

ANTITRUST CIVIL PROCESS ACT

FEBRUARY 26, 1962.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. ROGERS of Colorado, from the Committee on the Judiciary,
submitted the following

R E P O R T

[To accompany S. 167]

The Committee on the Judiciary, to whom was referred the bill (S. 167) to authorize the Attorney General to compel the production of documentary evidence required in civil investigations for the enforcement of the antitrust laws, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill do pass.

The amendments are as follows:

1. Page 2, line 6, following the "semicolon" insert the word "and".
2. Page 2, beginning at line 7 and through line 14, strike all of the language therein.
3. Page 2, line 15, strike subparagraph "(4)" and insert in lieu thereof subparagraph "(3)".
4. Page 2, line 17, strike the words "or antitrust agency".
5. Page 2, lines 22 through 25, strike all of the language therein.
6. Page 3, line 1, strike all of the language therein.
7. Page 3, line 2, strike subparagraph "(c)" and insert in lieu thereof subparagraph "(b)"; also on line 2, after the word "means" strike "any final".
8. Page 3, line 3, strike the words "order of any antitrust agency, or".
9. Page 3, line 7, strike subparagraph "(d)" and insert in lieu thereof subparagraph "(c)".
10. Page 3, line 11, strike subparagraph "(e)" and insert in lieu thereof subparagraph "(d)".
11. Page 3, line 14, strike subparagraph "(f)" and insert in lieu thereof subparagraph "(e)".
12. Page 3, line 18, strike subparagraph "(g)" and insert in lieu thereof subparagraph "(f)".

13. Page 3, line 21, strike subparagraph "(h)" and insert thereof subparagraph "(g)".
14. Page 3, line 25, strike subparagraph "(i)" and insert thereof subparagraph "(h)".
15. Page 4, line 8, strike the word "an" and insert in lieu thereof "a civil".
16. Page 7, line 3, after the word "writing" and before the thesis, insert "or as the court may direct, pursuant to section 5 of this Act".
17. Page 7, line 14, after the word "General" strike the "co:" and insert in lieu thereof a "period"; also after the word "Ge" strike "to have access to"; and on line 15 strike the words material for examination".
18. Page 7, line 19, insert "period" after the word "Justice" strike the word "or".
19. Page 7, line 20, strike the words "any antitrust agency".
20. Page 8, line 2, after the word "court" strike the "comma" insert the word "or".
21. Page 8, line 3, after the word "jury" strike ", or anti agency".
22. Page 8, line 11, after the word "court" strike the "comma" insert the word "or".
23. Page 8, line 12, after the word "jury" strike ", or anti agency".
24. Page 8, line 19, after the word "Justice" strike "or any".
25. Page 8, line 20, strike "antitrust agency".
26. Page 8, line 21, after the word "court" strike the "comma" insert the word "or", after the word "jury" strike ", or antitrust".
27. Page 8, line 22, strike the word "agency".
28. Page 9, line 9, after the word "Justice" strike "or any antit agency".
29. Page 14, line 7, after the word "person" strike the "peri" and insert in lieu thereof ", including a natural person.".

PURPOSE OF AMENDMENTS

The second amendment is to insure that civil investigative demands will not be used with the intent to bring a criminal prosecution under section 3 of the Robinson-Patman Act. Section 3 provides for criminal penalties.

The bill, as amended, confines to the Department of Justice the use of documents procured by a civil investigative demand. For this purpose, all reference to other "antitrust agencies" have been deleted from the bill.

Section 4(b) has been amended to insure that a company which keeps records at branches or at some place other than at its principal place of business need not necessarily bring them to its principal office to comply with a demand. If agreement cannot be reached for the antitrust investigator to examine documents where they are normally kept, this amendment permits the company to apply to the court for an appropriate order.

Amendment 17 is a technical amendment to delete a vestigial phrase dependent upon other language originally in the bill which was struck out by the Senate. The Senate inadvertently failed to strike the modifying phrase, and the amendment thus deletes meaningless verbiage.

