at that Ryder completed only sixty percent of the divestiture order in the year allotted for compliance. In August of 1962, the Chicago requirement was reduced to 60; in July of 1963, the Memphis requirement was reduced to 44.[25]

Perhaps the extreme of *de minimus* divestitures in a consent settlement is found in the case of Diamond Crystal's acquisition of Jefferson Island Salt Company.[26] Jefferson Island cost approximately $5 million. The divestiture of some "undeveloped" Seneca Lake property brought $4 thousand from a local resident! This did little to establish another salt producer![27]

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[21] Proposed Order of Counsel Supporting the Complaint and Reasons in Support Thereof at 4 (Sept. 29, 1961), Brillo Mfg. Co., Docket No. 6557 (FTC, July 31, 1963).

[22] See United States v. Hertz Corp., BB No. 1444, I Antitrust Division Pleading File, Complaint of May 1, 1959; Consent Order of June, 1960; and Wall Street Journal, June 30, 1960 at 4, col. 2.

[23] Wall Street Journal, *id.*

[24] See United States v. Ryder System, Inc., BB No. 1564, I Antitrust Division Pleading File Complaint of October 3, 1960, Consent Order of June, 1961. Ryder had 15,500 trucks at the time of the complaint.

[25] See correspondence and petitions in Pleading File, *id.*

[26] Diamond Crystal Salt Co., 56 F.T.C. 818 (1960).

[27] This was not the only provision of the order; but it was the only divestiture provision.

The handling of improvements

So far, unscrambling and partial divestiture have been discussed as barriers to the asset restoration necessary for effective relief. Still another barrier has been the controversy over the disposal of post-acquisition improvements to the acquired company. The controversy, briefly expressed, is this. Assume firm A acquires firm B in violation of Section 7. Assume further that before or during the Government suit firm A adds substantial improvements to its B plant. Query: should (and there is the legal question of "can") the Government order divestiture of firm B *with its improvements?*

If the relief is to restore firm B as it existed before the acquisition, then the improvements should not be included in the relief decree, some would argue. If firm B in its unimproved condition were sufficient to cause a Section 7 violation, divestiture of it *sans* improvements would be adequate relief.

Two points can be made to rebut this line of reasoning. First, in a dynamic market the reestablishment of firm B as it existed at the time of acquisition, some five or ten years later, may not make technological sense; restoration to premerger status might dictate an outmoded firm with no chance of survival. Second, it is not illogical to assume that if the firm B had not been acquired, it would have added certain improvements itself; thus restoration of firm B in a meaningful premerger sense requires that it be an improved firm B that is reestablished.

In the first litigated decision which required divestiture of a large firm, the FTC directed Crown-Zellerbach (hereafter Crown) to divest itself of the St. Helens' properties along with such improvements needed to insure the viability of the new St. Helens.[28] Since Crown had poured more than $14 million into St. Helens, it took the position that the FTC could require *only* the divestiture of the original assets.[29] In this case the FTC succeeded in obtaining the eventual divestiture of the improvements to St. Helens arguing that ". . . the broad purpose of the statute cannot be thwarted merely because respondent has commingled its own assets and those of the acquired firm."[30] The ninth circuit affirmed this order and Crown's appeal to the Supreme Court was denied.[31]

But the issue was far from settled by the Crown case and has cropped up again. In the Reynolds case, the FTC ordered divestiture of the florist foil acquisition found to violate Section 7 as well as the building Reynolds had built to house the company.[32] At the time of the acquisition the assets were housed in a leased building. But the Court of Appeals for Washington, D.C. did not agree with the FTC's order *in toto*:

> That date (1956) marks the violation and on this record delimits the properties to be affected by the government's decree. After-acquired properties are not relevant, except in the case where they represent reinvestment of capital realized from the sale of property included in a forbidden acquisition and replacement of that property.[33]

What are the implications of this line of reasoning? There are three, which in certain situations, could preclude effective relief or nullify the intent of the law. First, as was mentioned before, divestiture of only the acquired assets, several years hence *sans* improvements, does not enhance a potential customer's view of the assets. In other words, who wants some aluminum foil machines without a plant to house them? The result in the Reynolds-Arrow case: no divestiture was ever accomplished.

A second obvious ramification of this reasoning: carried to an extreme, it could prevent divestiture if the improvements were made in such a manner that they could not be separated from the acquired assets.[34]

Finally, barring the divestiture of post-acquisition improvements allows a firm to enter a market externally in violation of Section 7, extend the litigation process, in the interim construct new facilities using the acquired know-how, and then divest the old acquired facilities at the appropriate time. Perhaps, by that time, they would be ready for abandonment anyway!

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[28] Crown Zellerbach Corp., 54 F.T.C. 769 (1957).

[29] Respondent's Reply Brief at 29, Crown Zellerbach Corp., 54 F.T.C. 769 (1957).

[30] Crown Zellerbach Corp., 54 F.T.C. 769, 807 (1957).

[31] Crown Zellerbach Corp. v. FTC, 296 F. 2d 800 (9th Cir. 1961), cert. denied, 370 U.S. 937 (1962).

[32] Reynolds Metals Co., 56 F.T.C. 743 (1960).

[33] Reynolds Metals Co. v. FTC, 309 F. 2d 223, 231 (D.C. Cir. 1962).

[34] This was, I suspect, a factor in the substantial weakening of the Scott relief decree, Scott Paper Co., FTC Docket No. 6559. Cf. Commission Order of June 1, 1956 (described in BNA ATRR 12: A-3) with a Modified Order of May 8, 1964 (described in BNA ATRR 146: A-20).

To illustrate: Union Carbide desired to enter the polyethylene film business which they did in violation of Section 7 by acquiring Visking Corporation in 1956.[35] Seven years later, the three Visking plants were dishonorably discharged from Union ownership. But in the meantime Union built a new plant to produce polyethylene film which it retained—though it was clear that the new plant was an integral part of Union's Visking division.[36]

The buyer problem

The relief problem does not end with the solution of "can we divest?" and "what should be divested?" Then follows: "To *whom* do we divest?" This again is not a new problem in antitrust relief.[37] But the increase in divestiture orders due to the Celler-Kefauver Act has made it more common.

What sort of buyer meets the relief criteria outlined above? A buyer who will operate the divested firm *successfully* and *independently*. Unfortunately, these can be rather contradictory criteria. For the buyer who can generally assure success is all too often one who does not meet the independence criterion, for example, a buyer already established in the industry of the divested firm. In short, it may be hard to find a wealthy individual (or group) interested in taking on the uncertain financial support of a firm which has not been on its own for some time in an industry in which the buyer *does not already have* financial or managerial ties. Our ideal buyer for divested assets would be a man in his middle forties, the possessor of substantial liquid wealth unlinked to corporate ties, having a sound knowledge of financial principles, a streak of business "maverick" in him, and the good sense to hire the most able of management to operate the divested facilities.

These are stringent criteria. But the buyer criteria are not so stringent as to preclude ideal divestiture. In the Spalding-Rawlings, National Sugar-Godchaux, and American Radiator-Mullins acquisitions, divestiture seems to meet these requirements exactly. Independent firms were reestablished, backed by money independent of the markets involved, and the firms stocked with adequate managerial talent. The Spalding divestiture probably best meets the standards for successful divestiture: the divester firm, the Rawlings Company, was purchased by a group of private investors headed by Burns, former president of RCA: the group then retained the managerial services of Carr, former president of Rawlings.[38]

Finding any buyer

Why are there not more successful relief orders like Spalding, *et al.*? In some cases divestiture fails when *no buyer* can be found. Diebold claimed it could find no one to repurchase its unlawful acquisition of Herring-Hall-Marvin and the divestiture order was dropped. Lucky Lager's acquisition of Fisher Brewing Company was allowed to stand in spite of a consent order to the contrary when Lucky luckily could find no buyer.

Maremont retained possession of Saco-Lowell when the divestiture order was declared null and void after two years of

> . . . bona fide and exhaustive efforts to carry out the divestiture provision . . . it appears that, notwithstanding such efforts, the divestiture provision cannot be carried out.[39]

In a similar vein the FTC rescinded its divestiture order against Reynolds foil machines when Reynolds wrote ". . . no prospective purchaser has even shown enough degree of interest . . . even to bring about the commencement of a negotiation regarding price."[40] Reynolds, in a certainly novel line of argument, then proposed ". . . going out of business as an acceptable method of divestiture and one most likely to achieve the ends sought by the Commission. . . ."[41] Though the Commission adopted Reynolds' proposal, it is not at all clear exactly

[35] Union Carbide Corp., 59 F.T.C. 614 (1961).

[36] Answer Brief To Respondent's Appeal Brief at 57, Union Carbide Corp., 59 F.T.C. 614 (1961).

[37] See George E. Hale, Trust Dissolution: "Atomizing" Business Units of Monopolistic Size, 40 Colum. L. Rev. 629 (1940); Philip Marcus, The Impact on Business of Antitrust Decrees, 11 Vand. L. Rev. 316 (1958).

[38] Wall Street Journal, Au . 19, 1963, at 7, col. 1; Sept. 5, 1963, at 14, col. 1.

[39] United States v. Maremont Automotive Products, Inc., BB No. 1453, I Antitrust Division Pleading File, Order of Jan. 3, 1963.

[40] Letter from Reynolds Metals Co. to the FTC, Jan. 16, 1963, at 5, Reynolds Metals Co., 56 F.T.C. 743 (1960).

[41] *Id.* at 7.

how this type of order ". . . would enhance the competitive situation the Commission is desirious of maintaining in the florist foil industry." [42]

In Hertz, Ryder Automatic Canteen, and others the problem of finding a buyer—*any buyer*—has hampered divestiture proceedings.

Finding the right buyer

A different shade of the buyer problem occurs when a prospective purchaser is found but the purchaser is unsatisfactory—usually for one of three reasons.

First, a sale to the prospective purchaser may not alleviate the trade restraint found objectionable in the original acquisition. This would generally be the case if the divested assets were sold horizontally to an important rival of the divesting firm. This has occurred several times.

The purchaser of the bulk of the Hazel-Atlas Glass Company, acquired by Continental Can in violation of Section 7, was the Brockway Glass Company the fourth largest producer of glass products. Its purchase of Hazel-Atlas catapulted it to number two in the glass industry.[43] Had Brockway been the original purchaser of Hazel-Atlas, this merger would have been a likely candidate for a Section 7 complaint!

The sale by Crown of St. Helens to Boise Cascade could hardly be classified a rousing choice of buyer. Boise Cascade had substantial timber holdings in the Pacific northwest and was committed to entering the paper industry on a large scale.[44] Part of its growth has been via the merger route; by 1963 it advertised: "Paper Is Now Our Biggest Business." [45] The opportunity to purchase the St. Helens property eliminated substantial potential entry *on its own* in the form of new capacity by Boise.

A second factor which would make a buyer unsatisfactory occurs when the buyer is not truly independent of the divesting firm, or some tie would still exist between the divesting and the divested firms. An example would be helpful to illustrate this.

Brown seemed reluctant to sever all ties with Kinney after the historic Supreme Court decision went against them. They pushed for a divestiture order which would allow the Kinney management to retain their stock in Brown arguing that preventing this ". . . would work an unnecessary hardship on *innocent third parties* who are presently in the Kinney organization and who own Brown stock." [46]

In Union Carbide's first attempt to sell Visking, they developed a sales agreement which would have enabled them to keep all but one of the Visking patents and divide sales territories between themselves and the purchaser.[47]

The Crown divestiture, which fell short on finding an acceptable buyer, also established rather close ties in production and marketing between Crown and Boise. Thus, in this case, the ill effects of an unsatisfactory buyer were compounded by a sales agreement which established ties of mutual interest between the firms involved. For example the Agreement of Purchase and Sale, dated May 8, 1963, between Crown and Boise allows Crown to continue operating one of the three paper machines at the St. Helens location until either 1969 or 1972 when it is to be taken over by Boise; Boise is to supply Crown with pulp for this machine; Crown will retain cutting rights on the St. Helens timber for another five years; and Crown will sell about half of the paper produced by the two machines purchased by Boise for the first four years after the divestiture. This is all done, according to Crown's president Sinclair, to ". . . protect the interests of the mill's employees, the community of St. Helens, customers supplied by the mill and Crown Zellerbach stockholders." [48] Not that any or all of these arrangements are *per se* wrong—only ties such as these can become the type that bind.

So far the problem of finding no buyer and the problem of finding an unsatisfactory buyer have been mentioned. Briefly the reader might be reminded that a part of the unsatisfactory buyer problem is the non-viable buyer; that is, the

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[42] Letter from Reynolds Metals Co. to the FTC, Dec. 27, 1965, Reynolds Metals Co., 56 F.T.C. 743 (1960).

[43] See 1964 Brockway Glass Company Ann. Rep. at 7; also Wall Street Journal, June 17, 1965, at 12, col. 3.

[44] 1957 Boise Cascade Co. Ann. Rep. at 2.

[45] *Id.* at 1.

[46] Defendant's Suggestion as to the Form and Content of Proposed Judgment, Dec. 10, 1959, at 4, in United States v. Brown Shoe Co., BB No. 1206, III Antitrust Division Pleading File (1959) [*underlining mine*].

[47] Memorandum to Bureau of Restraint of Trade from Bureau of Economics, Re Sale of Visking to Ethyl, Oct. 7, 1963, at 4–5, in Union Carbide Corp., 59 F.T.C. 614 (1961).

[48] Wall Street Journal, April 13, 1964, at 11, col. 2.

purchaser for the assets is found; he is independent of ties with the divesting firm and the relevant market involved, but shortly after the divestiture he fails. This happens with some frequency—for example, in Hooker Chemical and Hertz .This failure could be due to the nature of the assets divested; at this time some of them are not always the most modern, particularly in cases where the divestiture occurred more than five years after the acquisition.

Where does this line of thought lead? The buyer problem consists of finding an independent and likely-to-be-viable purchaser. Often, however, no purchaser can be found or, if found, the purchaser is unsatisfactory. We now turn to the question: Why can a satisfactory purchaser not be found every time?

That the market for corporate control is imperfect is one plausible reason. However, anyone who goes through the correspondence between a divesting firm (or its agent) and inquiring brokers and firms cannot help but be impressed at least by the sheer number of inquiries. Even as unlikely an asset as a salt plant in Utah drew 207 different inquiries. Prospective purchasers ran the gamut from a power boat company to a tourist lodge.[49]

At times, as was mentioned above, the package of assets being offered is insufficient to form a new firm or so outmoded as to be unattractive to any existing firm. Perfecting the market for corporate control would not, for example, have made Maremont's muffler manufacturing facilities less obsolete or put a roof over the Reynolds' foil machines.

In addition there is evidence of a certain (rather understandable) recalcitrance on the part of some sellers to comply with a divestiture order. It is beyond the scope of an economic study to prove bad faith on the part of some divesting firms. But some of the cases seem rather blatant. In one case, letters such as this were not uncommon:

> I can understand Leslie Salt Company's reluctance to provide a prospective purchaser with the Plant Income Statements, especially if not doing so might result in the plant not being sold during the period specified by the Federal Trade Commission.[50]

One unidentified telegram to Attorney General Kennedy contained this plea: "Continental Moving All Key Personnel From Omar Plants in Order To Discourage Sale of Omar, Inc. Please Investigate."[51]

Union Carbide, when asked why it did not publicize the Visking plants it was to divest and in response to the implication that this might demonstrate a lack of effort on its part, had this unusual reply: "It would be impractical because such advertising would only attract large numbers of curiosity-seekers hopelessly unqualified to purchase and operate the business."[52]

This sort of strategy, if not evidence of a lack of effort to divest, does put Union in the position of being able to contact *only* those buyers it prefers to buy Visking. In other words, closely linked to the problem of the divesting firm being balky in its divestiture efforts, is the possibility of its selecting a buyer *it prefers* to own the properties to be divested.

As a general rule, having resolved itself that divestiture is inevitable, it is in the divesting firm's interest to seek out or favor a buyer who will either be cooperative, phlegmatic in his rivalry, or destined to fail. It is in the public's interest that the buyer be independent, a business maverick, and destined to succeed. Consequently, effective antimerger relief requires that the authorities not give the companies involved free rein in this selection.

There is evidence that companies have attempted to select the buyer in their interest. Union Carbide presented Texaco, Socony, Continental Oil, then Celanese to the Commission as prospective purchasers of Visking. In the Crown case:

> Crown apparently pursued only Boise until we demanded that it open negotiations among potentials we selected from the total list it had furnished us of all persons who had made any inquiries about St. Helens.[53]

An investigation by the FTC "... revealed what had been surmised: that Crown had discouraged negotiations with others. ..."[54] One wealthy businessman, with no ties in the paper industry but with a reputation as an aggressive competitor,

[49] Compliance Reports in Leslie Salt Co., 59 F.T.C. 1278 (1961).

[50] Leslie Salt Co., 59 F.T.C. 1278 (1961), in 8220–3–3–2–2, Exhibit 123.

[51] This telegram concerning Continental Baking is dated July 30, 1962 and is in the files of the FTC.

[52] Statement of Union Carbide to FTC, April 25, 1963, at 12, in the files of the FTC, in Union Carbide Corp., 59 F.T.C. 614 (1961).

[53] Memorandum to the Commission from the Bureau of Restraint of Trade at 3, in Crown Zellerbach Corp., 54 F.T.C. 769 (1957).

[54] Memorandum, *id.* at 6.

complained that Crown "had ignored his possible interest in purchasing St. Helens." [55]

In private correspondence with the author, concerning a case which must remain unidentified, one party close to the sale wrote:

> At the time that we were negotiating for the purchase of this plant, another . . . firm . . . was also interested . . . [the divesting firm] seemed to favor us as the buyer [since] the [other company] is known in the industry as a particularly destructive element as far as prices are concerned, and we were at least an unknown.[56]

The marketing order

The marketing order was rather briefly mentioned earlier. Its use has been common in antimerger enforcement.

The marketing order, as the term is used here, is a relief decree which directly involves the government in the determination of the firm's marketing mix. This is in contrast to a pure divestiture order which leaves the divesting firm free to follow its own post-divestiture course.

Generally, a marketing order will dictate some aspect of a firm's price, product or customer selection policy for some period of years. For example, such an order might direct an integrated firm producing *and* converting Product X to sell 50 percent of its output from its first stage to nonintegrated converters at book cost plus 10 percent for a period of five years; the rationale being that such an order assures the nonintegrated converters of a source of supply for five years and prevents the integrated firm from supplying only its own converter, foreclosing the others. Bluntly, then, marketing orders call for governmental regulation of some part of the acquiring firm's marketing mix.

To an extent, a ten- or twenty-year ban on future acquisitions without government approval meets the criteria of a marketing order. It puts a restriction on the firm's marketing mix by cutting off a possible avenue of product or capacity expansion and involves the government's participation in an external expansion decision. But in this section we are more concerned with the implications of marketing orders of a different type or degree. Those marketing orders which bring the government into price and customer selection policy in a direct and meaningful sense are the ones considered first. The orders containing a future ban on acquisitions will be taken up later.

To begin with, it should be stressed that the marketing order is a deviation from the ideal of antitrust enforcement. The aspect which makes antitrust enforcement palatable to the libertarian is that the efforts by the government to enforce free markets supposedly will not involve the government in detailed regulation of markets. As Kahn put it: "The antitrust laws involve the Government in no entrepreneurial activity proper and require no detailed review of either basic investment or run-of-the-mill business decisions." [57] Perhaps Kahn might have included the words "should not" before "involve."

From a purely practical point of view, there is ample historical support for avoiding this sort of order. In the complex Hartford-Empire decree, where marketing orders were substituted for structural relief, the Supreme Court installed a complex regulatory scheme of compulsory patent licensing, "reasonable rates," and complicated credit arrangements. The scheme was so complex that all of the companies involved decided to form a committee to work out the difficulties among themselves! [58] Such an arrangement is hardly conducive to independent rivalry!

In the motion picture industry Marcus tells us:

> The problems that arose in connection with these judgments were, in the annals of the Antitrust Division, unique in number and complexity. . . . Since 1949, there has been no time when the Division has not had several problems to wrestle with which have stemmed from the judgments. About two-hundred sections of correspondence on the average of one and one-half inches in thickness have been spawned from the judgments. For one lengthy

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[55] *Id.*

[56] Private correspondence with author of January 16, 1967.

[57] Alfred E. Kahn, Standards for Antitrust Policy, 67 Harv. L. Rev. 28 (1953). Reprinted in Readings in Industrial Organization and Public Policy, 354 (Richard D. Heflebower & George W. Stocking, eds., 1958).

