To amend the Clayton Act to modify the standard for an unlawful acquisition, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 14, 2017

Ms. Klobuchar (for herself, Mrs. Gillibrand, Mr. Blumenthal, and Mr. Markey) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend the Clayton Act to modify the standard for an unlawful acquisition, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Consolidation Prevention and Competition Promotion Act of 2017”.

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds that—

(1) competitive markets are critical to ensuring opportunity for all people in the United States;
(2) when companies compete, businesses offer the highest quality and choice of goods for the lowest possible prices to consumers and other businesses;

(3) competition fosters small business growth, reduces economic inequality, and spurs innovation;

(4) concentration that leads to market power and anticompetitive conduct makes it more difficult for people in the United States to start their own businesses, depresses wages, and increases economic inequality;

(5) undue market concentration also contributes to the consolidation of political power, undermining the health of democracy in the United States;

(6) the anticompetitive effects of market power created by concentration include higher prices, lower quality, significantly less choice, reduced innovation, foreclosure of competitors, increased entry barriers, and monopsony power;

(7) monopsony power—

(A) allows a firm to force suppliers of goods or services to cut their prices to unreasonably low levels, resulting in reduced business opportunities for suppliers and reduced avail-
ability and quality of products and services for consumers; and

(B) can result in workers being forced to accept unreasonably low wages;

(8) horizontal consolidation, vertical consolidation, and conglomerate mergers all have potential to cause anticompetitive harm;

(9) unprecedented consolidation is reducing competition and threatens to place the American dream further out of reach for many consumers in the United States;

(10) since 2008, firms in the United States have engaged in over $10,000,000,000,000 in mergers and acquisitions;

(11) between 2010 and 2015, there was a 50-percent increase in the number of mergers and acquisitions reviewed by the Federal Trade Commission and the Antitrust Division of the Department of Justice;

(12) the antitrust laws, particularly section 7 of the Clayton Act (15 U.S.C. 18), are the first line of defense against anticompetitive mergers; and

(13) in recent years, some court decisions and enforcement policies have limited the vitality of the Clayton Act to prevent harmful consolidation by—
(A) discounting previously accepted presumptions that certain acquisitions are anti-competitive;

(B) focusing inordinately on the impact on price of an acquisition in the short term;

(C) underestimating the dangers that horizontal, vertical, and conglomerate mergers will lower quality, reduce choice, impede innovation, exclude competitors, increase entry barriers, or create monopsony power; and

(D) requiring the government to prove harmful effects of a merger to a near certainty.

(b) PURPOSES.—The purposes of this Act are to promote competition and prevent harmful consolidation by restoring the original intent of the Clayton Act to address the full range of anticompetitive harms, including—

(1) eliminating the requirement that a merger “substantially” lessens competition to clarify that the Clayton Act prohibits mergers that, as a result of consolidation, may materially lower quality, reduce choice, reduce innovation, exclude competitors, increase entry barriers, or increase price;

(2) inserting the phrase “materially” to establish that the plaintiff need not show an acquisition may cause a substantial amount of harm to competi-
tion, but rather show that an acquisition may cause
more than a de minimis amount of harm to competi-
tion;

(3) amending the Clayton Act to include the
term “monopsony” to clarify that an acquisition that
tends to create a monopsony violates the Clayton
Act; and

(4) establishing simple, cost-effective decision
rules that require the parties to certain acquisitions
that either significantly increase consolidation or are
extremely large bear the burden of establishing that
the acquisition will not materially harm competition.

SEC. 3. UNLAWFUL ACQUISITIONS.