Since the definition of "person" in section 2(f) excludes a natural person, it is necessary to include a reference to "a natural person" in section 7. Otherwise the saving clause, which refers to grand jury proceedings as well as to proceedings to enforce a court order, might be considered inapplicable to proceedings against a natural person.

Amendment 15 is designed to insure that the civil investigative demand procedure will be used only in a civil antitrust investigation.

PURPOSE OF THE BILL

The purpose of this proposed legislation is to enable the Department of Justice to obtain documentary evidence during the course of a civil investigation to enforce the antitrust laws.

In the opinion of the committee, a determination whether or not to bring a civil antitrust suit, wherever possible, should be made only after an adequate investigation. Fairness to a prospective defendant requires no less. On the other hand, to enforce the antitrust laws adequately on the civil side, the antitrust authorities must be able to make an adequate investigation to ascertain the facts.

Although the Federal Trade Commission, like many other Government agencies,¹ has authority to procure documents for investigative purposes, the Department of Justice, which, through its Antitrust Division, is the primary enforcer of the antitrust laws, lacks such authority. This proposed legislation would merely place the Department of Justice on a parity with other Government agencies in this respect.

At present, if the Department of Justice believes that the antitrust laws are being violated, and that a civil case is more appropriate than a criminal prosecution, it is limited to three alternatives to ascertain the true facts:

(1) It may seek the cooperation of prospective defendants to furnish evidence against themselves. Some companies will fully cooperate under such circumstances, but others will not. At the public hearings before the Antitrust Subcommittee of the Committee on the Judiciary on August 23, 1961, the Attorney General furnished the subcommittee with a large number of instances where such cooperation was not forthcoming. In some instances this caused a complete frustration of the investigation. This method of investigation is unsatisfactory since it leaves the public interest in the enforcement of the antitrust laws subject to the will of those who violate the laws.

(2) The Department can secure information of antitrust violations through the use of a grand jury subpoena. The courts, however, have held it an abuse of process to proceed by way of a grand jury investigation where there is no intention to bring a criminal suit. *United States v. Procter & Gamble*, 356 U.S. 677 (1958); *United States v. Procter & Gamble*, 25 F.R.D. 485 (D. N.J. 1960). Resort to a grand jury, moreover, is a drastic method of investigation; it is a secret ex parte proceeding, and neither the prospective defendant nor his attorney can know what evidence has been laid before the grand jury. The American Bar Association has deplored the fact that the Department must resort to grand jury proceedings in order to obtain information

¹The agencies include the Federal Trade Commission, the Department of Agriculture, the Department of the Army, the Department of Labor, the Federal Maritime Commission, Treasury Department, National Science Foundation, and the Veterans' Administration. More than 15 States have expressly granted such authority in connection with antitrust investigations.

upon which to base a civil proceeding. Furthermore, the grand jury procedure cannot be used in cases arising under certain of the antitrust laws, such as section 7 of the Clayton Act, which can only be enforced civilly.

(3) Finally, under 15 U.S.C. 46, the Federal Trade Commission has the power, upon application of the Attorney General, to make investigations. But this power is a limited one. It applies only with respect to corporations (whereas the present bill also applies to partnerships and associations), and its scope is not clear. It has never been used. It is uncertain, moreover, as to whether the Commission is under an obligation to make such investigations. Both the head of the Antitrust Division and the Chairman of the Federal Trade Commission regard it as unworkable because of the inability of the Department's attorneys to maintain control of such investigation on the one hand, and the drain on the Commission's budget and its manpower resources on the other hand.

In the absence of the authority provided for by this legislation, the Department of Justice may be placed in the position of filing a civil complaint without adequate prior information as to the nature of a suspected violation and without certainty that sufficient evidence would be available to justify bringing a civil case. The Judicial Conference of the United States has expressed its disapproval of bringing a suit without adequate factual preparation.

Accordingly, this bill is designed to enable the Department of Justice to proceed fairly but effectively in the civil enforcement of the antitrust laws.

PROVISIONS OF THE BILL

This legislation would empower the Attorney General or the Assistant Attorney General in charge of the Antitrust Division to issue a written civil investigative demand to a corporation, association, or partnership. The demand would require the entity on which it is served to produce documents for examination by duly designated representatives of the Department of Justice in connection with a civil antitrust investigation, instituted to determine whether the evidence warrants the filing of a civil antitrust suit.