[58] See Sigmund Timberg, Equitable Relief under the Sherman Act, 1950, U. Ill. L.F. 637–38; see also the excellent dissent of Justice Rutledge, Hartford Empire Co. v. United States, 324 U.S. 570, 575 (1945).

period, at least one-third of the entire correspondence of the Antitrust Division was in the motion picture field. Amendments to the judgments have exceeded the original judgments in size. In number they have been legion."[59]

In 1940, when Wendell Berge headed the Antitrust Division, he complained that the policing of such decrees was "highly difficult," that proof of noncompliance was "as difficult as proof of a new equity suit," and that often lawyers can so skillfully guide the companies involved that they accomplish what they want "without technically violating the decree."[60]

Consequently, on both theoretical and pragmatic grounds, there is a strong *prima facie* case against marketing orders. The Court spoke wisely when it said:

> The object to be sought, for the convenience of the parties as well as the Court, is a decreee which will embody the necessary elements of suitable relief and require a *minimum of supervision* by the Court and reports and data by the parties.[61]

In spite of this, they are often used in antitrust enforcement as a substitute, albeit an imperfect one, for structural relief. There still exists the attitude, even among lawyers working for the government, that divestiture is a harsh and radical remedy: it is better merely to substitute some injunctive order directing the respondent to behave in a certain way, subject to governmental scrutiny.

Of course, this notion is false. Divestiture is a conservative remedy since it eliminates the need for the close regulation of future marketing activities. Unfortunately this line of reasoning falls on some deaf ears.

What has been the form of marketing orders in Section 7 cases? Some have been distressingly complex. The *American Cyanamid* Final Judgment of August, 1962, involves more than ten pages of marketing orders too lengthy to summarize here.[62] They include such protective stipulations as enjoining American Cyanamid from increasing its production of melamine beyond thirty million pounds per year for a specified time, various patent license clauses, and purchasing requirements. The court opens the door to becoming a regulatory commission for American Cyanamid. Should American Cyanamid feel the price it pays for melamine it must buy from other producers is "oppressively high," it may petition the court which will (somehow) determine if the price is in fact "non-competitive."

In the *Simpson Timber* case, a consent order directing the marketing of redwood timber was entered in place of reestablishing the acquired firm.[63] This case is one of many which point up the supposed rationale of a marketing order. The fourth largest seller of redwood lumber and lumber products acquired another substantial seller of the same products. In the consent decree negotiations, Simpson probably argued as follows: "The primary restraint you are worried about is the possible foreclosure from the redwood timber market of non-integrated lumber product manufacturers with whom we compete horizontally and have sold lumber to vertically. To protect their supply of redwood lumber, we will agree to sell to them at reasonable prices 500,000,000 board feet of redwood timber over the next decade or so. This assures them of a source of timber supply and the sticky problem of divestiture is eliminated; we can all go home." To many, this line of reasoning must be appealing; at least it was to the powers that be in this case. Thus Simpson presently is to sell not less than 35,000,000 board feet of timber per year to a select list of buyers until sometime in the 1970's at prices "less than $20.00 per thousand board feet for stumpage, plus 8% per annum compounded from January 1, 1961, to cover actual carrying costs," plus the logging costs if done by Simpson.

There are specific hazards to this decree—which in general, apply to all such orders. Who in Washington is going to see that the order is enforced? Is it left to the good faith of Simpson? This is the sort of decree which any accountant and lawyer worth their timber could evade—and that is no reflection on Simpson's compliance. Finally, there is a great risk, as will be pointed out shortly, in attempting to "peg" how a market *should* work several years into the future—which is what this decree attempts to do by allocating a certain portion of timber to a certain group of customers for a certain length of time at prices supposed to be reasonable both now and several years hence. As it turned out, thus far

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[59] Marcus, *supra* note 37, at 323; see also the order in United States v. American Can Co., 1951 Trade Cas ¶ 62,679 at 71,277 (N.D. Cal. 1950).

[60] Wendell Berge, Some Problems in the Enforcement of the Antitrust Laws, 38 Mich. L. Rev. 469 (1940).

[61] United States v. Pullman Co., 50 F. Supp. 123, 136 (1943) [underlining mine].

[62] United States v. American Cyanamid Co., 1964 Trade Cas. ¶ 71,166 at 79,628 (S.D.N.Y. 1964).

[63] Simpson Timber Co., 60 F.T.C. 43, 51 (1962).

Simpson has so exceeded its quota to the designated group that what it is directed to do in this part of the order would obviously have been done voluntarily.[64]

Other examples of relief orders "pegging" what are supposed to be competitive market arrangements in lieu of divestiture are: Prehler was to buy 22 per cent of the electrical insulation products it distributes from manufacturers other than MMM for five years; Diamond Crystal, in another involved marketing order, must offer 30 per cent of the Louisiana rock salt from its acquired facility to "all other producers of salt for sale who do not have resources and facilities for the production of Louisiana Rock Salt" for a period of ten years in place of reestablishing the company; International Paper can retain Long Bell Corporation providing it sells 40 per cent of the output of a new paper and board mill (it was then building) to nonintegrated wholesalers and converters for ten years at "standard prices"; General Shoe avoided divestiture in part by agreeing to purchase a certain percentage of the shoes sold by *its* distributors from other manufacturers.[65] One FTC official admitted that such orders would require a "full-time staff member to police."

How do these orders "work out" in practice? Since many of them involve consent decrees, that question is difficult to answer, due to the paucity of data in these settlements. However, there are some limited data on the efficacy of these decrees. The data do not make a strong case for the government's ability to predict "what the market should be like."

In the Gulf-Warren consent decree Gulf consented to offer a certain portion of its LP gas to "independent non-major refiners" or "independent non-integrated petrochemical manufacturers." This was done to "protect" some firms which were customers of Warren, to insure that they would continue to be served. One of Warren's major customers of LP gas was Texas Butadiene and Chemical Company, one of the independents as defined by the order. In 1962, Texas was acquired by a subsidiary of the Sinclair Oil Corporation; all sales thereafter to Texas, who still desired to purchase LP gas from Gulf's Warren subsidiary, were now classified as sales to a "major." In order to meet the established percentage requirement, based on past sales which of course included Texas as an *independent*, Gulf would be forced to discontinue these sales, Texas forced to find a new source of supply.

Gulf was unable to meet its percentage requirement of natrual gas to independent refiners as directed in the order. Here again an unforeseen factor in a dynamic market nullifies what, if any, merit the percentage order had originally. Gulf consented to sell a certain percentage of its natural gas to independent refiners. As in most marketing orders of this type, the percentage was based on that handled by the acquired firm prior to its acquisition—then extrapolated into the future as if there is some magic aura about that percentage to which the market should always conform.

But some markets change, and the market for natural gasoline changed after the acquisition. Natural gasoline sold to independent refiners was used as a blending agent to increase the volatility of motor fuel. But since the octane requirements of motor fuel increased during this period, natural gasoline, with its low octane rating, fell into disfavor with independent refiners who switched over to a high gravity condensate. Gulf, ordered to sell so much natural gasoline to a certain class of customers, found the bottom to have dropped out of the market.[66]

Another example of the inability to extrapolate from past market shares to what future market shares "should be," occurred in the *Lucky Lager* order. Unable to divest Fisher Brewing Company in the allotted time, Lucky was permitted to retain the Fisher brewery. At the time of the acquisition, Lucky had 12 percent of the Utah market; Fisher had 39 percent of that market. Conseqeuntly, a rather unique, albeit illogical order was entered on the theory that the anticompetitive effects of the merger would somehow be nullified, if the two companies were not allowed to sell more than 39 percent of the Utah beer market *combined*. However, Lucky found it could not continue to operate in the Utah market with this restriction; for financial reasons it would have to withdraw if the order were not altered. The percentage requirement was dropped when its results became apparent.

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[64] Compliance Reports, in Simpson Timber Co., 60 F.T.C. 43 (1962).

[65] See respectively, Minnesota Mining & Mfg. Co., 59 F.T.C. 821 (1961); Diamond Crystal Salt Co., 59 F.T.C. 818 (1960); International Paper Co., 53 F.T.C. 1192 (1957); United States v. General Shoe Co., 1956 Trade Cas. ¶ 68,271, at 71,227 (M.D. Tenn. 1956).

[66] Compliance Reports, in Gulf Oil Corp., 56 F.T.C. 688 (1960).

Recall the *Brillo* order of partial divestiture discussed earlier; Brillo divested only the business but *not* the production assets of Williams which remained with Brillo providing they were not used to produce industrial steel wool. In addition, this marketing order was entered:

> It is further ordered that from and after the effective date of such divestiture, respondent shall refrain for a period of five years from selling industrial steel wool to customers of The Williams Company excepting that respondent may continue to sell industrial steel wool to any customer it served in common with Williams as of July 5, 1955, providing the maximum unit annual quantity sold to each such common customer does not exceed the total unit quantity which respondent sold to it in the twelve months immediately preceding July 5, 1955.[67]

In other words, if Brillo sold 1,000 units of industrial steel wool to a customer served by Williams in the twelve months preceding July, 1955, it could not sell more than 1,000 units per year to this customer for five years thereafter—and what it does sell must not be made on the Williams machines. Clearly, the order is designed to be protective.

However, this order, as is the case with others, had to be changed. The Williams business went to the J. H. Rhodes Co. which found it was *unable* to supply all of the old Williams' customers—which is understandable since the order did not enable Rhodes to purchase any extra steel wool machines. The old Williams customers were unable to go to Brillo due to the marketing order; in addition, since the machines were not to be used to produce industrial steel wool, Rhodes was unable to go to Brillo to purchase industrial steel wool to meet his customers needs. So, in 1965, the order was modified to allow Brillo to produce industrial steel wool in the Williams' plant to supply Rhodes so that he, in turn, could fill his customers' orders.

The future ban

There is another type of marketing order involving the Government in considerably less decision making, but which, due to its frequent and increasing usage, merits attention. This marketing order is the order barring a firm from acquiring another firm (in a particular industry) without prior Government approval for a given period of years. In the sample of 39 cases used in this study, 25 (or 64 percent) had some form of future merger ban. All but two of the cases in the *unsuccessful* category included some form of ban on future mergers without prior Government approval.

What does the ban accomplish? First, it does not prevent *all* acquisitions by firms under the ban—only those not approved by the Government. The Government has approved some, though data are not available as to how many. The ban does *not*, nor is it designed to, prevent any acquisitions in markets *not* specified under the ban.[68]

The question of what standards the Government is to use in approving the merger application of a firm under the ban is unanswered. If the standard is close to a *per se* ban (it is not at present *per se*,) that is, if it is next to impossible to secure Government approval for a proposed acquisition in a market where a future ban exists, then in industries of heavy Government antimerger activity (such as cement and dairy products) where several firms may be operating under such a ban, the market for corporate assets may be diminished. On the other hand, if the standards applied in approving an acquisition are the *same* as those applied in any Section 7 proceeding, the the ban does no more than provide the Government with a premerger notification process.

Securing a limited premerger notification process may be admirable and desirable; but it is not admirable if the premerger notification is a *quid pro quo* for ineffective relief, that is, if the Government secures a future ban without prior approval in place of structural relief. Generally where the government has secured structural relief, the ban was not imposed. But in almost every case where no divestiture, partial divestiture, or some marketing order was imposed, the future ban is found.

What is disturbing about the future ban is the implication that it is a substitute for structural relief. In at least five Section 7 cases settled in 1966 the FTC

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[67] Brillo Mfg. Co., Docket No. 6657 (FTC July 31, 1963), Final Order, January 17, 1964, at 2 (mimeo).

[68] If anything, the ban encourages the firm to make conglomerate acquisitions.

imposed future bans of five to ten years with *no divestiture ordered.*[69] Elman correctly points out in his dissent in National Tea that:

> If National Tea's past acquisitions were unlawful (as the Commission decision so held) because their likely effect, individually or cumulatively, was to lessen competition in any market, the public interest requires that divestiture be ordered . . .[70]

The environment of antimerger enforcement

Any enumeration of the factors which raise barriers to antimerger relief would be incomplete without mentioning the political-legal environment within which Section 7 is enforced and any deleterious effect this environment might have on the efficacy of the law.

Earlier, the general rule was stated that the longer a merger remains consummated, the more difficult it is to unravel. One of the reasons for the lengthy time span between the acquisition and the relief order is that the adjudicative process can be so long. The Methuselah of merger cases, the Pillsbury fiasco, was literally litigated to death with the FTC finally dropping the case after fourteen years and some forty thousand pages of evidence.[71]

That antitrust cases take too long is not a new proposition; the problems of the "big case" have been explored before—yet still exist. Any lawyer interested in dragging out a merger case has several excellent examples to draw from. The Crown Zellerbach case, for example, lays out an exemplary strategy for lengthening this time span. In the trial records of that case, pages 11 through 1649 are consumed by pre-trial jockeying for position, correspondence for extensions, pre-trial conferences, resetting of trial dates, admmissibility of evidence, etc. These tactics ran out over three years of the judicial clock. All this may be very necessary and integral to the litigative process: the author is not competent to judge. But there is no doubt that they lengthen the time span—and structural relief becomes less probable.

The impact of politics on antimerger relief decrees should not be discounted—or minimized. A piece of legislation is not always necessary to weaken a relief decree. In the Union Carbide relief, a June, 1963 letter from one of Louisiana's senators extolling the virtues of selling the Visking plants to Ethyl Corporation was sent to the Commission; four months later, the sale was allowed. It was said of Senator Pastore that he ". . . preached antipoverty to the Justice Department and has all but undone the Government's assault on Kaiser Aluminum & Chemical Corp.'s acquisition from U.S. Rubber of a wire and cable plant in Bristol, Rhode Island."[72] The divestiture order in the above case was dropped.[73]

Political pressure, played from the poverty and unemployment angles, also influenced the Continental Can relief decree[74] and the Justice Department's decisions not to challenge the Firestone-Seiberling Rubber Co. and General Electric-Landers, Frary & Clark acquisitions.[75]

Conclusions

What can we conclude on the general problem of asset restoration as a barrier to efficient antimerger enforcement? First, that the time span between the acquisition and the divestiture order can, in a dynamic market setting, prevent or make very difficult the unscrambling of two firms. Second, the so-called partial divestiture has not distinguished itself for efficacy. Third, a loose handling of the divestiture of post-acquisition improvements could afford an economic incentive to firms to expand in violation of Section 7, planning on divesting the acquired assets several years hence. The answer to these problems involves cutting down or eliminating this time span. It does not require some *per se* rule regarding partial vs. full divestiture or regarding the divestiture of post-acquisition improvements. Rather it requires a closer adherence to the principle that relief is a failure if sufficient assets are not excommunicated to reestablish an in-

[69] See American Bakeries, FTC Docket No. C–1111 (1966); Broadway Hale Stores, Inc., FTC Docket No. C–1057 (1966); May Department Stores Co., FTC Docket No. C–1105 (1966); National Tea Co., FTC Docket No. 7453 (1966); Winn-Dixie Stores, Inc., FTC Docket No. C–1110 (1966).

[70] Elman dissent, March 4, 1966, at 3 (mimeo) in National Tea Co., FTC Docket No. 7453 (1966).

[71] BNA ATRR 247: A–13.

[72] James Harwood, The Mystique of Antitrust, 1 Mergers & Acquisitions: The Journal of Corporate Venture 35 (1965).

[73] Business Week, Jan. 1, 1966, at 22.

[74] BNA ATRR 168: A–7.

[75] Harwood, *supra* note 72, at 35.

dependent firm of sufficient size to survive. Normally, this would seem to require full divestiture including any post-acquisition improvements.

With regard to marketing orders in antimerger enforcement I conclude:

1. The marketing order is considered by some to be a substitute for structural relief. This is an error, for the marketing order is a bastard form of antitrust regulation.

2. As a substitute for structural relief, marketing orders have distinguished themselves for being ineffective, difficult and/or costly to enforce, often protective or anticompetitive in nature, and being in effect a probable bar to efficient resource allocation.

3. They should be used parsimoniously, if ever.

Concerning those parts of the political-legal environment that hamper the securing of meaningful antimerger relief, the author cannot express any solutions—only his chagrin.

VI. A CONCLUDING NOTE ON THE MARKET AS A FORCE FOR RELIEF

Examining old relief decrees does not carry one to ebullient heights on the efficacy of Section 7 relief. Nor is the probability high of Congress passing new legislation to strengthen the hand of the government in enforcing the antimerger law. The future course that Section 7 of enforcement will have to steer through the courts and the Commission is very bright for the prosecutors. But a no better prediction than the weatherman's "mixed" can be made for securing more meaningful relief.

In light of this, what solace can the proponent of Section 7 enforcement take? He can find comfort in the fact that where the angels charged with formulating antimerger relief have feared to tread, the market mechanism has not always been so cowardly. Anyone doing research in the problem of relief as it relates to Section 7 violations cannot help but come away with renewed or strengthened faith in the market mechanism.

Market conditions may so change during a prolonged adjudicatory proceeding that, at its conclusion, relief negotiations may seem almost unnecessary, or at least not nearly so pressing.

For example, in the Reynolds-Arrow acquisition, new domestic entry into the industry which took place during the lengthy litigation, and the fierce new competition from foreign oil companies, brought about a steady decline in Arrow sales from 1960 to 1964 and effectively obliterated any potential market leverage Reynolds may have had from the acquisition.[76]

While preparing its case before the Circuit Court in the Union Carbide-Visking acquisition, the General Counsel of the FTC advised the Commission to settle the case outside of Court by allowing Union Carbide to sell Visking to Texaco. Market forces were such that the Commission lawyers were skeptical of retaining their Commission victory on the appeal of Union Carbide.[77]

In this case the Commission had found a Section 7 violation largely on the prediction that Union Carbide would be able to drive nonintegrated extruders of polyethylene film "to the wall" by lowering its own film prices. During the course of litigation, it became apparent, even three years after the merger, that such was not going to be the case. Union Carbide experienced a market share loss of ten percentage points in film resin and thirteen percentage points in film production.[78] The losses came at the expense of gains by Union Carbide's competitors in film resins and film production, *following* the Visking acquisition. Perhaps this offers a new explanation for some of the weak relief decrees—namely that industry conditions had sometimes so changed that the Government became afraid to press too hard or else thought that structural relief was no longer as necessary as it one time may have been.

The above is not in any way to be taken as favoring contentment with the status quo in antimerger relief. Nor can it serve as ammunition for those who might argue that anticompetitive mergers should be left to the market mechanism to undo. The fact still remains that where there is no meaningful cost to violating the antimerger law, the law will be broken. Relying only on the market mechanism to undo these mergers would offer would-be anticompetitive mergers the time

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[76] Petition of Respondent to Reopen Case for New and Additional Evidence or Alternatively for a Rehearing and for Modification of Order of January 31, 1960, in Reynolds Metals Co., 56 F.T.C. 743 (1960), aff'd, 309 F. 2d 223 (D.C. Cir. 1962).

[77] Memorandum to the Commission from General Counsel, March 26, 1962, in Union Carbide Corp., 59 F.T.C. 614 (1961).

[78] Memorandum, *id.* at 6.

and the opportunity to try and entrench their position against market forces. Undoubtedly, some would be successful.

More than fifty years ago, Clark wrote that "only from a strife with the right kind of rules can the right kind of fitness emerge." [79] Business freedom must operate within a framework of rules, lest the conduct of business destroy the basis upon which the freedom rests. Since free access by all to markets of more than a few sellers is essential to preserve business freedom, a rule against the consummation of anticompetitive mergers is indeed logical.

For this rule to be effective, the penalty for its violation must be stringent. The rule of quick, total structural relief needs to be followed if the incentive to consummate anticompetitive mergers is to be minimized.

