

ASSISTANT ATTORNEY GENERAL
WASHINGTON

March 17, 1939.

Dear Senator:

I believe that the attached memoranda, marked appendices A, B, C, and D, are self-explanatory. I wish you would give them your consideration and talk to me about them as soon as possible.

If I happen to be out of the office Mr. Milton Katz, who did the major share of the drafting of these, can give you any explanations you require.

For your convenience I am inclosing a copy of the foregoing memoranda.

Sincerely,

THURMAN ARNOLD,
Assistant Attorney General.

Honorable William E. Borah,
United States Senate,
Washington, D.C.

APPENDIX B

PROPOSED REVISIONS OF ANTITRUST LAWS:

- I. TO INCREASE ACCOUNTABILITY OF OFFICERS AND DIRECTORS
- II. TO PROVIDE ADDITIONAL CIVIL REMEDIES
- III. TO INCREASE CRIMINAL PENALTIES

1. Amend section 1 of Clayton Act by:

- (a) Amending the third paragraph to read as follows:

“The word ‘person’, as used herein, means an individual or a company.”

- (b) Adding the following paragraphs:

“The word ‘company’, as used herein, means a corporation, a partnership, an association, a joint stock company, a business trust, or any organized group of persons, whether incorporated or not; or any receiver, trustee or liquidating agent of any of the foregoing in his capacity as such.

“The word ‘director’ means a director of a corporation or any individual who occupies a similar status or performs similar functions in respect of any company.

“The word ‘officer’ means an officer of a corporation or any individual who occupies a similar status or performs similar functions in respect of any company.”

Note:

The text of the entire Act should be checked, and appropriate modifications made where necessary to bring the text into conformity with the new definitions.

2. Amend section 14 of the Clayton Act to read as follows:

“Sec. 14 (a) Any violation of any provision of the antitrust laws by any company shall be a violation of such provision by each officer or director of such company who shall have done, or authorized, ordered or caused to be done, any act constituting in whole or in part such violation. In any proceeding against any officer or director of any company in respect of any such violation by such company, such officer or director, if he shall have had knowledge of any act constituting in whole or in part such violation, shall be presumed to have authorized, ordered or caused such act; and if evidence shall be introduced in behalf of such officer or director adequate to rebut such presumption, the fact of such knowledge shall, nevertheless, be submitted to the jury, or, in any action or suit tried by the court without a jury, shall be taken into account by the court, as evidence of such authorization, ordering or causation.

“(b) Any officer or director chargeable under subsection (a) of this section with a violation of any penal provision of the antitrust laws shall be guilty of a misdemeanor, and upon conviction therefor he shall be punished by a fine of not exceeding \$10,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court.¹

“(c) Any officer or director chargeable under subsection (a) of this section with a violation of any provision of the antitrust laws by any company shall forfeit to the United States a sum equal to twice the total compensation, direct and indirect, whether in the form of salary, commission, bonus, share of profits or otherwise, received by or due to such officer or director from such company or on account of services to or in behalf of such company for each month during which any such violation or any part thereof shall have occurred: Provided, that if the sum

¹ Is it necessary or advisable to provide explicitly that a prosecution of any officer or director in respect of any violation may be consolidated with a prosecution of the company or of any other officer or director for the same violation?

computed as aforesaid should amount to less than \$5,000, such forfeiture shall nevertheless be in the amount of \$5,000. Such forfeiture shall be payable into the Treasury of the United States and shall be recoverable in a civil action by the United States.

“(d) Upon a proper showing in a civil action brought by the United States, any officer or director chargeable under subsection (a) of this section with a violation of any provision of the antitrust laws by any company shall be enjoined, permanently or for a specified period not less than ninety days in the discretion of the court, from rendering any service directly or indirectly to or in behalf of such company and from receiving any compensation, direct or indirect, whether in the form of salary, commission, bonus, share of profits or otherwise, from such company or on account of services to or in behalf of such company, and such company shall likewise be enjoined for such period from receiving any service, direct or indirect, whether voluntary and uncompensated or otherwise, from such officer or director, and from paying any compensation directly or indirectly, whether in the form of salary, commission, bonus, share of profits or otherwise, to or in behalf of such officer or director, and such officer or director shall likewise be enjoined for such period from engaging in business, whether on his own account or as an officer or director of any other company, or otherwise, in competition with such company.”