The bill provides many safeguards for the recipient of a civil demand. In both civil and criminal cases the courts have required that documents requested be described in enough detail to facilitate compliance. Similar requirements are imposed by this proposed legislation. The demand must set out the nature of the conduct constituting the alleged antitrust violation which is under investigation and the applicable provision of law. It must also describe the classes of documents to be produced with such definiteness and certainty as to permit such material to be fairly identified. Privileged documents may not be demanded, and existing law is expressly invoked to protect against unreasonable demands.

The Department must apply to the district court where the recipient does business to enforce the demand if the recipient does not comply with it. The recipient may also apply to the court to vacate or modify the civil investigative demand. The reasonableness of the demand would be determined upon the same test as the reasonableness of a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged antitrust violations.

The proposed legislation provides for service of the civil demand and return of service similar to the provisions for service of complaints in civil cases under the Federal Rules of Civil Procedure.

Copies of documents may be made but originals may be substituted therefor. The head of the Antitrust Division will designate an investigator and any necessary deputies to be custodians responsible for the documents procured. Under reasonable terms and conditions prescribed by the Attorney General, documentary material, while in possession of the custodian, will be available for examination by representatives of the entity which produced the material.

The proposed statute provides for the return of material in custody of the custodian, other than copies made by the Department of Justice, which has not passed into the control of a court or grand jury.

Willful destruction, removal, concealment, or falsification of documents which are the subject of a demand make the perpetrator subject to the penal provision of section 1505 of title 18 of the United States Code, if done with the intent to prevent compliance with a civil investigative demand.

LEGISLATIVE HISTORY

The Antitrust Subcommittee held public hearings on the proposed legislation on August 23, 1961. After hearings before the Senate Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary of the Senate, S. 167 was extensively amended to conform to a number of suggestions made by the American Bar Association. As amended it was adopted by the Senate during the first session of this Congress.

In 1955 the Attorney General's National Committee To Study the Antitrust Laws, after a comprehensive study, thought it necessary to recommend only a few legislative changes. One such recommendation, however, was a civil investigative demand statute. Since that time legislation similar to this bill has been recommended in the Economic Reports by the President to the last four Congresses. Since 1955 every head of the Antitrust Division of the Department of Justice has stressed to Congress the importance of this enforcement tool. President Kennedy and Attorney General Robert F. Kennedy have asked that this means of enforcing the antitrust laws be given to the Department of Justice. The Chairman of the Federal Trade Commission has urged that the Department be given such authority, which the Commission has possessed for many years and has found invaluable. The Cabinet Committee on Small Business in its progress report of August 7, 1956, and in its second progress report of December 31, 1958, supported such legislation. The American Bar Association, at hearings before the Senate Antitrust and Monopoly Subcommittee, recognized the need for such legislation and supported an appropriate statute.

Bills to carry out those recommendations were presented in the 84th and 85th Congresses. They were not acted upon. In the 86th Congress the Senate did pass such a bill but it was not acted upon in the House.

During this period the Department of Justice had urged premerger notification legislation. Bills to enact such legislation have been pending in several Congresses. A comprehensive civil investigative demand

statute would serve some of the purposes of, and hence might obviate the need for, premerger notification legislation.

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 change is proposed by the bill as here reported, with matter proposed to be stricken by the bill as here reported enclosed in black brackets, new language proposed by the bill as here reported is printed in italic.

TITLE 18.—UNITED STATES CODE—CHAPTER 73.—OBSTRUCTION OF JUSTICE

Sec. *

1505. **【Influencing or injuring witness before agencies and committees.】** *Obstruction of proceedings before departments, agencies, and committees*

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§ 1505. 【Influencing or injuring witness before agencies and committees.】 *Obstruction of proceedings before departments, agencies, and committees*

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein, or;

Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part with any civil investigative demand duly and properly made under the Antitrust Civil Process Act willfully removes from any place, conceals, destroys, mutilates, alters, or by other means falsifies any documentary material which is the subject of such demand: or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