Section 7 of the Clayton Act (15 U.S.C. 18) is
amended—

(1) in the first and second undesignated para-
graphs, by striking “substantially” each place that
term appears and inserting “materially”;

(2) by inserting “or a monopsony” after “mo-
nopoly” each place that term appears; and

(3) by adding at the end the following:
“In a case brought by the United States, the Federal
Trade Commission, or a State attorney general, a court
shall determine that the effect of an acquisition described
in this section may be materially to lessen competition or
create a monopoly or a monopsony if—

“(1) the acquisition would lead to a significant
increase in market concentration in any line of com-
merce or in any activity affecting commerce in any
section of the country; or

“(2)(A) the acquisition is not a transaction that
is described in section 7A(e); and

“(B)(i) as a result of such acquisition, the ac-
quiring person would hold an aggregate total
amount of the voting securities and assets of the ac-
quired person in excess of $5,000,000,000 (as ad-
justed and published for each fiscal year beginning
after September 30, 2018, in the same manner as
provided in section 8(a)(5) to reflect the percentage
change in the gross national product for such fiscal
year compared to the gross national product for the
year ending September 30, 2017); or

“(ii)(I) the person acquiring or the person being
acquired has assets, net annual sales, or a market
capitalization greater than $100,000,000,000 (as so
adjusted and published); and

“(II) as a result of such acquisition, the acquir-
ing person would hold an aggregate total amount of
the voting securities and assets of the acquired per-
son in excess of $50,000,000 (as so adjusted and published),
unless the acquiring and acquired person establish, by a preponderance of the evidence, that the effect of the acquisition will not be to tend to materially lessen competition or tend to create a monopoly or a monopsony. In this paragraph, the term ‘materially lessen competition’ means more than a de minimis amount.”.

SEC. 4. POST-SETTLEMENT DATA.

Section 7A of the Clayton Act (15 U.S.C. 18a) is amended by adding at the end the following:

“(l)(1) Each person who enters into an agreement with the Federal Trade Commission or the United States to resolve a proceeding brought under the antitrust laws or under the Federal Trade Commission Act (15 U.S.C. 41 et seq.) regarding an acquisition with respect to which notification is required under this section shall, on an annual basis during the 5-year period beginning on the date on which the agreement is entered into, submit to the Federal Trade Commission or the Assistant Attorney General, as applicable, information sufficient for the Federal Trade Commission or the United States, as applicable, to assess the competitive impact of the acquisition, including—
“(A) the pricing, availability, and quality of any product or service, or inputs thereto, in any market, that was covered by the agreement;

“(B) the source, and the resulting magnitude and extent, of any cost-saving efficiencies or any consumer benefits that were claimed as a benefit of the acquisition and the extent to which any cost savings were passed on to consumers; and

“(C) the effectiveness of any divestitures or any conditions placed on the acquisition in preventing or mitigating harm to competition.

“(2) The requirement to provide the information described in paragraph (1) shall be included in an agreement described in that paragraph.

“(3) The Federal Trade Commission, with the concurrence of the Assistant Attorney General, by rule in accordance with section 553 of title 5, United States Code, and consistent with the purposes of this section—

“(A) shall require that the information described in paragraph (1) be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to assess the
competitive impact of the acquisition under paragraph (1); and

“(B) may—

“(i) define the terms used in this subsection;

“(ii) exempt, from the requirements of this section, information not relevant in assessing the competitive impact of the acquisition under paragraph (1); and

“(iii) prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section.”.

SEC. 5. OFFICE OF COMPETITION ADVOCATE.

(a) DEFINITIONS.—In this section—

(1) the term “agency” has the meaning given the term in section 551 of title 5, United States Code;

(2) the term “covered company” means any company that has, at any time, been required to make a filing under section 7A of the Clayton Act (15 U.S.C. 18a);

(3) the term “Office” means the Office of the Competition Advocate established under subsection (b);
(4) the term “Chairman” means the Chairman of the Commission; and

(5) the term “Commission” means the Federal Trade Commission.

(b) ESTABLISHMENT.—There is established within the Federal Trade Commission the Office of the Competition Advocate.

