

# Report for Congress

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## **General Overview of United States Antitrust Law**

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## **Summary**

This Report briefly summarizes (1) the primary United States antitrust statutes, and (2) some of the activities which are generally considered to be violations of those laws. There is also some reference to the prohibition against unfair competition and the “unfairness” jurisdiction of the Federal Trade Commission (FTC). The laws discussed do not constitute all of the statutes which may be applicable to, or implicated in antitrust issues, but rather, are those which are most often utilized.

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# General Overview of United States Antitrust Law

## Introduction

There are two basic antitrust laws in the United States – the *Sherman Act* and the *Clayton Act*; both are enforceable either by the Antitrust Division of the Department of Justice, the Federal Trade Commission or private persons alleging economic injury caused by violation of either of them. In addition, the *Federal Trade Commission (FTC) Act* and the *Robinson-Patman Act* may also be utilized by the Commission<sup>1</sup> and private persons (only the Commission, however -- *i.e.*, neither the Antitrust Division nor private persons -- may enforce the *FTC Act*). Together, they spell out the conduct and activities prohibited in economic, market transactions. There are also some statutes directed to specific industries or types of transactions which indicate the likely antitrust consequences for economic conduct in those areas.

This Report briefly summarizes (1) the primary United States antitrust statutes, and (2) some of the activities which are generally considered to be violations of those laws. There is also some reference to the prohibition against unfair competition and the “unfairness” jurisdiction of the Federal Trade Commission (FTC). There is not, however, any discussion of the extraterritorial reach of the United States antitrust laws, a subject which is beyond the scope of this brief Report. Further, the laws whose descriptions follow do not constitute all of the statutes which may be applicable to, or implicated in antitrust issues, but rather, are those which are most often utilized. In reading the information presented, readers should bear in mind that the antitrust laws are concerned with the functioning of the marketplace – *i.e.* *competition* and *not* the protection of *any individual competitor*.

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<sup>1</sup>In theory, the *Robinson-Patman Act* may be enforced by either the Antitrust Division or the FTC. In practice, the Division has never enforced the statute, which it believes is “based on questionable economic assumptions prevalent in the 1930s” and likely fosters anticompetitive behavior. REPORT ON THE ROBINSON-PATMAN ACT, United States Department of Justice, 1977, at 149.

## The Primary Laws

### Sherman Act (15 U.S.C. §§ 1-7)

**SECTION 1 (15 U.S.C. § 1).** Prohibits contracts or conspiracies in restraint of trade, which phrase has been, since at least 1911, judicially interpreted as meaning *unreasonable* restraints of trade.<sup>2</sup>

**SECTION 2 (15 U.S.C. § 2).** Prohibits monopolization or attempted monopolization; it is sometimes used in conjunction with section 7 of the *Clayton Act* (15 U.S.C. §18), which prohibits mergers or acquisitions which may tend to lessen competition.

Violation of either provision is a felony, and fines for violation are currently set at \$350,000 for individuals and \$10 million for corporations.

### Clayton Act (15 U.S.C. §§ 12-27)

**SECTION 4 (15 U.S.C. § 15).** Contains the damage provisions of the antitrust laws. 15 U.S.C. §15(a) permits “any person ... injured in his business or property by reason of anything forbidden in the antitrust laws [to] sue therefor [and to] recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.” After the Supreme Court interpreted the words “any person” to include foreign governments,<sup>3</sup> the provision was amended in 1982 to restrict foreign states’ recovery of monetary antitrust damages to “actual damages sustained” plus costs and reasonable attorneys’ fees (15 U.S.C. §15(b)). The limitation to actual damages was also applicable, until late 1990, to monetary injuries sustained by the

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<sup>2</sup>*Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 60 (1911): “And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which would be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus ... it follows that it was intended that the standard of reason ... was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.” *Board of Trade of the City of Chicago v. United States*, 246 U.S. 231, 238 (1918): “But the legality of an agreement cannot be determined by so simple a test as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.” See also, *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933); *The Sugar Institute, Inc. v. United States*, 297 U.S. 553, 597-98; *White Motor Co. v. United States*, 372 U.S. 253 (1963); *GTE Sylvania, Inc. v. Continental T.V., Inc.*, 433 U.S. 36 (1977).

<sup>3</sup>*Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978).

