

112TH CONGRESS  
1ST SESSION

# S. 49

To amend the Federal antitrust laws to provide expanded coverage and to eliminate exemptions from such laws that are contrary to the public interest with respect to railroads.

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## IN THE SENATE OF THE UNITED STATES

JANUARY 25 (legislative day, JANUARY 5), 2011

Mr. KOHL (for himself, Mr. VITTER, Mr. LEAHY, Mr. HATCH, Ms. KLOBUCHAR, Mr. FRANKEN, and Mr. TESTER) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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## A BILL

To amend the Federal antitrust laws to provide expanded coverage and to eliminate exemptions from such laws that are contrary to the public interest with respect to railroads.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. SHORT TITLE.**

4       This Act may be cited as the “Railroad Antitrust En-  
5       forcement Act of 2011”.

1 **SEC. 2. INJUNCTIONS AGAINST RAILROAD COMMON CAR-**  
 2 **RIERS.**

3 The proviso in section 16 of the Clayton Act (15  
 4 U.S.C. 26) ending with “Code.” is amended to read as  
 5 follows: “*Provided*, That nothing herein contained shall be  
 6 construed to entitle any person, firm, corporation, or asso-  
 7 ciation, except the United States, to bring suit for injunc-  
 8 tive relief against any common carrier that is not a rail-  
 9 road subject to the jurisdiction of the Surface Transpor-  
 10 tation Board under subtitle IV of title 49, United States  
 11 Code.”.

12 **SEC. 3. MERGERS AND ACQUISITIONS OF RAILROADS.**

13 The sixth undesignated paragraph of section 7 of the  
 14 Clayton Act (15 U.S.C. 18) is amended to read as follows:  
 15 “Nothing contained in this section shall apply to  
 16 transactions duly consummated pursuant to authority  
 17 given by the Secretary of Transportation, Federal Power  
 18 Commission, Surface Transportation Board (except for  
 19 transactions described in section 11321 of that title), the  
 20 Securities and Exchange Commission in the exercise of its  
 21 jurisdiction under section 10 (of the Public Utility Hold-  
 22 ing Company Act of 1935), the United States Maritime  
 23 Commission, or the Secretary of Agriculture under any  
 24 statutory provision vesting such power in the Commission,  
 25 Board, or Secretary.”.

1 **SEC. 4. LIMITATION OF PRIMARY JURISDICTION.**

2 The Clayton Act is amended by adding at the end  
3 thereof the following:

4 “SEC. 29. In any civil action against a common car-  
5 rier railroad under section 4, 4C, 15, or 16 of this Act,  
6 the district court shall not be required to defer to the pri-  
7 mary jurisdiction of the Surface Transportation Board.”.

8 **SEC. 5. FEDERAL TRADE COMMISSION ENFORCEMENT.**

9 (a) CLAYTON ACT.—Section 11(a) of the Clayton Act  
10 (15 U.S.C. 21(a)) is amended by striking “subject to juris-  
11 diction” and all that follows through the first semicolon  
12 and inserting “subject to jurisdiction under subtitle IV of  
13 title 49, United States Code (except for agreements de-  
14 scribed in section 10706 of that title and transactions de-  
15 scribed in section 11321 of that title);”.

16 (b) FTC ACT.—Section 5(a)(2) of the Federal Trade  
17 Commission Act (15 U.S.C. 45(a)(2)) is amended by strik-  
18 ing “common carriers subject” and inserting “common  
19 carriers, except for railroads, subject”.

20 **SEC. 6. EXPANSION OF TREBLE DAMAGES TO RAIL COM-**  
21 **MON CARRIERS.**

22 Section 4 of the Clayton Act (15 U.S.C. 15) is  
23 amended by—

24 (1) redesignating subsections (b) and (c) as  
25 subsections (c) and (d), respectively; and

26 (2) inserting after subsection (a) the following:

1       “(b) Subsection (a) shall apply to a common carrier  
 2 by railroad subject to the jurisdiction of the Surface  
 3 Transportation Board under subtitle IV of title 49, United  
 4 States Code, without regard to whether such railroads  
 5 have filed rates or whether a complaint challenging a rate  
 6 has been filed.”.