(c) COMPETITION ADVOCATE.—

(1) IN GENERAL.—The head of the Office shall be the Competition Advocate, who shall—

(A) report directly to the Chairman; and

(B) be appointed by the Chairman, with the concurrence of a majority of the Commission, including at least 1 Commissioner who is not a member of the same political party of the majority members of the Commission, from among individuals having experience in advocating for the promotion of competition.

(2) COMPENSATION.—The annual rate of pay for the Competition Advocate shall be equal to the highest rate of annual pay for other senior executives who report to the Chairman of the Commission.
(3) **Limitation on Service.**—An individual who serves as the Competition Advocate may not be employed by the Commission—

(A) during the 2-year period ending on the date of appointment as Competition Advocate; or

(B) during the 5-year period beginning on the date on which the person ceases to serve as the Competition Advocate.

(d) **Staff of Office.**—The Competition Advocate, after consultation with the Chairman of the Commission, may retain or employ independent counsel, research staff, and service staff, as the Competition Advocate determines is necessary to carry out the functions, powers, and duties of the Office.

(e) **Duties and Powers.**—The Competition Advocate shall—

(1) recommend processes or procedures that will allow the Federal Trade Commission and the Antitrust Division of the Department of Justice to improve the ability of each agency to solicit reports from consumers, small businesses, and employees about possible anticompetitive practices or adverse effects of concentration;
(2) recommend practices in certain industries that merit antitrust investigation, but may not recommend practices in certain industries that do not merit antitrust investigation or are not anticompetitive;

(3) publicly provide recommendations to other Federal agencies about administrative actions that may have anticompetitive effects and the potential harm to consumers if those actions are carried out;

(4) publish periodic reports on—

(A) market concentration and its impact on the United States, local geographic areas, and different demographic and socioeconomic groups; and

(B) the success of merger remedies required by the Department of Justice or the Federal Trade Commission in consent decrees;

(5) collect data regarding concentration levels across industries and the impact and degree of antitrust enforcement; and

(6) standardize the types and formats of data reported and collected.

(f) SUBPOENA AUTHORITY.—

(1) IN GENERAL.—The Competition Advocate may either require the submission of or accept vol-
untary submissions of periodic and other reports from any covered company for the purpose of assessing market concentration and its impact on the United States, local geographic areas, and different demographic and socioeconomic groups and on the success of merger enforcement.

(2) WRITTEN FINDING.—Before issuing a subpoena to collect the information described in paragraph (1), the Competition Advocate shall make a written finding that—

(A) the data is required to carry out the functions of the Competition Advocate; and

(B) the information is not available from a public source or another agency.

(3) MITIGATION OF REPORT BURDEN.—Before requiring the submission of a report from any company required to make a filing under section 7A of the Clayton Act (15 U.S.C. 18a), the Competition Advocate shall—

(A) coordinate with other agencies or authority; and

(B) whenever possible, rely on information available from such agencies or authority.

(g) DATA CENTER.—
(1) **ESTABLISHMENT.**—There is established within the Office the Data Center.

(2) **DUTIES.**—The Data Center shall—

(A) collect, validate, and maintain data obtained from agencies, as defined in section 551 of title 5, United States Code, commercial data providers, publicly available data sources, and any covered company; and

(B) prepare and publish, in a manner that is easily accessible to the public—

(i) a concentration database;

(ii) a merger enforcement database;

(iii) any other database that the Competition Advocate determines is necessary to carry out the duties of the Office; and

(iv) the format and standards for Office data, including standards for reporting financial transaction and position data to the Office.

(3) **REGULATIONS.**—The Competition Advocate shall promulgate regulations relating to the collection and standardizing of data under paragraph (2).

(4) **CONFIDENTIALITY.**—
(A) IN GENERAL.—The Data Center may not disclose any confidential data collected under paragraph (2).

(B) REQUIREMENTS.—Data obtained from an agency shall be subject to the same confidentiality requirements and protection as the agency providing the data.

(C) INFORMATION SECURITY.—The Competition Advocate shall ensure that data collected and maintained by the Data Center are kept secure and protected against unauthorized disclosure.