United States (15 U.S.C. §15a)); that limitation was removed by the 101st Congress in H.R. 29 (P.L. 101-588), following much hearing testimony to the effect that the damage limitation made the federal government the “antitrust victim of choice.” Treble damage recovery is now available to the United States, as it is to private antitrust plaintiffs pursuant to 15 U.S.C. §15.

**SECTION 7 (15 U.S.C. § 18).** Is probably the most prominent, substantive provision of the *Clayton Act*. Whereas the *Sherman Act* was enacted to prohibit concerted activity which actually restrains trade, this provision is directed at preventing activity in its incipiency which may tend to restrain trade. The *Merger Guidelines* issued by the Department of Justice offer an indication of the ways in which mergers and acquisitions will be analyzed by the Antitrust Division and the FTC;<sup>4</sup> although they are not binding upon the courts, they are considered to be persuasive.

**SECTION 7A (15 U.S.C. § 18a).** Contains the “premerger notification” provisions, added to the *Clayton Act* in 1976<sup>5</sup> to allow the antitrust enforcement agencies the opportunity to examine potential mergers/acquisitions prior to their consummation. It is enforced by both the Department of Justice and the FTC. As originally enacted, the provision required notification, with certain, enumerated exceptions, of all merger or acquisition transactions by persons in or affecting commerce in which either party had net sales or assets of \$10 million and the other party had net sales or assets of \$100 million (15 U.S.C. §18a(a)). The reviewing agency had 30 days from the time of notification (15 days in the case of tender offers) to review the proposed transaction, which could not be consummated during that time unless the reviewing agency granted an early termination of the waiting period (15 U.S.C. §18a(b)). Prior to the conclusion of that time, the reviewing agency was authorized to seek a second round of information, which extended the original waiting period by 20 days (10 days in the case of a tender offer) (15 U.S.C. §18a(e)).<sup>6</sup> The focus of the current premerger notification provision is more clearly directed at the consequences of a merger/acquisition transaction: notification must occur when

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<sup>4</sup>The *Guidelines* were first issued in 1962, and revised in 1982, 1984, 1992, and 1997. The 1984 version indicated that the Department will consider foreign as well as domestic competition in determining the geographic market for the products or services of a potential merger (section 2.34). The 1992 version, enacted jointly with the FTC, states that the “unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise” (section 0.1). The 1997 revision dealt only with the Agencies’ treatment of the so-called “efficiency defense” often put forth in support of a merger: although “[e]fficiencies generated through merger can enhance the merged firm’s ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products,” mergers that are, on balance, anticompetitive will not likely be approved (section 4). Efficiencies “almost never justify a planned merger to monopoly or near-monopoly.” 1997 FTC Chairman Robert Pitofsky, quoted at 72 ANTITRUST & TRADE REGULATION REPORT 348 (4-10-97).

<sup>5</sup>Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (P.L. 95-435).

<sup>6</sup>Often, the second request for information is perceived by the parties as an indication of the fact that the reviewing agency has “problems” with the transaction, and either the entire proposal will be withdrawn, or it will be restructured so as to meet the objections.

the transaction will result in the acquiring party's holding assets or voting securities (1) in excess of \$200 million, or (2) between \$50 million and \$200 million plus the assets or voting securities of the acquired party (either a \$10 million or \$100 million entity being acquired, respectively, by a \$100 million or \$10 million entity). The current provision also extends, for merger transactions, the period for review of material submitted in response to a second request for information -- from 20 to 30 days; and establishes, based on the size of the proposed transaction, a sliding scale of fees required in order for premerger review to begin (the fee previously was \$45,000 irrespective of the size of the transaction; the new scale begins at \$45,000).<sup>7</sup> The penalty for failure to comply with the premerger notification statute remains at \$10,000 "for each day during which [a person required to report] is in violation of" the provision.<sup>8</sup>

### **Robinson-Patman Act (15 U.S.C. § 13)**

Broadly, the *Robinson-Patman Act* (which is not, "technically," considered an antitrust statute) prohibits price discrimination: it mandates that two or more purchasers of a commodity from the same seller must be charged identical prices. There are exceptions to the mandate, however, such that the *Act* may be seen to prohibit only *unjustified* price differentiation. There are also jurisdictional limits to the *Act*, the courts having interpreted it so that all the sales in question must be *in interstate commerce*.<sup>9</sup> *Robinson-Patman* applies only to sales of "commodities of like grade and quality" (15 U.S.C. § 13(a)) and not to services; and only to goods "sold for use, consumption, or resale within the United States" (15 U.S.C. § 13(a)), but not to goods destined for export.<sup>10</sup>

