

115TH CONGRESS
1ST SESSION

S. 1812

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.

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 “Consolidation Preven-
5 tion and Competition Promotion Act of 2017”.

6 **SEC. 2. FINDINGS AND PURPOSES.**

7 (a) FINDINGS.—Congress finds that—

8 (1) competitive markets are critical to ensuring
9 opportunity for all people in the United States;

1 (2) when companies compete, businesses offer
2 the highest quality and choice of goods for the low-
3 est possible prices to consumers and other busi-
4 nesses;

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

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

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

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

20 (7) monopsony power—

21 (A) allows a firm to force suppliers of
22 goods or services to cut their prices to unrea-
23 sonably low levels, resulting in reduced business
24 opportunities for suppliers and reduced avail-

1 ability and quality of products and services for
2 consumers; and

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

5 (8) horizontal consolidation, vertical consolida-
6 tion, and conglomerate mergers all have potential to
7 cause anticompetitive harm;

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

12 (10) since 2008, firms in the United States
13 have engaged in over \$10,000,000,000,000 in merg-
14 ers and acquisitions;

15 (11) between 2010 and 2015, there was a 50-
16 percent increase in the number of mergers and ac-
17 quisitions reviewed by the Federal Trade Commis-
18 sion and the Antitrust Division of the Department
19 of Justice;

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

23 (13) in recent years, some court decisions and
24 enforcement policies have limited the vitality of the
25 Clayton Act to prevent harmful consolidation by—

1 (A) discounting previously accepted pre-
 2 sumptions that certain acquisitions are anti-
 3 competitive;

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

6 (C) underestimating the dangers that hori-
 7 zontal, vertical, and conglomerate mergers will
 8 lower quality, reduce choice, impede innovation,
 9 exclude competitors, increase entry barriers, or
 10 create monopsony power; and

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

13 (b) PURPOSES.—The purposes of this Act are to pro-
 14 mote competition and prevent harmful consolidation by re-
 15 storing the original intent of the Clayton Act to address
 16 the full range of anticompetitive harms, including—

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

23 (2) inserting the phrase “materially” to estab-
 24 lish that the plaintiff need not show an acquisition
 25 may cause a substantial amount of harm to competi-

1 tion, but rather show that an acquisition may cause
2 more than a de minimis amount of harm to competi-
3 tion;

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

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

13 **SEC. 3. UNLAWFUL ACQUISITIONS.**

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

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

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

21 (3) by adding at the end the following:

22 “In a case brought by the United States, the Federal
23 Trade Commission, or a State attorney general, a court
24 shall determine that the effect of an acquisition described

1 in this section may be materially to lessen competition or
 2 create a monopoly or a monopsony if—

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

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

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

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

23 “(II) as a result of such acquisition, the acquir-
 24 ing person would hold an aggregate total amount of
 25 the voting securities and assets of the acquired per-

1 son in excess of \$50,000,000 (as so adjusted and
2 published),
3 unless the acquiring and acquired person establish, by a
4 preponderance of the evidence, that the effect of the acqui-
5 sition will not be to tend to materially lessen competition
6 or tend to create a monopoly or a monopsony. In this
7 paragraph, the term ‘materially lessen competition’ means
8 more than a de minimis amount.”.

9 **SEC. 4. POST-SETTLEMENT DATA.**

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

12 “(l)(1) Each person who enters into an agreement
13 with the Federal Trade Commission or the United States
14 to resolve a proceeding brought under the antitrust laws
15 or under the Federal Trade Commission Act (15 U.S.C.
16 41 et seq.) regarding an acquisition with respect to which
17 notification is required under this section shall, on an an-
18 nual basis during the 5-year period beginning on the date
19 on which the agreement is entered into, submit to the Fed-
20 eral Trade Commission or the Assistant Attorney General,
21 as applicable, information sufficient for the Federal Trade
22 Commission or the United States, as applicable, to assess
23 the competitive impact of the acquisition, including—

1 “(A) the pricing, availability, and quality of any
2 product or service, or inputs thereto, in any market,
3 that was covered by the agreement;

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

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

12 “(2) The requirement to provide the information de-
13 scribed in paragraph (1) shall be included in an agreement
14 described in that paragraph.

15 “(3) The Federal Trade Commission, with the con-
16 currence of the Assistant Attorney General, by rule in ac-
17 cordance with section 553 of title 5, United States Code,
18 and consistent with the purposes of this section—

19 “(A) shall require that the information de-
20 scribed in paragraph (1) be in such form and con-
21 tain such documentary material and information rel-
22 evant to a proposed acquisition as is necessary and
23 appropriate to enable the Federal Trade Commission
24 and the Assistant Attorney General to assess the

1 competitive impact of the acquisition under para-
2 graph (1); and

3 “(B) may—

4 “(i) define the terms used in this sub-
5 section;

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

10 “(iii) prescribe such other rules as may be
11 necessary and appropriate to carry out the pur-
12 poses of this section.”.