THE ANTIMERGER LAW: PYRRHIC VICTORIES

APPENDIX

DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION CELLER-KEFAUVER CASES BROUGHT THROUGH 1960 AND EITHER WON BY THE GOVERNMENT OR SETTLED BY CONSENT BY 1965

Case No.[1]	Year of filing	Defendant	Year of termination
17-DJ	1955	Schenley Industries	1957
18-DJ	1955	General Shoe Corp. (now Genesco)	1956
19-DJ	1955	Hilton Hotels Corp	1960
20-DJ [2]	1955	Minute Maid Corp	1955
21-DJ	1955	Brown Shoe Co., Inc	1962
22-DJ	1956	American Radiator	1960
23-DJ	1956	Continental Can-Hazel Atlas	1964
25-DJ [2]	1956	Maryland and Virginia Milk	1960
26-DJ	1956	Owens-Illinois	1963
27-DJ	1956	Bethlehem Steel	1958
28-DJ [3]	1957	El Paso Natural Gas	1964
29-DJ	1958	Lucky Lager Brewing	1958
31-DJ [3]	1958	National Alfalfa	1962
33-DJ	1958	Anheuser-Busch	1960
35-DJ	1959	Jerrold Electronics	1961
36-DJ	1959	Hertz Corp	1960
38-DJ	1959	Diebold, Inc	1963
42-DJ [2]	1959	National Homes Corp	1962
43-DJ [4]	1959	Standard Oil of Ohio	1960
47-DJ	1960	Gamble-Skogmo	1960
48-DJ	1960	Maremont Automotive	1960
52-DJ	1960	Ryder System, Inc	1961
53-DJ	1960	American Cyanamid	1964
16-FTC	1954	Crown Zellerbach Co	1962
17-FTC	1955	Farm Journal	1956
18-FTC	1955	Union Bag & Paper Corp	1956
19-FTC	1955	A. G. Spalding & Brothers	1962
21-FTC	1956	Scovill Mfg. Co	1956
22-FTC	1956	Brillo Mfg. Co	1964
23-FTC	1956	Scott Paper Co	1964
25-FTC	1956	The Vendo Co	1957
26-FTC	1956	National Dairy Products Corp	1963
27-FTC [2]	1956	The Borden Co	1964
30-FTC	1956	International Paper Co	1957
31-FTC	1956	Gulf Oil Corp	1960
32-FTC	1957	Automatic Canteen Co. of America	1958
33-FTC	1957	Union Carbide Corp	1963
34-FTC	1957	National Sugar Refining Co	1962
37-FTC	1957	Reynolds Metals Co	1962
40-FTC	1958	Diamond Crystal Salt Co	1960
43-FTC [2]	1959	ABC Vending Corp	1964
44-FTC	1960	Simpson Timber Co	1962
47-FTC	1960	Continental Baking Co	1962
51-FTC	1960	Minnesota Mining & Mfg. Co	1961
54-FTC	1960	Hooker Chemical Corp	1961
56-FTC	1960	Leslie Salt Co	1961

[1] Case numbers refer to those used in the merger case digest of the American Bar Association, sec. of antitrust law, revised Jan. 1, 1964, at 3-4, 269-270.

[2] These 5 cases were dropped from the sample since sufficient relief data were not available to enable their classification on the continuums.

[3] These 2 cases, though won by the Government at the Supreme Court level, were dropped from the sample because of regulatory aspects.

[4] This case, Standard Oil of Ohio, is included in the sample. Though it does not represent a legal victory for the Government as such, since the case was dismissed, it constitutes an economic victory since the dismissal was pursuant to stipulation barring Sohio's proposed acquisition of Leonard Refineries.

[79] J. B. Clark, The Control of Trusts 201 (1914).

SECURITIES AND EXCHANGE COMMISSION,
Washington, D.C., April 19, 1976.

Hon. WILLIAM PROXMIRE,
Chairman, Committee on Banking, Housing and Urban Affairs, U.S. Senate, Washington, D.C.

DEAR CHAIRMAN PROXMIRE: You have requested our views concerning S. 2522, a bill designed to provide full disclosure to investors concerning persons intending to file tender offers.

Section 1 of the bill would amend Section 12 of the Securities Exchange Act of 1934 (the "Act") by adding a provision, subsection "(n)," that a tender offer shall not be made for a security registered under Section 12, or for certain other securities,[1] unless the offeror has filed with the Commission information and documents specified by the Commission and comparable to those required in an application to register a security pursuant to Section 12 of the Act. This filing, which the bill denominates as a "registration statement," would become effective in 60 days, except as otherwise ordered by the Commission. The section continues, "Until such registration statement becomes effective it shall not be deemed filed for the purposes of section 14(d) of this title."[2]

Section 2 of the bill would amend Section 13(a) of the Act to make its periodic reporting requirements applicable to every "person" registered pursuant to proposed Section 12(n).

Section 3 of the bill would amend Section 15(d)(1) of the Act to require any person making a tender offer for a security registered under Section 12 of the Act, or for certain other securities,[3] to file the statement presently required under Section 14(d) with the Commission at least 60 days prior to the time copies of the offer are first published or sent to shareholders. Section 14(d)(1) would also be amended to require the Commission to send a copy of the statement to the officers of the target company within five days of receipt.

Section 4 provides that the amendments will apply to any tender offer made on or after September 1, 1975, "as to any transaction not consummated prior to [its] effective date."

BALANCED REGULATION: POLICY CONSIDERATIONS

In adopting the Williams Act in 1968, the Congress made clear its intent to establish even-handed regulation which did not favor either the tender offeror or incumbent management, but which ensured the investing public full disclosure concerning the offer. S. Rep. No. 550, 90th Cong., 1st Sess. at 3 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess. at 4 (1968). Recently, in *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975), the Supreme Court recognized this fact, stating:

"The Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids. . . . Indeed, the Act's draftsmen commented upon the 'extreme care' which was taken to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid."

Under the provisions of the Williams Act, 15 U.S.C. § 78m(d)–(e), 78n(d)–(f)(1970), no public filing is required until the time a tender offer is "first published or sent or given to security holders." 15 U.S.C. 78n(d). Thus, a potential tender offeror can prepare an offer and plan its implementation in private and, when the circumstances are right, proceed expeditiously. Management of the target company has some time to communicate its views to shareholders, since under Section 14(d)(5) of the Act tendered shares are withdrawable until seven days after the offer is first made, but its opportunity to engage in more sophisticated forms of opposition, such as the negotiation of a defensive merger, is limited. Nonetheless, as you are no doubt aware, the techniques for defending against unwelcome tender offers have become well developed. *See* E. Aranow & H. Einhorn, *Tender Offers for Corporate Control*, 219–298 (1973) [hereinafter cited Aranow & Einhorn]; Bradshaw, *Defense Tactics Employed by Incumbent Managements in Contesting Tender Offers*, 21 Stan. L. Rev. 1104 (1969); Comment, *Cash Take-Over Bids*, 44 Tul. L. Rev. 517 (1970); Schmults and Kelly,

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[1] These are: "any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 12(g)(2)(G) of . . . [the Act], or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1949 [sic]."

[2] As discussed *infra*, p. 7, the meaning of this language is unclear.

[3] See note 1, *supra*.

Cash Take-Over Bids—Defensive Tactics, 23 Bus. Law 115 (1967); *see also* Cary, *Corporate Devices Used to Insulate Management from Attack*, 25 Bus. Law 839 (1970); Hays and Taussing, *Tactics of Cash Takeover Bids*, 45 Harv. Bus. Rev. 135, 142–47 (1967); Mullaney, *Guarding against Take-overs—Defensive Charter Provisions*, 25 Bus. Law 1441 (1970).

By requiring an offeror to disclose his intentions 60 days in advance, S. 2522 would provide incumbent management with substantial additional time within which to commence defensive maneuvering and, thus, may significantly alter the existing balance. If the effectiveness of the tender offer mechanism were thereby impaired, investors would lose an effective means for replacing ineffective management as well as the opportunity from time-to-time to tender shares owned by them at prices generally higher than the market.

The establishment of a 60-day waiting period would also significantly prolong disruption of the market in the shares of the target company which generally follows the announcement of a tender offer. Even during the waiting period, depending upon their views of whether consummation of the offer seems likely, speculators will generally be interested in acquiring shares for the purpose of tendering them at a profit and will thus drive the market price of the shares towards that specified in the offer. Persons who want to purchase or sell shares of the target company during this period for bona fide investment purposes will be unable to do so without incurring speculative risks. The disruption would, of course, be compounded by the pendency of more than one offer. Moreover, the possibilities during this prolonged period for misuse of non-public information concerning the probability of consummation of the offer are apparent.

Arguably, additional time for the Commission to investigate the adequacy of disclosure might be desirable in some cases. This issue was raised, however, during the Congressional consideration of the bills which became the Williams Act in 1968 and the Congress concluded at that time that the problems connected with a pre-offer filing outweighed the benefits.[4] Since then a number of states have enacted legislation imposing various waiting periods and other requirements upon tender offers for shares of companies which are incorporated or have their principal place of business or substantial assets therein.[5] Although the Commission has not yet taken a formal position on the propriety of such state legislation, significant questions have been raised as to whether the carefully balanced regulation enacted by Congress in 1968 preempted such state legislation and whether, in any event, it constitutes an unconstitutional burden on interstate commerce. See Aranow & Einhorn, supra, at 156–58, 172; Sommer, *The Ohio Takeover Act: What Is It?*, 21 Case W. Res. L. Rev. 681 (1970). *But see* Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 Case W. Res. L. Rev. 722 (1970). In any event, we recommend that the bill be amended to provide specifically that the regulatory scheme established by Congress with respect to tender offers is exclusive and that state regulation of tender offers is preempted. Otherwise, the obvious interest of states in making their laws attractive so that management will locate corporate operations within their borders seems certain to encourage the imposition of ever greater and possibly conflicting state requirements with respect to tender offers which are opposed by management. We understand that a number of states, in addition to those referred to in n. 5, are presently drafting laws applicable to tender offers. Significantly, the propriety of such state legislation is extremely difficult to challenge in court because of the time within which a tender offer must, as a practical matter, be completed. Judicial resolution of this question in a particular case would require a substantial period of time to obtain.

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[4] In the 1967 and 1968 hearings on the bills which ultimately became the Williams Act, the Commission recommended that offering materials be filed with it on a confidential basis five days prior to commencement of an offer. The purpose of this requirement would have been to provide time for staff review to help ensure full disclosure. This recommendation was opposed by the industry and rejected by the Congress because of concern about leaks, misuse of inside information and market disruptions. S. Rep. No. 550, *supra*, at 4; Hearings on S. 510 Before the Subcommittee on Securities of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess. at 20, 35, 72–76, 87–89, 98, 105, 139–40, 151, 163, and 245 (1967); Hearings on H.R. 14475 and S. 510 Before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 90th Cong., 2d Sess. at 44–46, 50, and 52–54 (1968).

[5] These include Colorado (Blue Sky Law), Idaho (Business Corporation Act), Indiana (Business Take-Over Law), Kansas (Takeover Bid Disclosure Law), Minnesota (Corporate Take-Over Law), Nevada (General Corporation Law), Ohio (Securities Law), South Dakota (Blue Sky Law), Virginia (Take-Over Bid Disclosure Act), and Wisconsin (Corporate Take-Over Law).

Rather than impose a significant waiting period before a tender offer can be made, we suggest that the period during which offerees are permitted to withdraw shares which they have tendered might be extended to 21 days. As discussed above, Section 14(d)(5) of the Act presently permits offerees to withdraw shares tendered during the first seven days after "definitive copies of the offer . . . are first published or sent or given to security holders. . . ." If this period were extended, as we recommend, incumbent management and interested parties supporting or opposing a tender offer would have more time to present their views to shareholders, and shareholders, for their part, would have more time to consider all viewpoints presented. Such an extension of the withdrawal period, however, would not delay the offeror's attempts to solicit tenders and would minimize the period during which the market would be disrupted.

The proposed requirement that offerors publicly file information comparable to that contained in an application to register securities under Section 12 of the Act would not seem, in itself, to impair the tender offer mechanism. Arguably, such a disclosure requirement might provide incumbent management with fertile grounds for defensive litigation designed solely to impede the offer, but under some circumstances information of this type may well be important to investors in deciding whether to tender. Unless the offer is for all tendered shares, *pro rata* acceptance pursuant to Section 14(d)(6) of the Act is a possibility. Accordingly, even those investors who decide to tender may be concerned with the desirability of the offeror achieving control of the target company and may thus be interested in full disclosure of the offeror's business and financial condition. The possibility was discussed briefly in H.R. Rep. No. 1711, supra at 2–3 (1968). In addition, a number of courts have considered whether such information must be disclosed pursuant to the general requirement of Section 14(e) of the Act that in connection with a tender offer all material information must be disclosed. *See Missouri Portland Cement Co.* v. *Cargill, Inc.*, 375 F. Supp. 249, 267–68 (S.D.N.Y., 1974), *affirmed in part, reversed in part, on the grounds*, 498 F. 2d 851 (C.A. 2, 1974), *certiorari denied*, 419 U.S. 883 (1974); *Corenco Corporation* v. *Schiavone & Sons*, 362 F. Supp. 939, 948–50 (S.D.N.Y., 1973), *affirmed on other grounds*, 488 F. 2d 207 (C.A. 2, 1973); *Copperweld Corporation* v. *Imetal*, [Current Binder] CCH Fed. Sec. L. Rep. ¶95,362, at pp. 98,804–06 (W.D. Pa., 1975); *Alaska Interstate Co.* v. *McMillian*, [Current Binder] CCH Fed. Sec. L. Rep. ¶95,276, at pp. 98,405–06 (D.Del., 1975).

If a question exists, it is only whether such disclosure should be required in connection with every tender offer. Significantly, under Section 14(d)(1) of the Act the Commission already has broad authority to require offerors to file such information as is "necessary or appropriate in the public interest or for the protection of investors." Rule 14d–1 promulgated by the Commission thereunder, 17 CFR 240.14d–1, presently requires a statement containing the information and exhibits required by Schedule 13D, 17 CFR 240.13d–101. Schedule 13D calls for certain information concerning the identity of the offeror and its management, the source and amount of the funds to be used, the purpose of the offer, including proposals to liquidate or merge the target company or to sell its assets, any interest in or contract relating to the securities of the target company, and the identity of any persons employed to solicit shareholders. In addition, copies of all offering, advertising and soliciting materials must be filed as exhibits. Our staff is presently considering whether these requirements should be expanded, particularly with respect to the offeror's financial condition.

THE FILINGS AND REPORTING REQUIREMENTS

As noted above, Section 1 of the bill would amend Section 12 of the Act to require a tender offeror, whether one or more individuals or a corporation, to file a registration statement thereunder. Presently, only securities are registered under that section, and it appears that other sections of the Act applicable by their terms to registered securities (*e.g.*, Sections 14(a)–(c) and 16) would be inapplicable to registered persons unless amended. Section 13(a) of the Act, however be amended to apply to both registered securities and registered offerors. Thus, an offeror who registers pursuant to proposed Section 12(n) of the Act would become obligated to comply with the periodic reporting requirements of Section 13(a) even after the offer is consummated.

The apparent purpose of this requirement is to ensure that current information as to the offeror's operations continues to be available after the consummation of the offer to investors who wish to evaluate the investment merits of shares of the target company which the offeror has not acquired. It seems desirable, therefore, to provide for deregistration where the offer has been abandoned after registration or where all, or substantially all, of the securities of the target company have been acquired, either initially or subsequently, by the offeror.

Furthermore, as a practical matter the registration requirement of proposed Section 12(n) of the Act will have the greatest impact on foreign tender offerors and may result in retaliatory action by foreign governments. Although most domestic corporate offerors would be reporting companies due to the requirements of Section 12(a), 12(g) and 15(d) of that Act, most foreign offerors would not. Even those foreign offerors who otherwise might be required to report may be exempted by the Commission pursuant to Section 12(g)(3) of the Act and Rule 12g3-2 thereunder, 17 CFR 240.12g3-2.[6]

TRANSACTIONS COVERED

The term "tender offer," which is not defined either by the bill or by existing statutes, would appear to encompass both a cash offer and an offer to exchange securities.[7] The latter, of course, is already subject to the registration requirements of the Securities Act of 1933.

In addition, proposed Section 12(n) would apply to all tender offers regardless of the percentage of the target company's securities the offeror seeks to obtain. Section 14(d), on the other hand, is limited to tender offers which would result in the offeror holding beneficial ownership of more than 5% of a class of a target company's shares. It may be appropriate that proposed Section 12(n) be reconciled with Section 14(d) in this regard.

Section 13(d) of the Securities Exchange Act, on the other hand, requires certain informational filings with respect to acquisitions, other than by tender offer, of substantial percentages of the securities of issuers registered pursuant to Section 12 of the Act. It may be that the proposed disclosure requirements are also appropriate as to those transactions. Under Section 13(d), as under Section 13(a), the Commission already has broad authority to require disclosure of such information "as necessary or appropriate in the public interest or for the protection of investors." It is not entirely clear, however, that this authority would permit the Commission to require periodic reporting of financial information.

WAITING PERIOD

Proposed Section 12(n) provides that registration statements filed thereunder shall become effective 60 days after filing, "except as otherwise ordered by the Commission." It is not clear whether it is intended that the Commission may both shorten or lengthen the statutory period. Further, if the period may be shortened, it is not clear what criteria should be applied. Some clarification would be helpful.

Furthermore, it is not clear whether an amendment to the information filed under Section 14(d), such as would result if the terms of the offer were revised, would extend the proposed waiting period under that Section by an additional 60 days. If this is intended, an offer might be delayed indefinitely where fluctuating market or other conditions compel periodic revisions. On the other hand, potential offerors might otherwise be encouraged to file prior to the time they have actually determined to make an offer so that if they later determine to proceed, the offer might be revised and the waiting period avoided. The probable disruptive effect of such filings on the market in the shares of the target company has already been discussed.

The last sentence of proposed Section 12(n) is also somewhat unclear. It provides:

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[6] Section 12(b)(3) was inserted in the Act because of the concern of foreign issuers and questions as to jurisdiction. S. Rep. No. 379, 88th Cong., 1st Sess. at 29–31 (1963); Hearings on S. 1642 Before the Subcommittee on Securities of the Senate Committee on Banking and Currency, 88th Cong., 1st Sess. at 309, 310 (1963) (Statement with Respect to Legislative Proposals of the Securities and Exchange Commission to Amend the Securities Exchange Act of 1934 and the Securities Act of 1933); Hearings on H.R. 6789, H.R. 6793 and S. 1642 Before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess. at 179–180 (1963) (written statement of Securities and Exchange Commission).

[7] See Aranow & Einhorn, *supra*, at 69–70; Note, *Cattlemen's Investment Co. Fears: Informal Solicitation of Stock Held to Constitute a Tender Offer*, 1972 Duke L. J. 1051, 1055–57.

"Until such registration statement becomes effective it shall not be deemed filed for the purposes of section 14(d) of this title."

Section 14(d) of the Act, however, requires only the filing of certain information, not a Section 12 registration statement. Moreover, the content of these two types of filings is not the same.[8] Thus, some clarification is needed. If it is to be required that the Section 14 filings must include an effective registration statement under proposed Section 12(n), the total waiting period for a nonreporting tender offeror would be 120 days.[9] Significantly, however, the filing of a registration statement under proposed Section 12(n) 60 days prior to announcement of the tender offer would probably be meaningless to investors.

DELIVERY REQUIREMENT

Section 3(b) of the bill would add a provision to Section 14(d) requiring the Commission to send a copy of the statement filed by the bidder pursuant to Section 14(d) to the officers of the target company within five (5) days of Commission receipt thereof. Since Section 14(d) currently requires the offeror to send such information to the target company's management on or before the date it is published or sent or given to any security holders, we suggest that Section 3(b) of the bill be revised so that Section 14(d) continues to place the responsibility for sending materials to the target company on the offeror.

APPLICABILITY

Section 4 would make the provisions of the bill applicable to any tender offer commenced on or after September 1, 1975, but not consummated prior to its effective date, thereby making its provisions retroactive to September 1, 1975, with respect to certain transactions. The desirability of requiring offers which have been almost completed and which have been made in compliance with the full disclosure requirement of Section 14(e) of the Act to be abandoned and begun again after the applicable waiting period may be questioned.[10]

The views herein are those of the Commission and do not necessarily reflect the view of the President. Our views are being submitted simultaneously to the Office of Management and Budget, and we will inform you of any advice received from OMB concerning the relationship of our views to the program of the administration.

Thank you for the opportunity to express our views on this subject.

Sincerely,

RODERICK M. HILLS, *Chairman.*

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[8] Section 12 requires the filing of more extensive information concerning the registrant's business, management and securities, including financial statements.
[9] Presumably, companies whose securities have been registered pursuant to Section 12 would not have to register as offerors as well.
[10] The reference in Section 1 of the bill to the Investment Company Act of "1949" is in error. It should read the Investment Company Act of "1940."