Nonprofit institutions (*e.g.*, schools, colleges, libraries, churches, hospitals) are not subject to the prohibitions of the *Robinson-Patman Act* to the extent that their purchases are made for "their own use" (15 U.S.C. §13c).<sup>11</sup>

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<sup>7</sup>P.L. 106-553, Sec. 630 (eff. 2/1/2001).

<sup>8</sup>15 U.S.C. § 18a (g).

<sup>9</sup>*Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186 (1974). The Sherman Act, the Federal Trade Commission Act, and most portions of the *Clayton Act*, for example, require only that transactions be in or affecting interstate commerce.

<sup>10</sup>*Fimex Corp. v. Barmatic Products Co.*, 429 F.Supp. 978 (E.D.N.Y. 1977), *aff'd without published opinion*, No. 7235 (2d Cir. 1977); *Raymond v. Avon Products, Inc.*, 1978 WL 15561 (N.Y. Sup. 1978).

<sup>11</sup>The leading case is *Abbott Laboratories v. Portland Retail Druggists Assn., Inc.*, 425 U.S. 1 (1976), which interpreted "for their own use" to include pharmaceutical purchases by a hospital for dispensing to inpatients, outpatients *treated at the hospital* (*i.e.*, prescriptions refilled by the hospital pharmacy in competition with retail druggists not permitted) and in an emergency room; and to staff physicians, medical and nursing students and their dependents. The Court extended its "for their own use" interpretation in 1983, in *Jefferson County Pharmaceutical Assn., Inc. v. Abbott Laboratories*, when it ruled that Government purchases -- just as those of non-governmental, "nonprofit" entities -- may not be used to compete in retail market (460 U.S. 150). *DeModena v. Kaiser Foundation Health Plan, Inc.*, (743 F.2d 1388 (9<sup>th</sup> Cir. 1984), *cert. denied*, 469 U.S. 1229 (1985)) held HMO's to be  
(continued...)

## **Federal Trade Commission Act (15 U.S.C. § § 41 et seq.)**

SECTION 5 (15 U.S.C. §45) is the operative, substantive provision of the *FTC Act*. It prohibits “unfair methods of competition” and “unfair or deceptive acts” in commerce (15 U.S.C. §45(a)(1)).<sup>12</sup> The provision applies to “unfair methods of competition involving commerce with foreign nations (other than import commerce),” however, only to the extent that such “unfair” conduct has a “direct, substantial, and reasonably foreseeable effect” on the foreign commerce in question (15 U.S.C. §45(a)(3)).

## **Other Applicable Laws**

### **National Cooperative Research Act of 1984 (15 U.S.C. § § 4301-05)**

This legislation was enacted in 1984 to meet the perceived problem of a lack of joint research and development projects (believed to adversely impact the United States’ international competitiveness) by business, which was said to fear (1) government prosecution of joint ventures which could be viewed as anticompetitive, and (2) private antitrust treble-damage actions. 15 U.S.C. §4302 states clearly that research and development joint ventures will be examined individually and analyzed under a “reasonableness” standard; moreover, provided that a joint venture has notified the Department of Justice and the FTC as to its intended existence and activities, litigants claiming antitrust injury by reason of the venture’s “notified” conduct may recover only actual damages (15 U.S.C. §4303(a)), despite the general antitrust damage provisions (see, *supra*, IB, paragraph 1). The statute was amended in 1993 to include production joint ventures (P.L. 103-42).

### **Export Trading Company Act (15 U.S.C. § § 4001-21)**

Export certificates of review are available to persons wishing to act collectively for the purpose of exporting goods or services from the United States. If the Secretary of Commerce, “with the concurrence of the Attorney General,” determines that the association will not likely result in a “substantial lessening of competition or restraint of trade within the United States nor a substantial restraint of the export

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<sup>11</sup>(...continued)

“eligible institutions” included in the Nonprofit Institutions Act.