7   **SEC. 7. TERMINATION OF EXEMPTIONS IN TITLE 49.**

8       (a) IN GENERAL.—Section 10706 of title 49, United  
 9 States Code, is amended—

10           (1) in subsection (a)—

11                   (A) in paragraph (2)(A), by striking “, and  
 12 the Sherman Act (15 U.S.C. 1 et seq.),” and all  
 13 that follows through “or carrying out the agree-  
 14 ment” in the third sentence;

15                   (B) in paragraph (4)—

16                           (i) by striking the second sentence;  
 17 and

18                           (ii) by striking “However, the” in the  
 19 third sentence and inserting “The”; and

20                   (C) in paragraph (5)(A), by striking “, and  
 21 the antitrust laws set forth in paragraph (2) of  
 22 this subsection do not apply to parties and  
 23 other persons with respect to making or car-  
 24 rying out the agreement”; and

1 (2) by striking subsection (e) and inserting the  
 2 following:

3 “(e) APPLICATION OF ANTITRUST LAWS.—

4 “(1) IN GENERAL.—Nothing in this section ex-  
 5 empts a proposed agreement described in subsection  
 6 (a) from the application of the Sherman Act (15  
 7 U.S.C. 1 et seq.), the Clayton Act (15 U.S.C. 12, 14  
 8 et seq.), the Federal Trade Commission Act (15  
 9 U.S.C. 41 et seq.), section 73 or 74 of the Wilson  
 10 Tariff Act (15 U.S.C. 8 and 9), or the Act of June  
 11 19, 1936 (15 U.S.C. 13, 13a, 13b, 21a).

12 “(2) ANTITRUST ANALYSIS TO CONSIDER IM-  
 13 PACT.—In reviewing any such proposed agreement  
 14 for the purpose of any provision of law described in  
 15 paragraph (1), the Board shall take into account,  
 16 among any other considerations, the impact of the  
 17 proposed agreement on shippers, on consumers, and  
 18 on affected communities.”.

19 (b) COMBINATIONS.—Section 11321 of title 49,  
 20 United States Code, is amended—

21 (1) in subsection (a)—

22 (A) by striking “The authority” in the  
 23 first sentence and inserting “Except as pro-  
 24 vided in sections 4 (15 U.S.C. 15), 4C (15  
 25 U.S.C. 15c), section 15 (15 U.S.C. 25), and

1           section 16 (15 U.S.C. 26) of the Clayton Act  
2           (15 U.S.C. 21(a)), the authority”; and

3           (B) by striking “is exempt from the anti-  
4           trust laws and from all other law,” in the third  
5           sentence and inserting “is exempt from all  
6           other law (except the antitrust laws referred to  
7           in subsection (c)),”; and

8           (2) by adding at the end the following:

9           “(c) APPLICATION OF ANTITRUST LAWS.—

10           “(1) IN GENERAL.—Nothing in this section ex-  
11           empts a transaction described in subsection (a) from  
12           the application of the Sherman Act (15 U.S.C. 1 et  
13           seq.), the Clayton Act (15 U.S.C. 12, 14 et seq.),  
14           the Federal Trade Commission Act (15 U.S.C. 41 et  
15           seq.), section 73 or 74 of the Wilson Tariff Act (15  
16           U.S.C. 8–9), or the Act of June 19, 1936 (15  
17           U.S.C. 13, 13a, 13b, 21a). The preceding sentence  
18           shall not apply to any transaction relating to the  
19           pooling of railroad cars approved by the Surface  
20           Transportation Board or its predecessor agency pur-  
21           suant to section 11322 of title 49, United States  
22           Code.

23           “(2) ANTITRUST ANALYSIS TO CONSIDER IM-  
24           PACT.—In reviewing any such transaction for the  
25           purpose of any provision of law described in para-

graph (1), the Board shall take into account, among any other considerations, the impact of the transaction on shippers and on affected communities.”.

(c) CONFORMING AMENDMENTS.—

(1) The heading for section 10706 of title 49, United States Code, is amended to read as follows: “**Rate agreements**”.

(2) The item relating to such section in the chapter analysis at the beginning of chapter 107 of such title is amended to read as follows:

“10706. Rate agreements.”.

#### 11 **SEC. 8. EFFECTIVE DATE.**

(a) IN GENERAL.—Subject to the provisions of subsection (b), this Act shall take effect on the date of enactment of this Act.

(b) CONDITIONS.—

(1) PREVIOUS CONDUCT.—A civil action under section 4, 15, or 16 of the Clayton Act (15 U.S.C. 15, 25, 26) or complaint under section 5 of the Federal Trade Commission Act (15 U.S.C. 45) may not be filed with respect to any conduct or activity that occurred prior to the date of enactment of this Act that was previously exempted from the antitrust laws as defined in section 1 of the Clayton Act (15 U.S.C. 12) by orders of the Interstate Commerce

1 Commission or the Surface Transportation Board  
2 issued pursuant to law.

3 (2) GRACE PERIOD.—A civil action or complaint  
4 described in paragraph (1) may not be filed earlier  
5 than 180 days after the date of enactment of this  
6 Act with respect to any previously exempted conduct  
7 or activity or previously exempted agreement that is  
8 continued subsequent to the date of enactment of  
9 this Act.

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