STATE TAKEOVER BID STATUTES

Applicability target nexus to State (1)	Type of statute-notice ("N") or registration ("R") (2)	Minimum number of days after filing after which offer may become effective (3)	Percent of shares of class of target to be owned after offer which constitutes a takeover (4)	Friendly takeover exemption (target board approval communicated to its shareholders) (5)
Alaska: (i) Incorporated in State or (ii) principal office and substantial assets located in State.	R	20	>5	Yes.
Colorado: (i) Incorporated or (ii) principal place of business in State ("PPB").	N	10	10	No (but eliminates 10-day period in col. 3).
Connecticut: (i) Incorporated or (ii) principal executive offices in State or (iii) majority of business operations in State.	R	10	>10	No.
Delaware: Incorporated	N	[1] 20	>5	No.
Hawaii: Incorporated and doing business in State.	R	60	>10	No.

STATE TAKEOVER BID STATUTES—Continued

Applicability target nexus to State (1)	Type of statute-notice ("N") or registration ("R") (2)	Minimum number of days after filing after which offer may become effective (3)	Percent of shares of class of target to be owned after offer which constitutes a takeover (4)	Friendly takeover exemption (target board approval communicated to its shareholders) (5)
Idaho: Incorporated or principal office and substantial assets in State and equity securities are or have been registered in State or under sec. 12 of the 1934 act.	R	(²)	>5	Yes.
Indiana: (i) Incorporated or (ii) PPB or (iii) a substantial portion of total assets in State.	R	20	>10	Yes.
Kansas: (i) Incorporated or (ii) PPB and substantial assets in State.	R	30	>20	Yes.
Kentucky (effective July 1, 1976): See Kansas.	R	20	>5	Yes.
Maryland (effective July 1, 1976): (i) Incorporated or (ii) primary place of business in State or (iii) substantial portion of assets in State.	N	20	>5	Yes.
Massachusetts: Incorporated or PPB	R	30	>10	Yes.
Minnesota: Incorporated or principal office and substantial portion of assets and equity securities are or have been registered in State within 2 years.	R	10	>10	Yes.
Nevada: Incoporated	N	[1] 10	>10	No.
Ohio: See Kansas	R	20	>10	Yes.
Pennsylvania: See Kansas	R	20	>5	Yes.[3]
South Dakota: See Idaho	R	10	>10	Yes.
Tennessee: Incorporated or principal office in State and substantial assets in State.	R	10	>10	Yes.
Utah: Incorporated or PPB	R	20	>5	Yes.
Virginia: Incorporated and doing business in State.	R	20	>10	Yes (if approved by ⅔ of target's shareholders after proxy solicitation).
Wisconsin: See Idaho	R	10	>5	Yes.

[1] No filing required with State authority only, with target.
[2] No schedule for filing in relation to effective date.
[3] Requires a filing for exemption and is limited to registration provisions of statute.

Note: As a practical matter in "Registration" states because of the availability of the hearing procedures which can be invoked by the applicable securities agency on its own motion and in many instances at the request of the target the minimum number of days set forth in col. 3 are a realistic time frame in most instances only in uncontested offers. The statutes generally contain provisions for the scheduling of the timing of the hearings and the ultimate disposition of the issues presented which vary from State to State.

Takeover legislation is pending in Michigan, New York, and Louisiana, the adoption of which seems imminent. In addition, Illinois has proposed certain regulations concerning takeovers.

Date	Companies involved (target firm listed 1st; bidding firm listed 2d)	$/X	C/U	Bidding premium (percent)	Outcome
1972					
Jan. 25	Newberry J. J. Co.; Rapid-American Corp	$	C	30	S
Jan. 28	See's Candy Shops, Inc.; Blue Chip Stamps	$	U	0	PS
Jan. 31	Electro-Craft Corp.; Napco Industries, Inc	X	U		S
Mar. 6	Nicholson File Co.; H. K. Porter Co., Inc	$	C	5	U
Apr. 7	Consolidated Water Co. GAC Utilities, Inc		C		S
Apr. 24	Southwest Florida Enterprises, Inc.; Hecht Enterprises, Ltd.		C		S
May 22	Yosemite Park & Curry Co.; U.S. Natural Resources Inc.		C		S
July 3	Erie Technological Products, Inc.; Eckens, Inc	$	C	47	PS
July 7	Colorado I terstate Corp.; Coastal State Crude Gathering Co.	$	C	31	S
July 19	American Mayflower Life Ins. Co.; First Colony Life Insurance Co.		C		S
July 25	Milan Pharmaceuticals, Inc.; Mylan Laboratories, In .		C		S
July 28	Mechanics Ban Corp., Inc.; Shorebank, Inc		C		S
Do	Donaldson, Lufkin & Jenrette American Exp ess; Co.	$	U	146	PS
Aug. 2	Smyth Manufacturing Co.; Wire O Corp		C		U

Date	Companies involved (target firm listed 1st; bidding firm listed 2d)	$/X	C/U	Bidding premium (percent)	Outcome
Aug. 7	Remco Industries, Inc.; Roth Steel Tube Co		U		S
Aug. 8	Kings Lafayette Corp.; Edmond F. Safra	$	U	17	S
Aug. 14	Metro-Go'dwyn-Mayer, Inc.; Kirk Kerkonian	$	U	21	S
Aug. 18	Oakcliffs Savings & Loan Association; First Texas Financial Corp.	X	U		S
Aug. 28	Adley Corp.; Yellow Freight Systems, Inc	$	U		S
Oct. 25	Rheingold Corp.; Pepsi Co., Inc	$	C	44	PS
Nov. 2	Pubco Petroleum Corp.; LVO Corp	$	C		U
1973					
Jan. 16	Modern Food Inc.; Katy Industries, Inc	$	C		S
Jan. 22	National General Corp.; American Financial Corp	$	C		PS
Jan. 22	North Ca.olina Telephone Co.; Mid-Continent Telephone Co.	$	C		P
Jan. 31	Electro Craft Corp.; Napco Industries, Inc	X	C		S
Feb. 1	G:eat Atlantic & Pacific Tea Co.; Gulf & Western Industries, Inc.	$	C	32.2	U
Feb. 5	California-Western States Life Insurance Co.; American General Insurance Co.	$	C	15.0	PS
Feb. 20	Western Maryland Railway Co.; Baltimore & Ohio RR. Co.	$	U		S
Mar. 5	Ekco Corp.; Microdot Investing, Inc	$	C	24.3	U
Mar. 15	General Host Corp.; Triumph American, Inc	S	C	43.7	U
Apr. 5	Co-Build Cos., Inc.; Residex Corp	S	C	40.0	S
Do	General Battery Corp.; the Norbat Corp	$	U	7.0	S
Apr. 19	Bresnahan Computer Corp.; Greyhound Computer Corp.	$	U	111.0	S
Apr. 23	Mercantile Industries, Inc.; Kay Corp	$	U	12.0	S
Apr. 27	Advanced Systems, Inc.; Education Sciences, Ltd. & Group.	$	C	29.0	P
May 1	Meridian Investing & Developing Corp.; Donaldson, Lufkin & Jenrette, Inc.	$	C		P
May	Certain-teed Products Corp.; Compagnie de Saint-Gobain-Pont-a-Mousson.	$	C	15.0	P
May 7	Hackney Corp.; Merchants, Inc	$	U		S
May 8	Sonesta International Hotels Corp.; Wellington Associates.	$	C	44	U
May 9	Greater Arizona Savings & Loan Association; the Liberty Corp.		U		P
Do	Missouri Pacific RR. Co.; Mississippi River Corp	$	C		S
May 22	Foster Grant Co., Inc.; United Brands Co	$	U	18	S
May 23	Timesavers, Inc.; IMM Holding Co	$	C	43	P
June 4	Hoskins Manufacturing Co.; Armada Corp	$		27	S
Do	Southwest Airmotive Co.; Cooper Industries, Inc	$	C	35	S
June 7	State Savings & Loan Association; Budget Industries, Inc.	$	C		U
June 1'	Gimbel Bros., Inc.; Brown & Williamson Tobacco Corp.	$	U	67	S
June 27	General Development Corp.; City Investment Co	$	[illegible]	4	P
Do	Mid-Continental Realty Corp.; Reynolds Development Co.	$	U	15	S
July 8	International Recreation Corp.; Open Road Industries, Inc.	$	U		S
July 10	Conrex Corp.; Chloride Group, Ltd	$	U	2[illegible]	S
July 17	Corenco Corp.; Schievone & Sons, Inc	$	C		U
July 23	Golden Nugget, Inc.; Stephen A. Wynn et al	$	U	20	S
Do	Cable Funding Corp.; Coaxial Communications, Inc.	$	C	66	U
	Geneve Corp	$	U	95	S
July 24	Texasgulf, Inc.; Canada Development Corp	$	C	38	S
July 25	T.I.M.E. D.C., Inc.: National City Lines, Inc	$	U	2	S
Aug. 6	Dearborn Storm Corp.; Trafalgar House Investments, Ltd.	$	U	47	P
Aug. 8	Signal Companies, Inc.; Cemp Investments Ltd. et al.	$	C	11	P
Aug. 17	Yosemite Park & Curry Co.; MCA Recreation Co	$	U		S
Do	Travelodge International, Inc.; Trust Houses Forte Ltd.	$	C	78	P
Aug. 20	Collins Radio Co.; Rockwell International Corp	$	U	25	P
Aug. 30	Herff Jones Co.; Carnation Co	$	U		S
Sept. 10	Whitney Fidalgo Seafoods, Inc.; Koyokoyo Co., Ltd.	$	U	35	S
Sept. 19	Federated Development Co.; SMR Holding Corp	$	U	66	P
Sept. 26	Indian Head, Inc.; Thyssen-Bornemisza Group	$	U	35	S
Sept. 27	Unimet Corp.; Azoon Corp	$	U	38	S
Oct. 1	William Hodges & Co., Inc.; Falcon Products Inc	$	C		S
Nov. 9	Russeks Ltd.; Equity Enterprises, Ltd	$	U		S
Nov. 12	Pioneer Texas Corp.; Terrell Inc	$	U	39	S
Nov. 15	Grand Union Co.; Cavenham Ltd	$	U	60	S
Nov. 21	Madison Square Garden Corp.; Gulf & Western Industries Inc.	$	C	33	P
Nov. 26	Hastings Manufacturing Co.; McCord Corp	$	C	44	U

Date	Companies involved (target firm listed 1st; bidding firm listed 2d)	$/X	C/U	Bidding premium (percent)	Outcome
Nov. 30	Cotter Laboratories Inc.; Rhinechem Corp	$	U		S
Dec. 3	Airco; Curtiss Wright Corp	$	C	42	U
	BOC Financial Corp	$	U	58	S
Dec. 13	EDP Resources, Inc.; Greyhound Computer Corp	$	C		S
Do	Manhattan Life Insurance Co.; Manhattan Life Corp.	$	U		S
Dec. 19	Vagabond Motor Hotels, Inc.; Beverly Hills Hotel Corp.	$	U	58	S
Do	Missouri Portland Cement Co.; Cargill Inc	$	C	35	P
Dec. 28	TBS Computer Center Corp.; National CSS, Inc	$	C		P
1974					
Jan. 14	First National Stores, Inc.; Madison Fund, Inc	$	C		PS
Jan. 15	Sunset Life Insurance Co. of America	$	C		PS
Jan. 28	Buffums; David Jones Ltd. (Australia)	$	C		PS
Feb. 11	Funk Seeds International, Inc.; Ciba-Geigy Corp. (wholly owned by Ciba Geigy International Ltd., Switzerland).	$	C	62	PS
Feb. 19	Gray Cablevision, Inc.; Storer Cable Communications (Storer Broadcasting Co.).	$	C		S
Feb. 27	Far West Financial Corp.; First City Financial Corp., Ltd. (British Columbia).	$	C		S
Do	Nardis of Dallas, Inc.; Akard Co	$	U	24	PS
Feb. 28	Commercial Solvents Corp.; Beker Industries Corp	$	C	53	U
	International Minerals & Chemical Corp	$	C	62.2	U
Mar. 1	Central Colorado Bancorp. Inc.; D. H. Baldwin Co	X	C		U
Mar. 5	Elco Corp.; Energy Resources Corp	$	C	81	U
Mar. 6	Towle Manufacturing Co.; Nortek, Inc	$	C	35	U
Mar. 11	UCA Corp.; Thyssen-Bornemisza Group N.V. (Netherlands).	$	C	36.1	U
	Ethyl Corp	$	U	48	S
Mar. 27	Wyomissing Corp.; Howard M. Fry, R. Harding Breithaupt.	$	C	13	U
Apr. 8	Scurry-Rainbow Oil, Ltd., (Alberta, Canada); Home Oil Co., Ltd.	$	C	13	S
Apr. 9	Medic-Home Enterprises, Inc.; Samuel A. Klurman	$	C	0	PS
Apr. 17	Michigan Carton Co. (Battle Creek, Mich.); St. Regis Paper Co.	X	U		S
Apr. 24	Hammond Corp. (Deerfield, Ill.); G.L. Corp	$	U	27	S
May 2	Golconda Corp. (Chicago, Ill.), Cerro Corp	$	C	11	PS
June 7	Latrobe Steel Co.; Eastmet Corp	$	C	69	U
Do	Airwick Industries Inc.; CIBA-Geigy Int., Ltd. (Switzerland).	$	C	47	S
June 20	National Union Electric Corp.; Aktiebolayet (Electrolux) (Sweden).	$	U		S
Do	Cerro Corp.; G. L. Corp	$	C	16	S
June 28	Commercial Solvents Corp.; International Minerals & Chemical Corp.	$	C	17	PS
July 1	Victory Life Insurance Co.; Integon Life Insurance Co.	$	U		S
July 10	Falconer Co.; McCorquodale & Blades Trust, Ltd. United Kingdom.	$	C		S
July 12	Indian Head Inc.; Thyssen Bornemisza	$	C	16	S
July 18	ESB Inc. (Philadelphia, Pa.), Inco Holding Inc. (a wholly-owned subsidiary of International Nickel Co. of Canada Ltd.).	$	C	44	PS
	United Aircraft Corp	$	C	46	U
Aug. 2	Recrion Corp.; Argent Corp	$	C	11	PS
Aug. 12	Marcor Inc.; Mobil Oil Corp	$	C	42	PS
Aug. 21	Time Industries, Inc.; Jefferson Smurfit Group Ltd. (Ireland).	$	C	74	S
Aug. 22	Foote Mineral Co.; Newmont Mining Corp	$	C	20	S
Aug. 29	General Crude Oil Co.; Dow Chemical Co	X	U		U
Aug. 30	Magnavox; North American Phillips Development Corp.	$	C	94	PS
Sept. 3	Aberdeen Petroleum Corp.; Sabine Royalty Corp	$	C	250	S
	Adobe Oil & Gas Corp	$	C		PS
Sept. 5	Thermal Power; Al-Aquitaine Exploration Ltd	$	C		PS
	Natomas Co	$	U		S
	Union Oil Co. of California	$	C		U
Sept. 20	A. J. Industries, Inc.; Tannetics, Inc	X	C		PS
Sept. 25	Dictaphone Corp.; Northern Electric Co., Ltd. (Canada).	$	C	43	U
Sept. 30	Peerless Insurance Co.; N.V. Netherlands Insurance Co. (Netherlands)	$	U	28	S
Oct. 4	I.C.B. Corp.; Louis J. Roussel	$	C	37	PS
Do	Flavorland Industries Inc.; Foxley & Co	$	C	36	PS
Oct. 18	Primary Medical Communications; Rapoca Energy Corp.	X	U		S
Oct. 24	Food Town Stores, Inc.; Etabussements Delhaize Freres Et. Cie. "Le Lion" (Belgium).	$	U	55	PS

Date	Companies involved (target firm listed 1st; bidding firm listed 2d)	$/X	C/U	Bidding premium (percent)	Outcome
Nov. 4	Appalachian Resources Co.; Ruhrkohle-Stinnes Corp. (wholly-owned by Ruhrkohle AG & Hugo Stinnes AG (Germany).	$	C	27	S
Nov. 6	MSL Industries, Inc.; Allegheny Corp	$	C	16	S
Nov. 8	Veeder Industries, Inc.; Western Pacific Industries, Inc.	$	C	4	PS
Nov. 11	CNA Financial Corp.; Loews Corp	$	C	46	S
Do	Great Western United Corp.; NB Hunt, W. H. Hunt	$	C	11	S
Nov. 12	Storm Drilling & Marine Inc.; Odeco Drilling, Inc	$	C	------------	S
Nov. 14	Bio-Dynamics, Inc.; ABM Corp	$	C	58	S
Nov. 21	John Roberts, Inc.; Lenox, Inc	$	C	23	S
Dec. 6	Simplex Industries, Inc.; Anthony Industries, Inc	$	C	157	S
Dec. 18	RSC Industries Inc.; Hoskins Manufacturing Co. (wholly-owned by Armada Corp.).	$	C	71	U
1975					
Jan. 7	RSC Industries; Hoskins Manufacturing Co. (wholly-owned by Armada Corp.).	$	C	15	PS
Jan. 8	Hamilton National Life Ins. Co.; National Western Life Ins. Co	$	C	------------	S
Jan. 27	Hexagon Laboratories. Inc.; Pharma-Investment, Ltd. (Canada).	$	U	------------	S
Jan. 30	Envirotech Corp.; Esmil B. V. (Netherlands)	$	U	51	S
Jan. 31	United American Life Insurance Co.; Lincoln American Corp.	$	C	------------	PS
Feb. 13	Sterndent Corp.; Magus Corp. (a subsidiary of Cable Funding Corp.).	$	C	60	U
Feb. 20	Westrans Industries, Inc.; Aquitaine Pennsylvania, Inc. (wholly-owned subsidiary of Aquitaine Co. of Canada Ltd.).	$	C	8	S
Mar. 7	Wisconsin National Life Insurance Co.; N.V. The Netherlands Insurance Co. (Netherlands).	$	C	------------	S
Mar. 13	Millmaster Onyx Corp.; Kewanee Oil Co	$	C	109	S
Apr. 11	Ingress Manufacturing Co., Inc.; Universal-Rundle Corp.	$	C	------------	S
Do	Fed-Mart Corp., Hugo Mann (West Germany)	$	C	16	S
Apr. 21	Universal Oil Products Co.; Signal Companies, Inc.	$	C	68	PS
Apr. 24	Polumbus Corp.; W. R. Grace & Co	$	U	------------	PS
Apr. 28	Vail Associates, Inc.; Contran Corp	$	C	57	U
Do	DHJ Industries, Inc.; Dominion Textile Ltd. (Canada).	$	C	3	S
Apr. 30	S. Riekes & Sons, Inc.; Alco Standard Corp	$	U	2	S
May 5	Commonwealth Oil Refining Co., Inc.; Tesoro Petroleum Corp.	$	U	------------	S
May 7	Sangamo Electric Co.; Schlumberger Electric Co. (Netherlands).	$	C	80	PS
May 21	Data Card Corp.; Deluxe Check Printers, Inc	$	C	------------	S
June 4	Philipsborn Inc.; Outlet Co	$	C	------------	S
June 13	Interstate Brands Corp.; DFP, Inc	$	C	49	PS
June 23	Helme Products, Inc., General Cigar Co., Inc	$	C	15	S
July 7	Apco Oil Corp.; Northwest Energy Co	$	U	142	S
	Alaska Interstate Co	$	C	8	U
July 25	Roberts & Porter, Inc.; Altair Corp	$	C	------------	U
July 7	Baird-Atomic, Inc.; Xonics, Inc				Pending.
July 24	Valhi, Inc.; Farnham Corp				Do.
	Contran Corp				Do.
Aug. 19	Anaconda; Crane				Do.
Sept. 2	Copperweld Corp.; Imetal (France)				Do.
Sept. 3	Imodco, Inc.; Amtel, Inc				Do.
Sept. 5	USM Corp.; Emhart Corp				Do.
Sept. 12	Coffee-Mat Corp.; Flagstaff Corp				Do.
Sept. 16	Anchor Coupling Co., Inc.; Amerace Corp				Do.

$=cash tender; X=exchange of shares tender; C=contested; U=uncontested; S=successful; U=unsuccessful; PS=partially successful.