<sup>12</sup>“Unfairness” has been defined by the courts as encompassing more than just conduct which would violate the *Sherman Act* or other antitrust statutes; conduct which runs counter to established public policy may also be deemed “unfair.” See, e.g., *Federal Trade Commission v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972): unfair practices may extend to “public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws”; *Spiegel, Inc. v. Federal Trade Commission*, 540 F. 2d 287 (7<sup>th</sup> Cir. 1976); *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447 (1986). Moreover, “puffing,” although it allows for (over)statements of opinion, does not include misrepresentations of fact, *F.T.C. v. US Sales Corp.*, 785 F.Supp. 787 (NDIll. 1992).

trade of any competitor of the applicant,” and issues a certificate, the recipient of the certificate is immune to any civil or criminal antitrust action based on the conduct covered by the certificate (15 U.S.C. §§4013, 4016).

### **McCarran-Ferguson Act (15 U.S.C. §§1011-15)**

Pursuant to the *Act*, the “business of insurance” is exempt from the prohibitions of the antitrust laws to the extent such business is regulated by state laws.<sup>13</sup> The Supreme Court has indicated on several occasions that “the business of *insurance*” is not synonymous with “the business of *insurers*.”<sup>14</sup>

### **Soft Drink Interbrand Competition Act (15 U.S.C. §§3591-03)**

Enacted in 1980 to permit the owners of trademarked soft drinks to grant exclusive territorial franchises to, *e.g.*, bottlers or distributors of those products, the *Act* renders contracts or agreements containing the exclusive rights not subject to the antitrust laws provided that the “product is in substantial and effective competition with other products of the same general class” (15 U.S.C. §3501). Outright price-fixing agreements or other horizontal restraints of trade and group boycotts remain subject to the antitrust laws (15 U.S.C. §3502).

### **Local Government Antitrust Act of 1984 (15 U.S.C. §§34, 35)**

The statute prohibits the recovery of monetary damages (injunctive relief is permitted) from “any local government, or official or employee thereof acting in an official capacity” by anyone who challenges the antitrust legality of a local government’s conduct.

## **Antitrust Offenses**

### **Per Se**

*Per se* offenses are those for which there is no justification. As the Supreme Court has expressed it:

... there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore

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<sup>13</sup>See, Cohen, “The McCarran-Ferguson Act’s Exemption of the Business of Insurance from Federal Antitrust Law,” CRS Report 90-212, April 24, 1990; and *Federal Trade Commission v. Ticor Title Insurance Co.*, 112 S.Ct. 2169 (June 12, 1992).

<sup>14</sup>*Group Health & Life Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979); *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 (1982); *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985).

illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.<sup>15</sup>

The kinds of activities which are most generally found to be *per se* antitrust offenses, and are most likely to be criminally prosecuted, include:

1. Horizontal price fixing
2. Vertical price fixing (sometimes referred to as “resale price maintenance”)
3. Bid rigging
4. Market division (customer or territorial allocation)
5. Boycotts (concerted refusals to deal)
6. Tying arrangements (“If you want X, you must also take Y”)

All of the *per se* offenses, as concerted activity in restraint of trade, are violations of section 1 of the *Sherman Act*.

## Rule of Reason

All antitrust-violative conduct which does not consist of a *per se* offense is judged by the reasonableness of the activity. Even when an otherwise unlawful action is found, if it is also determined that the action is ancillary to some lawful activity, and that its procompetitive consequences outweigh its anticompetitive effects, the action may well be found to be a not unreasonable violation of the antitrust laws. In other words, the rule of reason involves a balancing test.

There is not, for example, any *per se* rule against monopolization, or attempted monopolization. There is no “no fault” monopolization, no situation in which there is some “magic” number beyond which a firm may not increase its size or market share; the determining factors will include the means by which those numbers were reached – the *reasonableness* of the actions which produced the final entity.

Most rule of reason offenses involve a single entity,<sup>16</sup> and do not usually violate section 1 of the *Sherman Act*.

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<sup>15</sup>*Northern Pacific Railroad Co. v. United States*, 356 U.S. 1, 5 (1957). See also, *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963); *United States v. Topco Associates*, 405 U.S. 596, 607-08 (1972); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9-10 (1979); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 344 (1982).

<sup>16</sup>Mergers and acquisitions are the exceptions which are most apparent. But even those transactions are most concerned with the antitrust lawfulness and the competitiveness of the resulting entity.