13 **SEC. 5. OFFICE OF COMPETITION ADVOCATE.**

14 (a) DEFINITIONS.—In this section—

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

18 (2) the term “covered company” means any
19 company that has, at any time, been required to
20 make a filing under section 7A of the Clayton Act
21 (15 U.S.C. 18a);

22 (3) the term “Office” means the Office of the
23 Competition Advocate established under subsection
24 (b);

1 (4) the term “Chairman” means the Chairman
2 of the Commission; and

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

5 (b) ESTABLISHMENT.—There is established within
6 the Federal Trade Commission the Office of the Competi-
7 tion Advocate.

8 (c) COMPETITION ADVOCATE.—

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

11 (A) report directly to the Chairman; and

12 (B) be appointed by the Chairman, with
13 the concurrence of a majority of the Commis-
14 sion, including at least 1 Commissioner who is
15 not a member of the same political party of the
16 majority members of the Commission, from
17 among individuals having experience in advo-
18 cating for the promotion of competition.

19 (2) COMPENSATION.—The annual rate of pay
20 for the Competition Advocate shall be equal to the
21 highest rate of annual pay for other senior execu-
22 tives who report to the Chairman of the Commis-
23 sion.

1 (3) LIMITATION ON SERVICE.—An individual
2 who serves as the Competition Advocate may not be
3 employed by the Commission—

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

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

10 (d) STAFF OF OFFICE.—The Competition Advocate,
11 after consultation with the Chairman of the Commission,
12 may retain or employ independent counsel, research staff,
13 and service staff, as the Competition Advocate determines
14 is necessary to carry out the functions, powers, and duties
15 of the Office.

16 (e) DUTIES AND POWERS.—The Competition Advo-
17 cate shall—

18 (1) recommend processes or procedures that
19 will allow the Federal Trade Commission and the
20 Antitrust Division of the Department of Justice to
21 improve the ability of each agency to solicit reports
22 from consumers, small businesses, and employees
23 about possible anticompetitive practices or adverse
24 effects of concentration;

1 (2) recommend practices in certain industries
2 that merit antitrust investigation, but may not rec-
3 ommend practices in certain industries that do not
4 merit antitrust investigation or are not anticompeti-
5 tive;

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

10 (4) publish periodic reports on—

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

15 (B) the success of merger remedies re-
16 quired by the Department of Justice or the
17 Federal Trade Commission in consent decrees;

18 (5) collect data regarding concentration levels
19 across industries and the impact and degree of anti-
20 trust enforcement; and

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

23 (f) SUBPOENA AUTHORITY.—

24 (1) IN GENERAL.—The Competition Advocate
25 may either require the submission of or accept vol-

1 untary submissions of periodic and other reports
 2 from any covered company for the purpose of assess-
 3 ing market concentration and its impact on the
 4 United States, local geographic areas, and different
 5 demographic and socioeconomic groups and on the
 6 success of merger enforcement.

7 (2) WRITTEN FINDING.—Before issuing a sub-
 8 poena to collect the information described in para-
 9 graph (1), the Competition Advocate shall make a
 10 written finding that—

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

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

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

20 (A) coordinate with other agencies or au-
 21 thority; and

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

24 (g) DATA CENTER.—

1 (1) ESTABLISHMENT.—There is established
2 within the Office the Data Center.

3 (2) DUTIES.—The Data Center shall—

4 (A) collect, validate, and maintain data ob-
5 tained from agencies, as defined in section 551
6 of title 5, United States Code, commercial data
7 providers, publicly available data sources, and
8 any covered company; and

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

11 (i) a concentration database;

12 (ii) a merger enforcement database;

13 (iii) any other database that the Com-
14 petition Advocate determines is necessary
15 to carry out the duties of the Office; and

16 (iv) the format and standards for Of-
17 fice data, including standards for reporting
18 financial transaction and position data to
19 the Office.

20 (3) REGULATIONS.—The Competition Advocate
21 shall promulgate regulations relating to the collec-
22 tion and standardizing of data under paragraph (2).

23 (4) CONFIDENTIALITY.—

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

4 (B) REQUIREMENTS.—Data obtained from
5 an agency shall be subject to the same confiden-
6 tiality requirements and protection as the agen-
7 cy providing the data.

8 (C) INFORMATION SECURITY.—The Com-
9 petition Advocate shall ensure that data col-
10 lected and maintained by the Data Center are
11 kept secure and protected against unauthorized
12 disclosure.

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