DURATION OF TENDER OFFERS (INCLUDING EXTENSIONS), JAN. 1, 1975, THROUGH DEC. 31, 1975

0 to 15 days	16 to 30 days	31 to 60 days	Over 60 days	Withdrawn, abandoned etc.[1]	Continuing as of March 1976
5	16 28	31 45	63	[4]0	17+
11	16 29	31 47	64	8	31+
11	16 29	32 47	[3]72	11	32+
12	17 29	32 48	74	12	[2]90+
12	18 29	32 48	99	13	[2]115+
13	18 29	32 48	[2]99	14	....
14	19 [2]30	32 50	101	18	....
15	21	33 51	106	22	....
15	21	34 54	108	22	....
....	22	35 54	127	26	....
....	23	36 [2]56	[2]171	54	....
....	26	36 58	[2]173	61	....
....	26	38 59	[2]272	64	....
....	27	40 60	....	177	....
....	28	43	....	....	....
9	22	29	13	14	5

Note: Median: 38 days, excluding tenders continuing as of March 1976. Mean: 45 days, excluding tenders continuing as of March 1976.

[1] To date of withdrawal, abandonment, etc.
[2] From filing date earlier than commencement date.
[3] From commencement date earlier than filing date.
[4] Filed, but never commenced.

Memorandum from: Ruth D. Appleton, Chief, Office of Tender Offers, Acquisitions and Small Issues Division of Corporation Finance.

Re List of Tender Offers for Calendar year 1975 reflecting commencement date and expiration date.

Attached is a list of the tender offers for the period from January 1, 1975 through December 31, 1975 which identifies both the offeror and the target company; a description of the offer (including the amount of stock, if any, owned by the offeror at the time of the filing); the date the offer commenced; the original expiration date; the number of extensions; the final expiration date; and the total number of days that the offer remained open, with appropriate explanations where deemed necessary.

While the average length of all tender offers during the period was approximately 40 days, numerous factors may impact on those offers which last longer than the stated original expiration date:

(1) Litigation over the adequacy of disclosure, precluding purchases during the pendency of such court action.

(2) Compliance with certain state take-over statutes.

(3) The desired minimum is not met prior to the offer's initial expiration.

(4) Certain offers require prior approval of other regulatory agencies—e.g., state insurance commissioners or bank regulatory authorities.

(5) Exchange offers typically require registration under the Securities Act of 1933.

(6) Competitive bids may develop, thereby causing the original offerors to simultaneously extend its offer and to increase its consideration.

(7) Offers may be conditioned upon prior shareholder approval, acceptance of creditor's committees for companies in bankruptcy and other non-conventional situations which cause such offers to be extended until such conditions precedent to purchase has been met.

(8) Offers may be sufficiently close to 90 or 100% of the total outstanding that the purchaser may extend its offer in an effort to obtain the balance of the publicly-held shares.

Attachment.

Target	Bidder	Description (number and class of shares; price)	Commencement date	Original expiration date	Extensions	Final expiration date	Total length of offer
Schlang & Co.	Dakota International Corp	192,500 common at $0.50 per share	Jan. 3, 1975	Feb. 3, 1975	1	Feb. 18, 1975	47
Hamilton National Life Insurance Co.	National Western Life Insurance Co.	All 500,000 shares outstanding at $7.50 per share.	Jan. 4, 1975	do	None	Feb. 3, 1975	[1]
Liberty Investors Life Insurance Co. (Tulsa, Okla.).	Florafax International, Inc	Common stock—all outstanding shares for cash at $0.08 net per share (Florafax owned 2,000,000 shares (31 percent) and a debenture convertible into 13,900,000 shares of common stock).	Jan. 17, 1975	Feb. 1, 1975	None	Feb. 1, 1975	16
National Dollar Stores, Ltd	Milton W. Shoong, Sr	6,000 common at $10 per share. Mr. Shoong, chairman of the board and president of National owned 32,350 shares (36.3 percent.)	do	Jan. 28, 1975	None	Jan. 28, 1975	12
Hexagon Laboratories, Inc. (Bronx, N.Y.).	Pharma-Investment Ltd. (Canada) (Boehringer Ingelheim GmbH (Germany) owns 74 percent of the voting power in Pharma.)	Common stock—all outstanding shares for cash at $6.60 per share. 6 percent convertible debentures—for cash at $200.43 net per $100 principal amount.	Jan. 27, 1975	Feb. 11, 1975	4	May 12, 1975	135
Hi-Shear Corp	Frank A. Klaus	100,000 common stock at $10 per share. Mr. Klaus owned 553,964 shares (41.65 percent).	do	Feb. 6, 1975	2	Feb. 21, 1975	26
Envirotech Corp	Esmil BV	668,000 common at $14.50 per share. Esmil BV owned 108,000 shares and had agreed to purchase 412,000 of the company's unissued shares.	Jan. 30, 1975	Feb. 19, 1975	None	Feb. 19, 1975	21
United American Life Insurance Co	Lincoln American Life Insurance Co.	All outstanding common at $3.75 per share; increased to $4.50. LAC owned 378,850 shares (43.6 percent).	Jan. 31, 1975	Feb. 24, 1975	1	Feb. 27, 1975	28
Concord Fabrics, Inc.[2]	AFW Fabric Corp	All outstanding 32 percent not owned by AFW (a family corporation of the Weinsteins who contributed their 68 percent in Concord).	Feb. 6, 1975	Mar. 5, 1975	None	[2]	
Accredited Hospital & Life Insurance Co. (St. Louis, Mo.).	Kiaga Inc	Common stock—all outstanding shares for cash at $4 net per share.	Feb. 7, 1975	Mar. 7, 1975	None	Mar. 7, 1975	29
Chomerics, Inc	Alyson Associates	103,000 common at $2 per share. (All sahres purchased were contributed to the Chomerics voting trust).	Feb. 10, 1975	Feb. 26, 1975	1	Mar. 26, 1975	46
Sterndent Corp.[2]	Magus Corp	1,080,000 common at $14. (70,555 shares were owned by a sister subsidiary of Cable Funding, Inc.)	Feb. 14, 1975	Mar. 3, 1975	None	Mar. 3, 1975	18
Westrans Industries, Inc	Aquitaine Pennsylvania, Inc	All outstanding common at $36 per share	Feb. 20, 1975	Mar. 7, 1975	1	Mar. 20, 1975	29
Trans Pacific Financial Corp	First Farwest Corp	398,410 common in exchange for common stock of First Farwest at the rate of 7 shares of First Farwest for each share of Trans Pacific.	Feb. 26, 1975	Mar. 31, 1975	1	Apr. 29, 1975	63

Farm & Ranch Financial, Inc. (Wichita, Kans.)	National American Life Insurance Co.	Common stock—all outstanding shares for cash at $5.20 net per share. (National owned 48,125 shares).	Mar. 18, 1975[4]	Apr. 1, 1975		None	Apr. 1, 1975	41
Wisconsin National Life Insurance Co. (Oshkosh, Wis.).	N.V. Insurance Co. (Netherlands)	Common stock—all outstanding shares for cash at $24 net per share.	Mar. 7, 1975	Mar. 26, 1975		1	Apr. 9, 1975	43
Midmaster Onyx Corp	Kewannee Oil Co	All common (80-percent minimum) at $18.55 per share.	Mar. 14, 1975	Mar. 31, 1975		2	Apr. 30, 1975	48
DHJ Industries Inc	Dominion Textile, Ltd	All 818,876 shares of common at $5 per share.	Mar. 20, 1975	Apr. 4, 1975		8	May 16, 1975	58
King International Corp	The Guy Group	350,000 common at $4.40 per share. (The group owned 58,200 shares.)	Apr. 9, 1975	Apr. 30, 1975		1	May 9, 1975	31
Loblaw Inc. (Buffalo, N.Y.)	Loblaw Cos., Ltd. (Canada)	Common stock—all outstanding shares for cash at $6 net per share. (The offeror, through a subsidiary and an affiliate, owned 76.23 percent of the outstanding common shares).	Apr. 9, 1975	May 1, 1975		3	July 25, 1975	106
National Tea Co. (Rosemont, Ill.)	do	Common stock—1,830,000 shares for cash at $7 net per share. (The offeror and its affiliates owned 59.27 percent of the outstanding common shares.)	do	do		4	July 18, 1975	99
Ingress Manufacturing Co., Inc	Universal-Rundle Corp	Any and all common at $9 per share	Apr. 11, 1975	Apr. 30, 1975		1	May 15, 1975	35
Fed-Mart Corp. (San Diego, Calif.)	Hugo Mann (West Germany)	Common stock—500,000 shares for cash at $25 net per share. (In addition, Mr. Mann will purchase 300,000 shares from Fed-Mart pursuant to an agreement.)	do	May 12, 1975		None	May 12, 1975	32
King International	Frank King, Herman King, and Maurice King.	200,000 at $4 per share—increased to $5 per share on Apr. 21, 1975. (132,382 shares were owned by the King brothers.)	Apr. 14, 1975	Apr. 25, 1975		1	Apr. 30, 1975	17
Commonwealth Oil Co	Tesoro Petroleum Corp	5,500,000 common at $11.50 per share	Apr. 19, 1975	Apr. 30, 1975		2	May 16, 1975	28
Universal Oil Products Co. (Des Plaines, Ill.)	Signal Co., Inc	Common stock—4,300,000 shares for cash at $21 net per share. (In addition, Signal will purchase 1,500,000 shares of Common stock from UOP at the same price.)	Apr. 21, 1975	May 2, 1975		None	May 2, 1975	11
Polumbus Corp	W. R. Grace & Co	All outstanding common at $15 per share. W. R. Grace purchased in escrow from the Polumbus and Nelson families 1,021,685 shares (82.6 percent).	Apr. 25, 1975	May 12, 1975		None	May 12, 1975	18
Vail Associates, Inc.[2]	Contran Corp	Common stock—250,000 shares for cash at $10 net per share.	Apr. 28, 1975	May 8, 1975		3	June 30, 1975	62
S. Riekes & Sons, Inc	Alco Standard Corp	All outstanding common at $11.40 per share.	Apr. 30, 1975	May 21, 1975		1	May 31, 1975	32
Pill & Puff, Inc	Midwest Health & Beauty Aids, Inc	Any and all shares of outstanding common stock at $4 per share (1st offer).	do	May 12, 1975		None	May 12, 1975	13
		Any and all outstanding common at $4 per share. (Midwest is wholly owned by the Stein group who are major shareholders of Pill & Puff. 47,700 shares were tendered pursuant to the offer which expired on May 12 and were purchased from Midwest by Pill & Puff on exercise of option granted by Midwest (2d offer).	June 5, 1975	June 23, 1975		None	June 23, 1975	19

Target	Bidder	Description (number and class of shares; price)	Commencement date	Original expiration date	Extensions	Final expiration date	Total length of offer
Sangamo Electric Co	Schlumberger Electric Co	All outstanding common at $23 per share	May 14, 1975	May 22, 1975	1	June 5, 1975	22
Total Energy Leasing Corp.[3]	Myer Steinberg	All outstanding common at $1 per share	May 12, 1975	June 2, 1975	None	June 2, 1975	20
Summers Electric Co. (Dallas, Tex.)	Summers Electric Co. Employee Stock Ownership Trust.	Common stock—50,000 shares for cash at $6.75 net per share. (The trust owned 30,165 shares of the common stock).	do	June 28, 1975	None	June 28, 1975	47
Morgan Adhesives Co	Bemis Co., Inc	316,245 common at $6.50 per share. Bemis owned 1,820,000 shares (69 percent).	May 20, 1975	June 6, 1975	1	June 20, 1975	32
Data Card Corp	Deluxe Check Printers, Inc	650,000 shares of common at $6.50 per share. (Deluxe owned a debenture convertible into 323,077 shares of data card).	May 21, 1975	June 16, 1975	None	June 16, 1975	21
American Videonetics Corp. (Sunnyvale, Calif.)	Omron Corp. of America (wholly owned subsidiary of Omron Tateisi Electronics Co. (Japan).	Common stock—300,000 shares for cash at $0.40 net per share. (Omron owned 80.7 percent of the voting stock of AVC).	May 28, 1975	June 18, 1975	2	July 14, 1975	46
Libby, McNeill & Libby	University Food Specialties, Inc	Any and all shares of common stock outstanding at $8⅛ per share; any and all outstanding 5 percent convertible subordinated debentures (due Jan. 15, 1989) at $700 per $1,000 principal amount of indebtedness. Universal owned 5,953,608 shares (61 percent).	May 29, 1975	June 13, 1975	1	June 23, 1975	26
Piper Jaffray Inc	Piper, Jaffray & Hopwood Inc	265,000 common shares at $10.50 per share. (Offeror is a wholly owned subsidiary of the company Shares acquired will be contributed to employee stock ownership trust).	May 30, 1975	June 27, 1975	None	June 27, 1975	28
Philipsborn, Inc. (Forestville, Md.)	Outlet Co	Common stock—all outstanding shares for cash at $1.50 net per share.	do	June 12, 1975	1	June 24, 1975	24
NN Investors Life Insurance Co., Inc. (Milwaukee, Wis.).	NN Corp	Common Stock—All outstanding shares for cash at $4.00 net per share. (NN Corp. owned 1,387,484 shares (82.5 percent)).	June 4, 1975	June 25, 1975	1	July 2, 1975	28
Taco Tico, Inc	Foley Family Corp	All outstanding common at $1.60 per share. (Daniel E., Robin B and D. Emnett Foley, controlling shareholders of Taco own the Foley Family Corp.).	June 10, 1975	July 9, 1975	1	July 19, 1975	39
GSC Enterprises, Inc. (Lincolnwood, Ill.)[2]	Sierra Capital Group, Clyde W. Engle, Roger L. Weston.	Common stock—500,000 shares for cash at $1.50 net per share. (The offerors own 1,214,900 shares (28.3 percent).)	June 12, 1975	June 27, 1975	30	Dec. 5, 1975	175
Diversified Realty Inc	The Montana Corp	140,000 shares of common stock at $0.30 per share. (Montana owned 27¼ percent of the outstanding common shares.)	June 19, 1975[4]	Aug. 31, 1975	1	Nov. 30, 1975	165
Interstate Brands Corp	DPF, Inc	Up to 1,000,000 shares of common stock at $14.50 per share.	June 16, 1975	June 27, 1975	3	Aug. 1, 1975	47

Helme Products, Inc.	General Cigar Co.	All 1,900,000 common shares outstanding at $13 per share. (On June 27 the offer was amended to increase the price to $13.25.)	June 23, 1975	July 3, 1975	1	July 10, 1975	17
Epko Shoes, Inc.	Epko Shoes, Inc.	248,243 shares of common stock at $8.50 per share. (K-B Marketing Systems, Inc., holder of 50.4 percent of the outstanding common shares, intends to enter into an agreement with Epko to purchase its assets.)	June 25, 1975	July 25, 1975	None	July 25, 1975	31
Rapoca Energy Corp. (Cincinnati, Ohio)	Field Resources, Inc. (wholly owned subsidiary of Field Enterprises, Inc.).	Common stock—all outstanding shares for cash at $10 net per share. Series B convertible preferred—all outstanding shares for cash at $200 net per share. Field owned 1,990,796 shares of common stock (81 percent).	July 2, 1975	July 30, 1975	1	Aug. 20, 1975	28
Baird-Atomic, Inc.	Xonics, Inc.	Proposed exchange for 51 percent of the Baird-Atomic, Inc., common based on ratio of 1 Xonics common for each 2.2 Baird common.				([7])	
Howmet Corp. (Greenwich, Conn.)	Pechiney Ugine Kuhlmann Corp. (wholly owned by Pechiney Ugine Kulmann (France) and Société d'Exploitations et d'Interets Chimiques et Metallurgiques (France)).	All outstanding common at $19 per share and 4½ percent convertible debentures at $630 net per $1,000 principal amount.	July 7, 1975	July 13, 1975	1	Aug. 7, 1975	30
Apco Oil Co.[2]	Alaska Interstate Corp.	Up to 1,500,000 shares of common stock (if at least 900,000 were tendered) at $17.50 per share.	do	July 21, 1975	None	July 14, 1975[8]	8
		Up to 1,200,000 shares of common stock at $23.50 per share.	July 14, 1975	July 26, 1975	1	Sept. 5, 1975[9]	54
Apco Oil Corp.[2]	Northwest Energy Co.	1,500,000 shares of common stock at $20 per share.	July 10, 1975	July 28, 1975	None	July 21, 1975[8]	12
		1,500,000 shares of common stock at $25 per share.	July 22, 1975	Aug. 1, 1975	1	Sept. 19, 1975	60
Universal Acceptance Corp.	The Montana Corp.	Any and all outstanding common shares at $0.50 per share. (Montana owned 36.5 percent of the outstanding common shares).	July 17, 1975[10]	Aug. 31, 1975	None	Aug. 31, 1975	46
Ajax Magnethermic Corp. (Warren, Ohio).	Guthrie Delaware, Inc. (wholly owned subsidiary of Mindustrial B. V., Netherlands).	Common stock—all outstanding shares for cash at $50 net per share.	do	Aug. 14, 1975	None	Aug. 14, 1975	28
Securities Intermountain, Inc.	First Security Corp.	Exchange offer of 2 shares of Securities Intermountain, Inc., for each share of First Security Corp.	Feb. 18, 1975[10]	Aug 7, 1975	None	Aug. 7, 1975	20
Valhi, Inc. (Houston, Tex.)[2]	Contran Corp.	Common stock—150,000 shares for cash at $20 net per share.	July 21, 1975	Aug. 2, 1975	None	July 31, 1975	10
Do[2]	Farham Corp.	Common stock—all outstanding shares for cash at $22 net per share. (An amended offer was filed on Aug. 4 increasing the price per share to $28)	July 24, 1975	Aug. 4, 1975	1	Aug. 14, 1975[11]	48

Target	Bidder	Description (number and class of shares; price)	Commencement date	Original expiration date	Extensions	Final expiration date	Total length of offer
Roberts & Porter, Inc.	Altair Corp.	203,000 common at $7.50 per share. (The offer is equivalent to $9.37 per share before the 25 percent common stock dividend distributed on Apr. 2).	July 25, 1975	Aug. 15, 1975	None	Aug. 15, 1975	21
Corduroy Rubber, Inc. [2]	Corduroy Rubber, Inc.	Any and all outstanding shares at $200 per share.	July 31, 1975			([13])	
Valhi, Inc. (Houston, Tex.) [3]	Contran Corp.	Common stock—250,000 shares for cash at the increased price of $27.50 net per share. (The amended offer also increases the number of shares from 150,000 shares).	do	Aug. 11, 1975	2	Aug. 31, 1975	14
Copperweld Corp.	Societe Imetal	Any and all outstanding shares of common stock at $42.50 per share; and any and all outstanding 5-percent convertible debentures at $1,517.86 per $1,000 principal amount of debentures. (Changed to $40.48 and $1,529 respectively on Nov. 13, 1975.)	Sept. 3, 1975	Sept. 11, 1975	8	Dec. 10, 1975	97
USM Corp.	Emhart Corp.	Up to 1,000,000 shares of common stock at $23 per share. Emhart owned 1,241,500 shares (30 percent) of the outstanding common shares.	Sept. 8, 1975	Sept. 19, 1975	2	Nov. 10, 1975	64
Epic Corp.	Ecco, Inc.	Any and all common stock at $1. (Epic acquired 1,613,504 shares of common stock (94 percent) in exchange for a like number of Ecco common from certain shareholders).	Sept. 11, 1975	Oct. 31, 1975	None	Oct. 31, 1975	50
Coffee-Mat Corp.	Flagstaff Corp.	Up to 360,000 shares of common-stock at $7.50 per share. (Flagstaff owned 475,218 shares (29 percent) of the outstanding shares).	Sept. 12, 1975	Sept. 22, 1975	None	Sept. 22, 1975	11
American Defender Life Insurance Co.	Employees Reinsurance Corp.	All outstanding shares at $80.59 per share.	do	Oct. 21, 1975	2	Jan. 16, 1976	121
National Insurance Co. of America	Protective Life Insurance Co.	All outstanding at $7 per share; increased to $8.50 per share. (Protective owned 106,109 shares class A common and 13,894 shares class B common (23.4 percent and 60.2 percent respectively) of the outstanding shares).	Sept. 15, 1975	Oct. 1, 1975	2	Nov. 7, 1975	52