3. Re-number present section 15 of the Clayton Act to make it section 17, and insert new sections 15 and 16, as follows:

“Sec. 15. Any company which violates any provision of the antitrust laws shall forfeit to the United States a sum equal to twice the total of net income received by or accruing to such company (A) during each month within which any such violation or any part thereof shall have occurred, (B) in respect of any operations of such company during each such month, and (C) otherwise attributable to each such month: Provided, that if the sum computed as aforesaid

should amount to less than \$25,000, such forfeiture shall nevertheless be in the amount of \$25,000. Such forfeiture shall be payable into the Treasury of the United States and shall be recoverable in a civil action by the United States. For the purposes of this section, net income shall be computed in accordance with the method of accounting regularly employed in keeping the books of such company, if such method is in accordance with recognized principles of accounting and clearly reflects the income. If no method of accounting has been employed in keeping the books of such company, or if the method employed does not accord with recognized principles of accounting or does not clearly reflect the income, the computation shall be made by a method which does conform to recognized principles of accounting and which does clearly reflect the income. In any such action tried by jury, the court may require the jury to return a special verdict upon the question of liability. If, in any such case, the jury in such special verdict shall find the plaintiff entitled to a forfeiture, or if, in any such action tried by the court without a jury, upon the conclusion of the taking of evidence upon the question of liability, the court shall be of opinion that the plaintiff is entitled to a forfeiture, the court, for assistance in the computation of such forfeiture, may require such company to retain at its own expense an independent public accountant satisfactory to the court; and the court may utilize the assistance of the Federal Trade Commission or an officer thereof as a master pursuant to section 7 of the Federal Trade Commission Act.”²

“Sec. 16. Any two or more of the proceedings hereinafter enumerated, if instituted against the same parties, or if relating in whole or in part to the same act or acts, may be consolidated:

(A) a proceeding in the name of the United States to prevent and restrain a violation of any provision of the antitrust laws;

² I.e. – section 7, as amended in accordance with Appendix C.

- (B) an action under subsection (c) of section 14 of this Act;
- (C) a suit under subsection (d) of section 14 of this Act; and
- (D) an action under section 15 of this Act:

Provided, that upon any such consolidation which involves an action under said subsection (c) of section 14 or an action under said section 15, the right of trial by jury shall be preserved”³

4. Add a new section 27 to the Clayton Act as follows:

“Sec. 27. This Act may be cited as the ‘Clayton Act’.”

5. Amend section 8 of the Sherman Act to read as follows:

“Sec. 8. The word ‘person’, as used herein, means an individual or company.

“The word ‘company’, as used herein, means a corporation, a partnership, an association, a joint stock company, a business trust, or any organized group of persons, whether incorporated or not; or any receiver, trustee or liquidating agent of any of the foregoing in his capacity as such.”

Note:

The text of the entire Act should be checked, and appropriate modifications made where necessary to bring the text into conformity with the new definitions.

6. Add a new section 9 to the Sherman Act, as follows:

“Sec. 9. This Act may be cited as the ‘Sherman Antitrust Act’.”

³ Is this section necessary, or should we rest on Rules 18-21 and Rule 42 of the new Rules of Civil Procedure?

7. Increase maximum criminal fines to \$50,000 in all sections of antitrust laws which fix penalties, as follows:

(a) Sherman Antitrust Act --

In section 1, strike “\$5,000” and substitute “\$50,000”;

In section 2, strike “five thousand dollars” and substitute “\$50,000”;

In section 3, strike “five thousand dollars” and substitute “\$50,000”;

(b) In Antitrust Provisions of Tariff Act of August 27, 1894, c. 349, 28 Stat. 509 --

In section 73, strike “five thousand dollars” and substitute “\$50,000”.⁴

GENERAL COMMENT

The foregoing remedies apply in case of violations of the “antitrust laws”. Should their scope be broadened to include violations of section 3 of the Robinson-Patman Act; or narrowed to exclude violations of any section of the Clayton Act other than sections 2, 3, 7 and 8?

⁴ Should a similar change be made in section 3 of the Robinson-Patman Act?