Anchor Coupling Co., Inc. (Libertyville, Ill.).	Amerace Corp	Common stock—All outstanding shares for cash at $16 net per share.	Sept. 16, 1975	Oct. 6, 1975	1	Oct. 23, 1975	34
Kentucky Insurance Co	South Carolina Insurance Co	Any and all outstanding shares of common stock at $2.55 per share.	Sept. 22, 1975	Sept. 26, 1975	None	Sept. 26, 1975	4
Chomerics, Inc. (Woburn, Mass.)	Chomerics, Inc., Employee Stock Ownership Trust.	Common stock—20,000 shares for cash at $5 net per share. (The trust will purchase from Chomerics that number of shares to bring its total holdings to 100,000 shares; i.e., at least 80,000 shares).	Oct. 8, 1975	Oct. 28, 1975	None	Oct. 28, 1975	20
Dahlstrom Corp	Hillman Coal & Coke Co	Up to 25,000 shares of common stock at $12.50 per share. Later amended on Oct. 17, 1975, to remove the 25,000 limitation. Hillman owned 164,358 shares (43.8 percent).	Oct. 9, 1975	Oct. 21, 1975	2	Dec. 1, 1975	53
Otis Elevator Co.[3]	United Technologies Corp	4,500,000 common shares at $42 per share	Oct. 15, 1975	Oct. 27, 1975		(13)	
Otis Elevator Co	United Technologies Corp	All outstanding common at $42 per share	Nov. 4, 1975	Nov. 14, 1975	None	Nov. 14, 1975	10
National Insurance Co. of America[3]	Northern National Life Insurance Co.	All outstanding shares at $18 per share				(14)	
Baltimore Paint & Chemical Corp	ELT, Inc	Any and all outstanding shares of common stock at $14 per share. ELT owned 279,098 shares (48.6 percent).	Oct. 21, 1975	Nov. 12, 1975	1	Nov. 21, 1975	32
Belmont Industries, Inc	Raymond G. Perelman	All outstanding common at $1.50 per share. Perelman and his brother own 570,592 shares (54.8 percent).	Nov. 5, 1975	Nov. 21, 1975	3	(15)	
Missouri Portland Cement Co. (St. Louis, Mo.)	H. K. Porter Co., Inc	Common Stock—500,000 shares for cash at $24 net per share. Porter owned 384,864 shares (21.4 percent).	Nov. 6, 1975	Nov. 17, 1975	2	Dec. 8, 1975[16]	21
Nucleonic Products Co., Inc	Semiconductor Electronics Inc	Any and all outstanding shares of common stock at $3.50 per share. Thomson—CSF owns 312,000 shares (62.3 percent).	Nov. 10, 1975	Nov. 25, 1975	None	Nov. 25, 1975	16
The Anaconda Co	Crane Co	Offer to exchange $20 principal amount of Crane Co. 8 percent subordinated sinking fund debentures for each share of the Anaconda Co.	Nov. 11, 1975	Dec. 11, 1975	6	(15)	
Imodco, Inc	Amtel, Inc	Exchange of $14 principal amount of Amtel, Inc., 5 percent convertible installment note, plus $4 cash for each share of Imodco, Inc.	Nov. 12, 1975[17]	Dec. 10, 1975	None	Dec. 10, 1975	38
Grand Union Co. (Elmwood Park, N.J.	Cavenham USA Inc. (wholly owned subsidiary of Cavenham Ltd., England).	Common stock—1,900,000 shares in exchange for 11½ percent SF debentures of Cavenham (USA) in the ratio of $18 principal amount debentures for each share Grand Union.	Nov. 14, 1975[18]	Dec. 12, 1975	3	Jan. 21, 1976	67
American Chain & Cable Co., Inc. (Bridgeport, Conn.)	Babcock International Inc. (wholly owned by Babcock & Wilcox Ltd., England).	Common stock—all outstanding shares for cash at $27 net per share.	Nov. 18, 1975	Dec. 5, 1975	2	Jan. 30, 1976	62
Garlock, Inc	Colt Industries, Inc	Any and all shares of common stock at $32 per share (increased to $35 on Nov. 26, 1975).	Nov. 19, 1975	Nov. 26, 1975	3	Dec. 4, 1975	16

Target	Bidder	Description (number and class of shares; price)	Commencement date	Original expiration date	Extensions	Final expiration date	Total length of offer
Mechanics Building Materials Co., Inc.	Mechanics Building Materials Co., Inc., Employee Stock Ownership Trust.	Up to 198,266 shares of common stock at $1 per share.	Dec. 1, 1975	Dec. 31, 1975	2	Mar. 31, 1976	([19])
Microdot Inc.[3]	General Cable Corp	Any and all outstanding common stock at $17 per share.	Dec. 2, 1975[20]			Jan. 30, 1976[3]	0
Tidelands Capital Corp	Western Preferred Life Insurance Co.	2,100,000 common shares at $1.02 per share. (WPL owned 20,000 shares of common stock).	Dec. 5, 1975	Dec. 19, 1975	None	Dec. 19, 1975	14
Onan Corp	Hawker Siddeley Overseas Investment, Ltd.	Any and all outstanding shares of common stock at $32.50 per share. Purchaser is a wholly owned subsidiary of Hawker Siddeley Group, Ltd. Group and Studebaker-Worthington, Inc., which presently control the company by virtue of its ownership of all outstanding shares of class B common, have entered into a letter agreement whereby Group will acquire that number of shares of class B common which, when added to the number of shares tendered will bring Group's total ownership up to 1,100,000 shares.	Dec. 8, 1975	Dec. 22, 1975	None	Dec. 22, 1975	15
Missouri Portland Cement Co. (St. Louis, Mo.).	H. K. Porter Co., Inc	Common Stock—500,000 shares for cash at $26 net per share. The offer of Nov. 7 to purchase shares for cash at $24 was withdrawn.	Dec. 9, 1975	Dec. 12, 1975	2	Jan. 13, 1976	25
Warbern Packaging Industries	A. & E. Plastik Pak Co	All outstanding common at $8.50 per share	Dec. 19, 1975	Jan. 5, 1976	1	Jan. 16, 1976	35
Midwestern United Life Insurance Co	N.V. The Netherlands Insurance Co.	Any and all outstanding shares of common stock at $19 per share.	Feb. 26, 1976[21]	Mar. 17, 1976		([19])	[22] 21
Ameritel Enterprises, Inc	First Ohio Investment Group, Inc	50,000 class A common shares at $1 per share. First Group owned, or had right to acquire 25,500 class A common shares.	Dec. 20, 1975[23]	Feb. 3, 1976	1	Mar. 19, 1976	([19])

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Boyertown Burial Casket Co.[2]	Amedco, Inc	All outstanding common at $16 per share	Dec. 22, 1975	Jan. 23, 1976	1	Feb. 20, 1976	60
I-T-E Imperial Corp.[2]	Gould, Inc	Common stock—2,500,000 shares at $20 per share.	Dec. 23, 1975	Jan. 5, 1976	None	Jan. 5, 1976	13
I-T-E Imperial Corp. (Spring House, Pa.)	do	Common stock—1,000,000 shares for cash at $20 net per share. Gould owned 1,751,-657 shares (21 percent). The offer of Dec. 23, 1975, to purchase 2,500,000 shares was terminated and all shares tendered pursuant thereto were to be returned.	Jan. 5, 1976	Jan. 16, 1976	None	Jan. 16, 1976	11
Coast Catamaran Corp	The Coleman Co., Inc	Any and all outstanding shares of common stock at $3.75 per share. Conditioned upon the receipt of 85 percent of the shares sought and upon acceptance of the offer by 750 shareholders of record.	Dec. 26, 1975	do	1	Feb. 6, 1976	43

[1] 60 days, when purchased. Although the offer expired on Feb. 3, 1975, shares in this insurance company could not be purchased until the State insurance commissioner gave his approval which was given on Mar. 3, 1975.

[2] Tender offers were abandoned by the bidder—whether through litigation, minimum not met or never commenced.

[3] Withdrawn on Mar. 3, 1975 following shareholder suits.

[4] Filed Mar. 3, 1975.

[5] Filed Apr. 14, 1975.

[6] Filed June 11, 1975.

[7] Registration statement under the Securities Act of 1933 filed on July 7, 1975, but has neither become effective nor been withdrawn.

[8] Abandoned.

[9] Abandoned because of injunction entered on that date.

[10] Filed July 7, 1975.

[11] Court enjoined Farnham from making offer on Aug. 10, 1975.

[12] Offer withdrawn when shareholder approval not given.

[13] Pursuant to Oct. 29, 1975, U.S. district court order, the 1st United Technologies offer was abandoned with 2d offer permitted to be made following court approval.

[14] Although it filed a schedule 13D on Oct. 20, 1975, with regard to its proposed offer, Northern National did not commence its offer when Protective Life Insurance Co. increased its offer to $8.50 on the same date.

[15] Continuity.

[16] Porter's $24 offer withdrawn pursuant to court order; amended offer at $26 commenced on Dec. 9, 1975.

[17] Filed Sept. 3, 1975.

[18] Filed Apr. 25, 1975: registered exchange offer; staff review process continued from April to November.

[19] Still in progress.

[20] Never commenced.

[21] Filed Dec. 19, 1975.

[22] Expected.

[23] Filed Nov. 26, 1975.

[Report No. 486, House of Representatives, 85th Congress, 1st Session]

Prenotification of Merger

The Committee on the Judiciary, to whom was referred the bill (H.R. 7698) to amend the Clayton Act, as amended, by requiring prior notification of certain corporate mergers and acquisitions, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

History of the Bill

On January 7, 1957, H.R. 2143 was introduced by Mr. Celler, to amend the Clayton Act, as amended, to require advance notification of certain corporate mergers and acquisitions, to authorize the Federal Trade Commission to seek a court injunction to preserve the status quo in energy proceedings before the Commission, and to extend the coverage of section 7 of the Clayton Act, as amended by the Celler-Kefauver Act, so as to cover bank mergers accomplished by asset acquisitions. With certain modifications, the measure was similar to H.R. 9424 which was approved by the House in the 84th Congress and in amended form recommended favorably by the Judiciary Committee of the Senate.

Specifically, H.R. 2143 would require corporate parties to a proposed merger or acquisition, whose combined capital, surplus and undivided profits exceed $10 million, to furnish the appropriate Federal enforcement agency with advance notice of the proposed transaction and to wait for a period of 60 days after delivery of such notice before consummating the transaction. As part of the notice, certain enumerated information would have to be provided the agencies to enable them to assess the probable impact of the transaction on competition. For like purpose, the parties would also be required to furnish the appropriate agency within 30 days after request, such additional relevant information within their knowledge or control, as the agency may require. Such agency request would have to be made within 60 days after delivery of notice. An extension of time for filing the information could, however, be granted. Willful failure to file the required notice or to furnish the requested additional information would be subject to a penalty ranging from $5,000 to $50,000, recoverable in a civil action brought by the Attorney General. Failure by the Government to bring suit within the 60-day waiting period would not constitute approval of the transaction or prejudice the Government's right at a later date to challenge the legality of the merger or acquisition.

H.R. 2143 exempted from the notification and waiting requirements mergers and acquisitions involving small-business enterprises whose combined capital, surplus, and undivided profits amounted to $10 million or less. It also exempted 10 additional categories of corporate transactions which technically constituted acquisitions by 1 corporation of the stock or assets of another corporation, on the ground that notification and a waiting period in such instances was considered unnecessary to effectuate enforcement of section 7. Thus exempted were: (1) any acquisition or stock not exceeding 10 percent of the voting rights of the acquiring corporation: (2) any acquisition of stock having a fair market value of $2 million or less; (3) any acquisition of nonvoting stock; (4) any acquisition of assets having a fair market value of $2 million or less; or any acquisition of "stock in trade" used in the ordinary course of the transferring corporation's business; (5) any acquisition of bonds issued by the United States or any political subdivision thereof; (6) any acquisition of real property solely for office space or residential use; (7) any acquisition from the Government of the United States; (8) any acquisition of assets solely for the purpose of investment by banking institutions or insurance companies in the ordinary course of business; (9) any acquisition by a parent corporation of the stock or assets of a subsidiary corporation or acquisitions as between subsidiaries of a common parent corporation; (10) any merger or acquisition where a Federal regulatory agency is required to approve the transaction before it can become lawful and where such approval immunizes the transaction from section 7 of the Clayton Act.

Beyond these statutory exemptions, enforcement agencies would be required to waive all or part of the notice and waiting period requirements in appropriate cases and categories of cases having remote antitrust significance. Such waiver would be accomplished by the mandatory issuance of regulations issued 120 days after enactment of the bill, at which time the provisions relating to advance notice would take effect.

A second major provision of H.R. 2143 would amend section 15 of the Clayton Act to provide the Federal Trade Commission with authority to seek a district court order preventing and restraining violation of section 7, pending issuance of a complaint and completion of the Commission's administrative proceeding. This provision would give the Federal Trade Commission, which has concurrent jurisdiction with the Attorney General to enforce section 7 of the Clayton Act, authority similar to that already possessed by the Attorney General and private parties, to seek a preliminary court injunction to restrain the consummation of a merger or acquisition pending adjudication of its legality.

Finally, the bill was designed to plug a loophole in the provisions of section 7 dealing with bank mergers by covering consolidations in this area accomplished by asset acquisitions.

Hearings on H.R. 2143 and on H.R. 264, introduced by Mr. Keating, were held by this committee's Antitrust Subcommittee (Subcommittee No. 5) on March 6, 7, 8, 20, and 21, 1957, in the course of which, all interested persons and organizations were given opportunity to present their point of view. After consideration of the entire record of hearings, comprising some 448 pages, the Antitrust Subcommittee recommended favorable consideration of H.R. 2143, with amendments. The subcommittee recommended deleting from section 1 of the bill the provision encompassing bank mergers accomplished by means of asset acquisition. Changes in the substantive standards by section 7, the subcommittee believed, should most appropriately be considered in separate legislation.

Other amendments to section 1 of the bill recommended by the subcommittee were as follows:

First, a clarifying amendment to insure that notification and waiting requirements would be applicable only if the combined capital, surplus, and undivided profits of the acquiring and acquired corporations were in excess of a book value of $10 million.

Second, a change in language to prescribe with greater clarity what information was to be furnished pursuant to the notification requirement.

Third, substantive changes pursuant to which the enforcement agencies would be afforded 25 days rather than 60 days to request additional relevant information. Beyond this, the parties would be required to furnish this information within 25 days in lieu of 30 days specified in the bill as introduced. Also it was made clear that time for furnishing such additional information could be extended only upon request of the parties.

Fourth, it was made clear that the penalty sanction would be applicable only if a transaction has been consummated. It was also made clear that the sole remedy for willful failure to give notice or to furnish the required information was a civil action which could be brought only by the Attorney General.

Fifth, an amendment declaring it a misdemeanor for any officer or employee of an enforcement agency to make public, without authority, any information furnished pursuant to the bill.

In addition, the subcommittee recommended a provision making it mandatory for the enforcement agencies to waive all or part of the notification and waiting requirements in appropriate cases. It also recommended insertion of a new section 3 providing that enactment of notification and waiting requirements was not to affect or impair any rights heretofore legally acquired or to make lawful anything heretofore prohibited or made illegal by the antitrust laws.

Finally the Antitrust Subcommittee recommended exempting certain additional categories of transactions on the basis that notification and waiting requirements in such cases was unnecessary for effective enforcement of section 7 or had little antitrust significance. For this reason the exemptions of H.R. 2143 were extended to include: (1) any acquisition of an interest in land for the purpose of constructing plants for use in the conduct of business; or any acquisition of vacant industrial property; (2) any acquisition of stock of a corporation 75 percent of whose assets consisted of undeveloped or partially developed mineral, mining, or timberland properties; or any acquisition of the whole or any part of such properties; (3) any acquisition from the Government of any State or political subdivision thereof; (4) any acquisition by a banking institution of the assets of another banking institution; (5) any acquisition by a subsidiary corporation of the stock or assets of the parent corporation; (6) any acquisition of stock or assets pursuant to judicially or Government-agency supervised reorganization or dissolutions; (7) any acquisition by a corporation engaged wholly in religious, educational, or charitable activities; (8) any acquisition of stock or assets by any corporation in connection with financing or underwriting transactions where title to such stock or assets is acquired solely for collateral, underwriting, or security purposes.

This committee approved the various amendments recommended by the subcommittee and adopted two additional amendments. The first would enable the enforcement agencies to prescribe exemptions only from the waiting period provisions but not from the notification requirements. The second would exempt any acquisitions of stock or assets of any foreign corporation unless such foreign corporation transacts business in the United States and has a permanent establishment in the United States; or has stock or other share interest in a corporation transacting business in the United States.

The provisions of H.R. 2143 as thus amended were incorporated in the present bill, H.R. 7698, whose passage is recommended by the committee.

EXPLANATION OF BILL

The first paragraph of section 1 of the bill makes no substantive change in existing law. It removes a redundancy resulting from the fact that all transactions prohibited by the first paragraph of section 7, as amended by the Celler-Kefauver Act, are likewise prohibited by the second paragraph of that section. For that reason, the first paragraph of present section 7 is stricken as unnecessary.

The second paragraph of section 1 is a new provision. It requires that, if a corporation subject to the Clayton Act acquires the stock of another corporation engaged in commerce, where the combined capital, surplus, and undivided profits of the 2 exceed a book value of $10 million, the Attorney General and the Federal Trade Commission (or other appropriate commission or board) must be notified 60 days in advance of the transaction. The notice must set forth separately as to the acquiring and acquired corporations the name and address, nature of business, products or services sold or distributed, net sales for the last accounting year, a copy of the last annual report and balance sheet, and location of plants and trading area in which each product or service is sold.

Pursuant to this provision, corporations subject to the jurisdiction of the Federal Trade Commission (i.e., nonregulated corporations) would have to notify the Federal Trade Commission and the Attorney General 60 days in advance. Different considerations are applicable with respect to corporations subject to the jurisdiction of a Federal regulatory agency. Under section 11 of the Clayton Act, authority to enforce compliance with sections 2, 3, 7, and 8 of the act is vested in the Interstate Commerce Commission with respect to common carriers subject to the Interstate Commerce Act; in the Federal Communications Commission with respect to common carriers engaged in wire or radio communications or radio transmission of energy; in the Civil Aeronautics Board with respect to air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board with respect to banks, banking associations, and trust companies; and in the Federal Trade Commission with respect to all other characters of commerce. In addition, the last paragraph of Clayton Act, section 7, exempts therefrom corporate mergers or acquisitions duly consummated pursuant to authority given by the Civil Aeronautics Board, the Federal Communications Commission, the Federal Power Commission, the 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.

By virtue of these provisions, together with the fact that mergers and acquisitions among regulated corporations are in the great majority of instances subject to approval by the appropriate regulatory agency upon advance notice, section 7 of the Clayton Act has only limited application in this area. In view of these considerations, it is unnecessary for the notice and waiting period provisions of the bill to be extended to any transaction which requires the advance approval of a Federal regulatory agency, where such approval immunizes the transaction from the provisions of section 7. Section 1 (15) accordingly exempts such transactions from the requirements of the bill. Similarly where a Federal regulatory statute affords parties to a proposed merger or acquisition the right to seek advance agency approval and such approval is in fact sought; it is exempted from the notification and waiting requirements should the transaction as approved be immunized from the reach of section 7. By reason of the fact that the Attorney General has a right to intervene before the regulatory agency in a merger or acquisition proceedings, provision is made for assuring that the Attorney General is adequately informed of all such proposed transactions. This is accomplished by requiring the appropriate agency promptly to notify the Attorney General of any application for agency approval of a merger or acquisition.

There are isolated instances where approval by the regulatory agency for a merger or acquisition is not required, or where parties, in contravention of the statute, proceed without agency approval, or where agency approval does not immunize the transaction from section 7. In such cases the requirements of the present bill would be applicable so that advance notification would have to be furnished the appropriate regulatory agency and the Attorney General.

It will be noted that common carriers or other public utilities whose rates and practices are regulated by State or local regulatory bodies, rather than by Federal regulatory agencies are not covered by this measure. Consequently, the bill would not require notification in the case of any acquisition of stock or assets by any common carrier or other public utility which under any specific provision of State or local law requires the approval in advance of a State or local regulatory agency.

With further reference to the second paragraph of section 11 of the bill, a corporate merger or acquisition could not take place until 60 days after delivery of notice to the Federal Trade Commission (or other appropriate commission or board in the instances noted above) and the Attorney General. The 60-day period would begin to run immediately after delivery to the 2 agencies of the notice containing the prescribed information, although it would be sufficient if one agency were sent a copy of the notice sent the other. However, submission of part rather than all the information specifically enumerated in the notice provision would not constitute "delivery * * * of notice of the proposed acquisition."

In the case of a merger or acquisition requiring stockholder approval, the required 60-day notice may be given prior to final approval of the terms of the acquisition at the stockholder meeting. However, the required 60 days' notice need not be given until after stockholder approval, so long as 60 days are allowed to elapse after notice and before the effective date of the merger or acquisition. Likewise, notice of an acquisition of stock or assets need not be given until after execution of a contract for the acquisition provided the parties, before the consummation becomes effective, allow the required 60 days to elapse after giving notice.

Ordinarily the acquiring corporation will obtain all the information necessary to comply with the notification provision and will undertake to make delivery to the appropriate enforcement agencies. In that event the acquired corporation will have no obligation to notify the agencies of the proposed transaction. On the other hand, if a company which is party to a merger or acquisition refuses to make available to the other party information necessary to satisfy the notification requirement, then that company would have to submit its own notification to the enforcement agencies. Of course, should a corporation not know that its stock or assets are being acquired, it would not be subject to liability for failure to file notification.

Within 25 days after delivery of the notice, the enforcement agency may request from either party additional relevant information which is within that party's knowledge or control and the party must furnish such information within 25 days after request. As a convenience to business, an extension of time may be provided. By placing a 25-day limit on agency request for additional information, it will be necessary for the agency to examine the notification promptly and to determine without delay whether additional information is needed to assess the transaction's probable impact on competition. A similar responsibility is placed on the companies to furnish the information expeditiously. It is contemplated that in the normal case, the agency will obtain the additional information within 50 days after delivery of notice, which will afford it a 10-day period to determine whether action seeking preliminary injunction prior to consummation of the transaction is justified.

It is particularly important that the Federal Trade Commission or the Attorney General not make a request for additional information where the other agency has already made such request. In this connection it must be observed that under section 7, as under other provisions of the antitrust laws, the statutory mechanism contemplates concurrent enforcement by the Federal Trade Commission and the Attorney General. Experience over a number of years has demonstrated an absence for the most part of duplicative effort on their part. In the enforcement of section 7 as amended, for example, liaison procedures have been worked out so that either the Commission or the Department of Justice will have investigative and enforcement responsibility for a given merger or acquisition, but not both. This avoids the burdening of business with duplicating Government investigation and enforcement. The committee emphasizes that these liaison procedures must be complied with meticulously in the administration of this measure in order that there not be a duplicate request for additional information in any case. As soon as notice has been delivered, agreement should be reached as to which agency will handle the transaction and thereafter only the agency having responsibility in accordance with the agreement should take any action whatever.

As to the information which a company is required to furnish, not only must it be relevant to section 7, it must be within the knowledge or control of that company. The provision does not authorize the agency to require a concern to undertake new studies or to make market surveys. However, if such material has been compiled in the past and is available in the company's files at the time of request, it would, if relevant, falls within the category of information required to be furnished.

In the event an acquisition has been consummated and there has been willful failure to file notification or to furnish additional relevant information, the bill provides a civil penalty of not less than $5,000 or more than $50,000 which may be recovered only in an action brought by the Attorney General. On the other hand, if the parties to a proposed merger or acquisition decide against its consummation, no sanction is provided for failure to file notification or to submit additional information. Compliance with the reporting and waiting requirements does not constitute a condition precedent to a merger or acquisition, and consequently no action may be instituted challenging the legality of a transaction on the ground of such noncompliance. Moreover, a private party may not bring an action for damages or injunctive relief based on willful failure to notify or to furnish additional information; remedy for such failure is available only in a suit brought by the Attorney General.

In order that the corporate transactions affected by this bill might not be jeopardized by premature disclosure, the bill contains safeguards against unauthorized disclosure by Government personnel of information required to be furnished. It would be a misdemeanor for employees of the agencies receiving information to make it public without the authority of the appropriate Commission or Board or Attorney General. This prohibition against unauthorized disclosure does not apply, however, where the information furnished has already been made public in one form or another, or where a court directs the publishing of such information. It is not the purpose of this section of the bill to restrict in any way the use of this information in a court proceeding, or in any other manner necessary for the enforcement of the statute. Accordingly, the bill does not prohibit making public the information where this is done under the specific authority of the Commission or Attorney General. Nor does the bill prohibit making such information available to committees of the Congress.

An important feature of the bill is the declaration that failure of any of the enforcement agencies to request information or to interpose objection to a proposed merger during the 60-day period shall not constitute a bar to any subsequent action, proceeding, or investigation concerning the transaction in question. The reason for this provision is to make it clear that neither silence nor inaction by the enforcement agencies during the 60-day period is to be interpreted in any sense as constituting approval of the legality of the merger or acquisition; nor does the bill in any sense confer authority upon the enforcement agencies to give legal approval to any proposed merger or acquisition, either within or subsequent to the 60-day period.

The bill provides no authority for the enforcement agencies to exempt from the modification requirements any transaction beyond those specified in the bill itself. However, the bill provides broad authority to the enforcement agencies to waive, and requires them to waive, all or part of the waiting period requirements in situations where the competitive significance is remote. Such waivers may be granted on the basis of broad categories of cases, as well as on an individual case basis.

In the establishment of procedures or regulations for the granting of waivers, ample opportunity will be provided for full public hearings. Such procedures or regulations are to be established within 120 days of the date of enactment of this measure, and the taking effect of the notice and waiting period provisions is to be delayed until the end of this interval. The waiver procedures should also make adequate provision for processing waiver requests with a minimum of redtape, for avoiding duplication of effort between enforcement agencies, and for fixing the responsibility for administrative action by each agency so as to avoid giving those seeking waivers an election as to which agency to deal with.

In order to avoid interference with legal rights acquired prior to enactment of the amendments of section 7 contained in the present bill, section 3 reenacts protection for such rights in the same language as contained in section 7 when first enacted in 1914. The effect of this provision is to maintain without legal impairment any contractual right which was lawfully obtained by a corporation before this meaure shall have become law. At the same time, as in the similar provision contained in the original section 7, the bill makes it clear that such protection of existing legal rights does not make lawful anything which before the enactment of this measure was in violation of the antitrust laws.

Section 4 of the bill authorizes the Federal Trade Commission to bring suit in the United States district court, before a merger is consummated, to restrain and prevent violations of section 7. It also authorizes the Federal Trade Commission to seek maintenance of the status quo after the merger or acquisition has been completed. It is the specific intent of the committee that the Commission, under this provision, should not have greater authority than that enjoyed by the Attorney General under section 15 of the Clayton Act. By providing that in an injunctive proceeding brought by the Federal Trade Commission, the court shall have power to make such order as may be deemed just, it is made clear that the courts in acting upon a petition by the Commission for a stay will be guided by precisely the same considerations which obtain in a similar proceeding brought by the Attorney General under section 15.

If a preliminary injunction should be granted by the court, the Federal Trade Commission is required to proceed as soon as may be to a hearing and determination of the case. However, the court will retain jurisdiction to issue such further orders as may be appropriate at various stages of the Commission's administrative procedure. Thus, should the Commission be dilatory in the issuance of a complaint or in the determination of the case, the corporate parties could file a motion with the court at any time for an order vacating any preliminary injunction or restraining order or for such other action as the court in its discretion may deem necessay in the circumstances.

In addition to a broad exemption for proposed mergers and acquisitions where the combined capital, surplus, and undivided profits of the acquiring and acquired corporations are $10 million or less, the bill exempts from notification and waiting requirements a number of specific types of transactions that are not likely to have substantial antitrust significance, or that need not be reported in the interest of effective enforcement of section 7. These exemptions are set forth in 15 subparagraphs of section 1 of the bill.

Subparagraph (1) exempts any acquisition by a corporation of 10 percent or less of the voting rights of another corporation. The 10 percent figure includes stock currently acquired plus that already held by the acquiring corporation. Thus, where a corporation owns 5 percent of the voting stock of another and then purchases an additional 6 percent of the latter's voting stock, the transaction would not be excluded from the notification and waiting requirements since the acquisition would give the acquiring concern more than 10 percent of the voting rights in the acquired.

Subparagraph (2) excludes from notice and waiting requirements any acquisition of stock, in a single transaction or series of related transactions, where the fair market value of the consideration paid for such stock by the acquiring corporation is $2 million or less. This exemption seeks to insure exclusion of routine, de minimis stock acquisitions.

Subparagraph (3) exempts any acquisition of stock which does not increase, directly or indirectly, the acquiring corporation's share of voting rights in another corporation. For instance, if corporation A owned 25 percent of the voting stock of corporation B and then acquired nonvoting preferred stock in B for $4 million, the transaction would be exempt. However, if, in the same situation, A purchased preferred stock in B for $4 million which stock could be converted into voting stock, the transaction would not be exempt by this provision since A's share of voting rights in B would be indirectly increased. Moreover, the exemption excludes transactions such as the receipt of stock dividends, certain assertions of preemptive rights, as well as purchase by a corporation of any of its own outstanding stock.

Subparagraph (4) excludes any acquisition in a single transaction or series of related transactions, by one corporation of assets of another corporation if the fair market value of the consideration paid for such assets is $2 million or less. The amount of consideration paid by the acquiring corporation for any assets comprising stock in trade is excluded in computing the $2 million limitation. This means that any acquisition of assets comprising stock in trade, regardless of the amount involved, is exempted. On the other hand, asset acquisitions not consisting of stock in trade are exempted only if they are in the amount of $2 million or less. To illustrate, if a corporation should purchase $3 million in assets from another concern and $1½ million of those assets were to constitute stock in trade, the transaction would be exempted under this provision since the assets not comprising stock in trade would be less than $2 million.

The term "stock in trade" covers supplies and materials which the transferring corporation sells in the ordinary course of its business. It includes the sale of locomotives by a locomotive manufacturer to a railroad company; the sale of ships by a shipbuilding concern to a shipping line: and the sale of aircraft by a manufacturer to an airline. It is immaterial whether the equipment is manufactured to specification.

Subparagraph (5) exempts the acquisition by any corporation of bonds or other obligations without voting rights of any other corporation. It also exempts the acquisition of securities issued by the United States, or by any State, Territory, or insular possession thereof, or by any political subdivision, public agency or instrumentality of the foregoing. Excluded by this provision would be countless transfers of bonded indebtedness which do not involve acquisition of voting rights.

Subparagraph (6) affects three types of transactions. First, it exempts any acquisition of real property, primarily for office space or nontransient residential use.

Second, the provision excludes any acquisition of an interest in land primarily for the purpose of constructing plants or other facilities for use in the conduct of business. This provision is designed to remove from advance notification any purchase of land which is to be used by the purchasing corporation for the building of facilities essential to the operation of its business.

Finally, any acquisition of vacant industrial property is exempted.

Subparagraph (7) pertains to corporations engaged in mineral, mining, or timberland operations. Such companies constantly acquire properties to hold in reserve for future operations. In some instances the corporation will, in the ordinary course of business, obtain an interest in such property by acquiring stock or other share capital in the corporation which owns the property. In other instances it will purchase the property directly from the owner, or acquire a lease in the property. In this context the bill exempts any acquisition of (1) stock or other share capital of a corporation, 75 percent or more of the market value of the assets of which consist of undeveloped or partially developed mineral, mining, or timberland properties, or (2) the whole or any part of such undeveloped or partially developed mineral, mining, or timberland properties.

The term "mineral" includes oil, gas, and coal properties. The phrase "partially developed mineral, mining or timberland properties" includes properties which have been exploited to a limited extent, but which are not being operated as business properties at the time they are acquired. For instance, it is common in the mining industry for a mine to be operated for a time and then shut down. The acquisition by a corporation of a shutdown mine for the purpose of increasing its reserves would be considered partially developed mining property and, therefore, would be exempted from the reporting requirements of the bill. Also in the category of partially developed mining property would be a situation where the discoverer of a new mineral deposit produces only a limited amount of mineral to determine the size, nature and scope of the mineral property. On the other hand, if a mine were acquired while it was producing ore on a commercial scale, the transaction would not be exempt.

Subparagraph (8) covers acquisitions from governmental agencies. It excludes from the notification and waiting period requirements any acquisition by a corporation from the Government of the United States, or from the government of any State, Territory, or insular possession thereof, or from any political subdivision or public agency or instrumentality of one or more of the foregoing. This provision would insure that premerger notification would in no way conflict with notification and clearance procedures Congress has specified for disposal of particular Government property. Each separate disposal statute, not this general premerger notification provision, would control.

Subparagraph (9) has two purposes. The first is designed to exempt ordinary investments by any bank, banking association, trust company or insurance company. Specifically, it exempts acquisitions of assets, other than voting share capital, by such companies which are solely for the purpose of investment. For example, the acquisition of property, solely for investment, under a purchase and lease-back arrangement would be exempt. As a further example, this provision would exempt asset acquisitions pursuant to the exercise of remedies provided in a security instrument in the event of default, such as the remedies of foreclosure or power of sale as authorized by the laws of the various States.

The second purpose of subparagraph (9) is to exempt bank mergers accomplished by asset acquisitions. Since neither the Attorney General nor the Federal Reserve Board is given authority by this bill to proceed against such transactions under section 7, enforcement of the section would not be effectuated by having these agencies notified in advance of such transactions.

Subparagraph (10) is aimed at excluding transactions between a parent corporation and subsidiary, as well as between two subsidiaries with a common parent. Thus, if a corporation owning more than 50 percent of the outstanding voting stock of a subsidiary corporation, acquires additional stock or assets from the subsidiary, such transaction would be exempted. Moreover, if more than 50 percent of the outstanding voting stock of 2 corporations is owned, directly or indirectly, by a single parent corporation, stock or asset acquisitions as between the subsidiaries would be exempt. Finally, the provision exempts stock or asset acquisitions by subsidiary corporation from the parent corporation where the parent owns more than 50 percent of the outstanding voting stock of the subsidiary.

Subparagraph (11) exempts any acquisition of stock or assets pursuant to judicially or Government-agency supervised reorganizations or dissolutions.

Subparagraph (12) exempts any acquisition, solely for purpose of investment, of stock or assets by any corporation engaged wholly in religious, educational, or charitable activities.

Subparagraph (13) exempts transactions which involve the transfers of title to stock, other share capital, or assets by one corporation to another solely for collateral, underwriting, or security purposes. Thus, the provision exempts a transaction where an underwriter, dealer, or broker acquires title to stock in connection with the marketing of such securities; or a transaction where a corporation acquires title to assets of another corporation only as security for a loan.

Subparagraph (14) pertains to acquisition by American corporations of the stock or assets of foreign corporations. If a foreign corporation does not transact business in the United States and has no stock or share interest in a corporation transacting business in the United States, acquisition of its stock or assets would be exempted. Conversely, if the foreign corporation transacts business and has a permanent establishment in this country, acquisition of its stock or assets would be subject to the requirements of this measure. Similarly, if a foreign corporation owns any stock in a concern transacting business in the United States, the provisions of the bill would be applicable.

Finally, subparagraph (15) exempts any merger or acquisition where a Federal regulatory agency is required to approve the transaction before it can become lawful and where such approval immunizes the transaction from section 7. However, it is incumbent upon the appropriate regulatory body promptly to notify the Attorney General of any application or request for such approval.

CHANGES IN EXISTING LAW

In compliance with clause 3 of rule XIII of the House of Representatives, there is printed below in roman existing law in which no new change is proposed, the matter proposed to be stricken out is enclosed in black brackets, and a new matter proposed to be added is shown in italic:

SECTIONS 7 AND 15 OF AN ACT APPROVED OCTOBER 15, 1914, AS AMENDED (15 U.S.C. 18 AND 25)

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, *directly or indirectly*, 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 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 substantially to lessen competition.]

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, directly or indirectly, 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 stock or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen completion or to tend to create a monopoly.

No corporation subject to the provisions of this Act shall acquire, directly or indirectly, the whole or any part of the stock, other share capital or assets of one or more corporations engaged in commerce, where the combined capital, surplus, and undivided profits of the acquiring and the acquired corporations are in excess of a book value of $10,000,000, until sixty days after delivery to the Commission or Board vested with jurisdiction under the first paragraph of section 11 of this Act and to the Attorney General of notice of the proposed acquisition. This notice shall include, separately as to the acquiring and acquired corporations: (1) the name and address; (2) the nature of business and products or services sold or distributed; (3) net sales for the last accounting year; (4) copy of last annual report and balance sheet; and (5) location of plants and trading area in which each product or service is sold. The parties shall furnish within twenty-five days after request therefor, such additional relevant information within their knowledge or control as may be requested within twenty-five days after delivery of notice of the proposed acquisition by the Commission or Board vested with jurisdiction under section 11 of this Act or by the Attorney General: Provided, That upon request of the parties the Commission or Board or Attorney General may extend the time for furnishing such additional relevant information. If any party to an acquisition which has been consummated, has willfully failed to give the required notice or to furnish the required information, such party shall be subject to a penalty of not less than $5,000 or more than $50,000, which may be recovered in a civil action brought by the Attorney General. No other person shall be entitled to sue either party to the acquisition for failure under this paragraph to give notice or to furnish the required information and such penalty shall be the sole remedy for willful failure to give notice or to furnish the required information. Any officer or employee of the Commission or Board vested with jurisdiction under section 11 of this Act or of the Department of Justice, who shall make public any information furnished to the Commission or Board or Attorney General pursuant to the provisions of this paragraph, without the authority of the Commission or Board or Attorney General, unless directed by a court, or unless such information has already been made public, shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine not exceeding $5,000 or by imprisonment not exceeding one year, or both. Failure by the Federal Trade Commission, the Attorney General or other appropriate agency to request additional relevant information pursuant to this paragraph or to interpose objection to such acquisition within the sixty-day *period shall not bar the institution at any time of any action or proceeding with respect to such acquisition under any provision of law. The Commission or Board vested with jurisdiction under section 11 of this Act, after consultation with and upon approval of the Attorney General, shall establish procedures for the waiver by the appropriate Commission or Board and the Attorney General and such Commission or Board and the Attorney General shall waive all or part of the waiting requirements in appropriate cases and in categories of cases where a waiting period is deemed unnecessary to effectuate enforcement of this section of this Act: Provided, however, That such procedures may be amended from time to time as the Commission or Board, upon the approval of the Attorney General, considers appropriate.*

The notification and waiting period provisions of the preceding paragraph shall not apply to the following:

(1) Any acquisition of stock when the stock acquired or held does not exceed 10 per centum of the voting rights, as represented by the voting stock or other voting share capital, of the corporation in which the stock is acquired;

(2) Any acquisition of stock in a single transaction or series of related transactions, unless the fair market value of the consideration paid for such stock in such transaction or transactions exceeds $2,000,000;

(3) Any acquisition of stock which does not increase, directly or indirectly, the acquiring corporation's share of voting rights in any other corporation;

(4) Any acquisition, in a single transaction or series of related transactions, by one corporation of assets of any other corporation if the fair market value of the consideration paid for such assets in such transaction or transactions (after deducting the portion thereof comprising stock in trade used in the ordinary course of the transferring corporation's business, and transferred by such acquisition) does not exceed $2,000,000;

(5) Acquisition by any corporation of bonds or other obligations without voting rights of any other corporation, securities issued by the United States, or by any State, Territory, or insular possession thereof, or by any political subdivision or public agency or instrumentality of one or more of any of the foregoing;

(6) Any acquisition of real property, primarily for office space or nontransient residential use; any acquisition of an interest in land primarily for the purpose of constructing plants or other facilities for use in the conduct of business; or any acquisition of vacant industrial property;

(7) Any acquisition of (i) stock or other share capital of a corporation 75 per centum or more of the market value of the assets of which consist of undeveloped or partially developed mineral, mining, or timberland properties, or (ii) the whole or any part of such undeveloped or partially developed mineral, mining, or timberland properties;

(8) Any acquisition by any corporation from the Government of the United States, or from the Government of any State, Territory, or insular possession thereof, or from any political subdivision or public agency or instrumentality of one or more of any of the foregoing;

(9) Acquisition, solely for the purpose of investment, of assets, other than voting stock or other voting share capital, by any bank, banking association, trust company, or insurance company, in the ordinary course of its business; acquisition by any bank, banking association, or trust company of the assets of another bank, banking association, or trust company;

(10) Acquisition of stock, other share capital, or assets of any corporation, if the acquiring corporation, prior to such acquisition, owned, directly or indirectly more than 50 per centum of the outstanding voting stock of the corporation whose stock, other share capital, or assets are acquired, or if more than 50 per centum of the outstanding voting stock of the acquiring corporation is owned, directly or indirectly, by a corporation which, prior to such acquisition, owned directly or indirectly, more than 50 per centum of the outstanding voting stock of the corporation whose stock, other share capital, or assets are acquired, or if more than 50 per centum of the outstanding voting stock of the acquiring corporation is owned, directly or indirectly, by the corporation from which the stock, other share capital, or assets are acquired;

(11) Any acquisition of stock, other share capital, or assets pursuant to judicially or government-agency supervised reorganizations or dissolutions;

(12) Any acquisitions of stock, other share capital, or assets, solely for the purpose of investment, by any corporation engaged wholly in religious, educational, or charitable activities;

(13) Any acquisition of stock, other share capital, or assets by any corporation in connection with financing, refinancing, borrowing, or underwriting transactions where title to such stock, other share capital, or assets is acquired solely for collateral, underwriting, or security purposes;

(14) Any acquisition of stock, other share capital, or assets of any foreign corporation unless such foreign corporation: (1) transacts business in the United States, its Territories, or possessions, and has a permanent establishment in the United States, its Territories, or possessions; or (2) has a stock or other share interest in a corporation which transacts business in the United States, its Territories, or possessions;

(15) Any acquisition of stock or assets which, under any specific provision of law, requires the approval in advance of a commission or board or other agency of the United States, and when so approved is exempt under any specific provision of law from the provisions of this section: Provided, however, That any commission, board, or agency of the United States which is authorized by law to approve the acquisition by one corporation of the stock or assets of another corporation where by virtue of such approval such acquisition is exempted from the provisions of this section shall promptly notify the Attorney General of any application or request for such approval.

Except for the provisions of the two preceding paragraphs this section shall not apply to corporations purchasing 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 substantially to lessen competition.

The second and third paragraphs of section 1 of this Act shall take effect one hundred and twenty days after their enactment. The procedures for the waiver by the appropriate commission or board and the Attorney General of all or part of the waiting requirements in appropriate cases and categories of cases required by the second paragraph of section 1 of this Act shall be established within one hundred and twenty days after enactment of this Act.

Nothing contained in the first and second paragraphs of section 1 of this Act 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.

SEC. 15. That the several district courts of the United States are hereby vested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not, and subpenas so that end may be served in any district by the marshal thereof.

Whenever the Federal Trade Commission has reason to believe—

(1) that any corporation subject to its jurisdiction is acquiring or has acquired stock or assets of another corporation in violation of the provisions of section 7 of this Act; and

(2) that the enjoining of such acquisition or the maintenance of the status quo after acquisition pending the issuance of a complaint or the completion

of proceedings pursuant to a complaint by the Commission under this section and until such complaint is dismissed by the Commission or set aside by the court on review, would be to the interest of the public,

the Commission, by any of its attorneys designated by it for such purpose, may bring suit in a district court of the United States to prevent and restrain violation of section 7 of this Act or to require maintenance of the status quo. Any such suit may be brought in any district in which the acquiring or the acquired corporation resides or transacts business. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited, and the court may make such temporary restraining order or prohibition as shall be deemed just in the premises. In any case where injunction or restraining order is granted under this paragraph, the Federal Trade Commission shall proceed as soon as may be to the issuance of the complaint and to the hearing and determination of the case.

[For immediate release, Tuesday, April 25, 1961]

DEPARTMENT OF JUSTICE

Attorney General Robert F. Kennedy today asked Congress to strengthen antitrust enforcement by enacting premerger notification and civil investigative demand bills.

The premerger notification measure, already introduced in the House by Representatives by Emanuel Celler, would require large firms to inform the Department of Justice before merging.

The civil investigative demand measure, already introduced in the Senate by Senator Estes Kefauver, would empower the Department to compel firms to turn over records believed pertinent to antitrust investigations.

"Neither of these measures changes the substance of the antitrust statutes." Mr. Kennedy said. "They provide, however, new and necessary tools for enforcement of the statutes.

"At present, we are virtually powerless when a firm flouts our request for information about a merger or about a possible civil violation of the Sherman or Claytons Acts. The impaired enforcement which results is damaging both to the public interest and to competing firms, trying hard to live up to the law."

The merger bill, an amendment to the Clayton Act, would require that the Department of Justice or other appropriate agencies would be notified prior to any merger resulting in a new firm with assets exceeding $10 million.

Mr. Kennedy said such advance notification would allow the Government to evaluate the competitive effect of a proposed merger and indicate whether it would object.

"The bill would greatly reduce the often costly difficulties of restoring already merged firms to their original status, following successful Government opposition in court," Mr. Kennedy said.

"Advance notification also would facilitate equal enforcement of the Clayton Act," he said. "It would prevent companies from merging secretly to gain advantage over law-abiding competitors." The Celler bill sets the maximum penalty for willful failure to comply at a $50,000 fine.

A like bill also has been introduced in the House by Representative Wright Patman of Texas.

The second measure Mr. Kennedy called for would, in effect, provide the Department of Justice with civil subpena power in antitrust investigations.

In present civil investigations, the Department must rely on documents submitted voluntarily.

"Knowing this," Mr. Kennedy said, "Many firms have refused to comply with or have only partially complied with requests from the Department for information."

In a few instances, where a criminal violation of the Sherman Act is possible, a grand jury can be convened to apply subpena powers. But generally, there now is no further action the Justice Department can take.

The new measure would permit the serving of a civil investigative demand for documents or records believed pertinent to antitrust investigation.

Court enforcement and a maximum penalty for noncompliance of 5 years imprisonment and a $5,000 fine are provided for in the bill.

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., May 2, 1961.

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR CONGRESSMAN CELLER: This is to express the views of the Department of Justice on the proposed bill H.R. 2882, to amend the Clayton Act, as amended, by requiring prior notification of corporate mergers and acquisitions, and for other purposes, which is now before your committee. This proposed legislation would require that the Department of Justice (or the appropriate Commission or Board vested with jurisdiction) be given 60 days' advance notice of proposed mergers or acquisitions where the companies involved have a combined capital structure in excess of a book value of $10 million.

Premerger notification would be of substantial aid to the Department of Justice in the enforcement of the Celler-Kefauver Act. By providing a systematic method of review of proposed mergers. H.R. 2882 would ease the investigative burden under this act. It would also enable the agencies charged with the enforcement of this act to move for preliminary injunctions in appropriate cases and avoid the difficulties involved in separating the commingled assets of previously merged companies. The bill would prevent companies from keeping secret their merger plans and thereby securing an advantage over other companies which seek to obey the requirements of the act.

In addition to its notice requirement, the bill also requires merging companies to submit relevant information to the agencies concerned. This would have the very important effect of enabling these agencies to promptly evaluate the competitive effects of proposed mergers or acquisitions and to take appropriate action. Such prompt action should be of benefit to companies contemplating mergers or acquisitions as well as to the Government.

Section 4 of the bill would permit the Federal Trade Commission to apply for preliminary injunctions in cases brought under the Celler-Kefauver Act. This would aid in the effective enforcement of this act by enabling the Commission to maintain the status quo prior to the completion of these proceedings.

The Department of Justice, for the foregoing reasons, strongly urges the enactment of H.R. 2882.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely,

ROBERT F. KENNEDY, *Attorney General.*

DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., April 25, 1961.

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice on the bill H.R. 2882, to amend the Clayton Act, as amended, by requiring prior notification of corporate mergers and acquisitions, and for other purposes.

Similar legislation was requested by the Department of Justice in a letter to the Speaker dated January 19, 1961, in which it was pointed out that such legislation would ease a most difficult investigative burden by requiring that the Department of Justice (or the appropriate Commission or Board vested with jurisdiction) be advised in advance of mergers of corporations where the combined capital, surplus, and undivided profits of the acquiring and acquired corporations are in excess of a book value of $10 million.

This dollar limitation eliminates any potential burden upon small business, while the measure provides a useful tool to enable the Government to learn of and evaluate proposed mergers which may have a significant effect upon the national economy. It should be emphasized that this bill does not contemplate the barring of mergers by virtue of executive branch disapproval of merger plans; it merely is a reporting act.

Premerger notification would insure to the agencies charged with the enforcement of the Clayton Act a chance to move for preliminary injunctions in appropriate cases, and to avoid the practical difficulties involved in restoring previously merged companies to their original competitive status. It would also systemize the process by which notices of mergers are sifted by these agencies and would thus enable more prompt action. Furthermore, it would facilitate equal enforcement of section 7 of the Clayton Act since companies could not secretly merge and thereby obtain an advantage over other companies conscientiously seeking to obey the requirements of the act. Finally, it would enable this Department of obtain information necessary to an evaluation of the competitive effect of a proposed acquisition, thus allowing the Government to indicate, for consideration by the companies involved, whether the Government will interpose objection in the courts. This should be of mutual benefit to business organizations and to the Government as well.

With respect to section 4 of the bill, permitting the Federal Trade Commission to apply for preliminary injunctions in section 7 cases, we believe the granting of such authority to the Commission would aid in the effective enforcement of the antitrust laws by enabling it to maintain the status quo prior to the completion of proceedings pending before it.

For the foregoing reasons, the Department of Justice strongly urges the enactment of H.R. 2882.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely yours,

BYRON R. WHITE,
Deputy Attorney General.

STATEMENT OF LEE LOEVINGER, ASSISTANT ATTORNEY GENERAL IN CHARGE OF THE ANTITRUST DIVISION, DEPARTMENT OF JUSTICE, ON H.R. 2882, APRIL 27, 1961

I appear today at your chairman's request to present the views of the Department of Justice on H.R. 2882. This bill contains two important procedural amendments to the Clayton and Celler-Kefauver Acts. The first of these amendments, and the one most directly affecting the Department of Justice, would require prior notification of corporate mergers and acquisitions, to the agencies possessing jursidiction to enforce the Celler-Kefauver Act. Bills requiring premerger notification have been before Congress for several years. I hardly need emphasize to you the importance of this legislation. It was your committee which favorably reported similar bills in the 84th and 85th Congresses and it was your chairman who introduced not only this bill but a number of its predecessors. I hope that this legislation will again receive your favorable consideration and that with your leadership it will be enacted during this Congress.

The premerger notification provisions of H.R. 2882 would provide an important aid in the enforcement of the Celler-Kefauver Act by the Department of Justice and the Federal Trade Commission. This act, probably the most important piece of antitrust legislation enacted in recent years, has served as an effective check upon mergers which would result in unwarranted increases in economic concentration or in other anticompetitive effects. This administration intends to continue the vigorous enforcement of the Celler-Kefauver Act. In this connection I would call your attention to the fact that the first three civil antitrust cases brought by the Department of Justice under his administration were brought at least in part under the Celler-Kefauver Act. Many more mergers are currently under investigation and although this is, of course, only a part of our antitrust program, I am confident that the enforcement of this act will continue to account for an important part of the work of the Antitrust Division.

The investigation of acquisitions and mergers for the purpose of discovering those involving violations of the Celler-Kefauver Act is performed by all four of the Division's litigating sections and by its six field offices. The extent of this task may be indicated by the fact that in 1960 the Antitrust Division made preliminary investigations of 1,250 mergers. Of these, 146 were considered to be of substantial competitive importance and were made the subject of further investigations. As a result of these investigations 13 merger cases were filed.

In this extensive sifting process H.R. 2882 would be of substantial aid. First, it would provide a more sure and efficient method of reviewing prospective mergers. At the present time the Antitrust Division staff must review a great volume of general and trade publications and financial manuals for this purpose. H.R. 2882 would eliminate the need for this procedure and would insure that all prospective mergers covered by its terms would be brought to the attention of the enforcement agencies.

Second, H.R. 2882 would provide the Division with the information necessary to an analysis of the competitive effects of each merger. The bill specifically requires the submission of certain basic information at the time that notice is given of the intended merger, and further provides for the submission of additional relevant information upon request by the Attorney General or by the Commission or Board concerned. Since even the basic information required by the bill is generally not contained in announcements of mergers appearing in the press, the Division staff must at the present time search among widely scattered sources for the information necessary to evaluate any merger which is believed to be of possible competitive significance. At best this process is time-consuming and inefficient. At the worst it may prevent prompt and adequate consideration of a merger since necessary information is often not available in any public sources, and answers to questions addressed to the merging companies are sometimes neither timely nor fully responsive.

I would add here a word of caution. Although H.R. 2882 would unquestionably increase the Department's efficiency in reviewing prospective acquisitions, I do not contemplate that it would reduce the Division's total workload under its merger program. In fact, the receipt of timely and relevant information concerning each important acquisition might well require some additional manpower. I believe, however, that the advantages to antitrust enforcement which would result from this bill would ~~more than~~ justify the possible additional expenditures of resources.

Providing the Government with prior notice and relevant information concerning proposed acquisitions and mergers would have two substantial enforcement advantages. Most important, it would give to the Department the opportunity to bring suit prior to the consummation of a merger. This is seldom possible at the present time since it requires both prior knowledge of the merger and sufficient time to obtain the information necessary to determine whether suit is warranted. When suit can be brought prior to consummation, however, it avoids the practical difficulties involved in the separation of already commingled businesses or of convincing a court to undertake this task. Further, it is of considerable advantage to companies contemplating merger since it permits a determination of legality before expenses of merger are incurred and avoids the damage to business which may be incident to an order of divestiture.

Finally, H.R. 2882 would insure uniform enforcement of the Celler-Kefauver Act. Pursuant to this bill, all important mergers would be subject to scrutiny well in advance of consummation. Companies could obtain no advantage by keeping secret their merger plans or by delay in responding to the Department's requests for information.

Although, as I have pointed out, H.R. 2882 would provide an effective aid to the enforcement of the Celler-Kefauver Act, it has at the same time been carefully drawn to apply only to those acquisitions where experience has shown anticompetitive effects are most likely. The burden which the bill would impose upon business is thereby kept to a minimum. Any possible burden on small business is avoided by limiting the application of the notice provisions to situations where the combined capital, surplus and undivided profits of the acquired and acquiring companies exceeds $10 million. Mergers of companies below this size are less likely to involve anticompetitive effects and it is therefore unnecessary to impose upon them the bill's notice provisions.

H.R. 2882 also exempts from its notice requirements a number of specific transactions not likely to have antitrust significance.

Subparagraph (1) of the bill exempts "any acquisitions of stock when the stock acquired or held does not exceed" 10 percent "of the voting rights." The 10 percent figure reflects the general assumption that 10 percent of corporate stock ownership does not indicate effective control. Acquisitions made with an eye to investment rather than to control are thus exempted.

Even where an acquisition of stock amounts to more than 10 percent voting control, it is exempted by subparagraph (2) when "the fair market value of the consideration paid for such stock" does not exceed $2 million. This exemption seeks to insure exclusion of routine de minima stock acquisitions where the percentage of control might be higher than 10 percent.

A related clause, section 1(4), exempts asset acquisitions of less than $2 million market value and exempts acquisitions of stock in trade entirely.

Acquisitions of stock which do not increase directly or indirectly the acquiring corporation's share of voting rights in any other corporation are exempted by subparagraph (5). This would exclude from the notice requirements of the bill the receipt of stock dividends, certain assertions of preemptive rights, and the purchase of the corporation's own outstanding stock.

Section 1(5) exempts acquisitions of bonds or other obligations without voting rights and specifically exempts municipal, State and U.S. bonds. Nonvoting security transactions generally raise few antitrust problems.

Acquisitions of real property primarily for office space, nontransient residential use, the construction of new plants, or use of vacant plant space are also exempted, pursuant to subparagraph (6), from notice requirements. This permits corporations to relocate, expand office facilities, or establish new offices, situations where anticompetitive effects are usually absent, without notifying the Government.

Under section 1(7) acquisitions of stock of a corporation, 75 percent or more of whose assets consist of undeveloped or partially developed mineral, mining, or timberland properties are excluded.

Acquisitions from the Government of the United States are exempted by section 1(8). This provision insures that premerger notification would in no way conflict with the notification and clearance procedures Congress has specified for disposal of particular Government property. The separate disposal statutes, not this general notification bill, should control.

Next, section 1(9) exempts acquisition of assets made solely for the purpose of investment and in the normal course of business by any banking organization or insurance company. This exempts routine asset investments by banks and insurance companies. This subparagraph also exempts acquisitions by one bank of the assets of another. Bank mergers are now subject to approval of the Federal banking agencies pursuant to the 1960 amendment of section 18 of the Federal Deposit Insurance Corporation Act, and the approval procedures established by that act insures that the Department receives advance notice of all bank mergers.

Section 1(10) provides exemption for acquisitions of stock or assets where the acquiring corporation, prior to such acquisition, already owns more than 50 percent of the stock of the acquired corporation. As a practical matter, such subsidiaries are already controlled and little purpose would be served by requiring notice of transactions between them.

Acquisitions made pursuant to judicial or Government agency supervised reorganizations or dissolutions are exempted by section 1(11), while (12) exempts acquisitions for the purpose of investment by religious, educational, or charitable corporations. These so rarely raise antitrust problems that they need not require notice.

Exempted by section 1(13) are acquisitions of stock or assets made solely for collateral, underwriting, or security purposes. Subparagraph (14) excludes acquisitions of stocks or assets of a foreign corporation not transacting business in the United States nor holding stock interest in a corporation which does so. Like most of the other exemptions considered, these transactions so rarely raise antitrust issues that they can well be eliminated.

Finally, section 1(15) exempts any acquisition which under specific provision of law requires the approval in advance of a commission or board or other agency of the United States, and when so approved is exempted from the provisions of the Celler-Kefauver Act. A proviso requires the commission, board, or agency with such powers to notify the Attorney General of any application or request for the necessary approval. This exemption would permit regulatory agencies to exercise their powers under their organic statutes unimpaired by the provision of this proposed law. Safeguarding, as this provision does, some notice of regulatory action to the Attorney General, transactions within this category should be exempt.

These exemptions, it should be underscored, apply only to premerger notification requirements and not to the substance of the Celler-Kefauver bill.

It should also be noted that the paragraph preceding section 2 of the amended bill, which repeats the act's present exemption for acquisitions intended "solely for investment" and which are not used for "the substantial lessening of competition" and the existing exemption for the legitimate establishment of a subsidiary when the effect is "not substantially to lessen competition," does not apply to the premerger notification provisions ("the two preceding paragraphs"). Unless exempted by the 15 provisions previously listed, therefore, even acquisitions intended "solely for investment" or for establishment of a legitimate subsidiary must be reported to the Attorney General. The defenses retained are defenses to the substantive features of the act, not further exemptions to its notification features.

In addition to lessening whenever possible the burden imposed by the bill's notice provisions, H.R. 2882 also recognizes the legitimate interest which companies may have in the confidential treatment of information submitted pursuant to the bill's requirements. To this end the bill provides for penalties for unauthorized disclosure of such information by any officer or employee of the enforcing agencies.

Failure to comply with the bill's notice and information requirements is punishable by a $5,000 to $50,000 fine. Here again the provisions of the bill are carefully limited and it is specifically provided that such penalty shall be the sole remedy for willful failure to give notice or to furnish the required information. This penalty may be recovered only by a civil action brought by the Attorney General.

The second major provision of H.R. 2882 is contained in section 4 of the bill which gives to the Federal Trade Commission authority to bring suit in the Federal district courts to prevent and restrain violations of the Celler-Kefauver Act or to require maintenance of the status quo pending the issuance of a complaint or the completion of proceedings pursuant to a complaint by the Commission. As I have pointed out earlier in my remarks, the problem of unscrambling the commingled assets of merging companies in a major barrier to effective relief in cases under this act. Permitting the Commission to bring suit to maintain the status quo pending the completion of its proceedings would enable the Federal Trade Commission to avoid this problem and would thereby provide an important aid to effective antitrust enforcement.

Both the premerger notification and the injunction provisions of H.R. 2882 would also serve the valuable purpose of eliminating existing differences between the powers of the Department of Justice and the Federal Trade Commission in the enforcement of the Celler-Kefauver Act. To the extent that the bill would give the Department the power to obtain relevant information from parties to a prospective acquisition it would parallel similar authority now possessed by the Commission under section 6(b) and 9 of the Federal Trade Commission Act. Similarly, the provisions enabling the Commission to bring suit for temporary injunctions would give the Commission authority now possessed by the Department under section 15 of the Clayton Act. Since the Department and the Federal Trade Commission have concurrent jurisdiction to enforce the Celler-Kafauver Act, I believe that any steps which can be taken to eliminate the present differences between the powers of these two agencies will result in more effective and uniform antitrust enforcement.

In conclusion, the need for the provisions of H.R. 2882 has long been felt both by the Department of Justice and the Federal Trade Commission. The present bill has evolved from a lengthy legislative history and has been carefully drawn to include the provisions necessary to achieve its objectives while at the same time avoiding all unnecessary burden upon business. I am sure that it will again receive your careful consideration and I recommend that it be enacted by this Congress.

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