



## Chapter II. Statutory Provisions and Guidelines of the Antitrust Division

A.	Statutes Enforced by the Antitrust Division	<a href="#">II-3</a>
1.	Sherman Antitrust Act, 15 U.S.C. §§ 1-7	<a href="#">II-3</a>
2.	Wilson Tariff Act, 15 U.S.C. §§ 8-11	<a href="#">II-4</a>
3.	Clayton Act, 15 U.S.C. §§ 12-27	<a href="#">II-4</a>
4.	Antitrust Civil Process Act, 15 U.S.C. §§ 1311-14	<a href="#">II-7</a>
5.	International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. §§ 6201-12	<a href="#">II-7</a>
6.	Miscellaneous	<a href="#">II-8</a>
B.	Statutes Used in Criminal Antitrust Investigations and Prosecutions	<a href="#">II-9</a>
1.	Offenses that Arise from Conduct Accompanying a Sherman Act Violation	<a href="#">II-9</a>
a.	Conspiracy; Aiding and Abetting	<a href="#">II-9</a>
b.	Fraud	<a href="#">II-9</a>
c.	Money Laundering	<a href="#">II-10</a>
d.	Tax Offenses	<a href="#">II-10</a>
2.	Offenses Involving the Integrity of the Investigative Process	<a href="#">II-10</a>
a.	Obstruction	<a href="#">II-10</a>
b.	Perjury and False Statements	<a href="#">II-11</a>
c.	Criminal Contempt	<a href="#">II-11</a>
3.	Procedural Statutes	<a href="#">II-12</a>
4.	Statutes of Limitation	<a href="#">II-12</a>
5.	Victim and Witness Rights	<a href="#">II-13</a>
a.	Attorney General Guidelines	<a href="#">II-13</a>
b.	Statutes Governing Victims' Rights and Services for Victims	<a href="#">II-13</a>
6.	Sentencing	<a href="#">II-13</a>
a.	General Provisions	<a href="#">II-14</a>
b.	Probation	<a href="#">II-15</a>
c.	Fines	<a href="#">II-15</a>
d.	Imprisonment	<a href="#">II-16</a>
e.	Restitution	<a href="#">II-16</a>
f.	Miscellaneous	<a href="#">II-17</a>
C.	Statutes Affecting the Competition Advocacy of the Antitrust Division	<a href="#">II-17</a>
1.	Statutory Antitrust Immunities	<a href="#">II-17</a>
a.	Agricultural Immunities	<a href="#">II-17</a>
b.	Export Trade Immunities	<a href="#">II-18</a>
c.	Insurance Immunities	<a href="#">II-19</a>
d.	Labor Immunities	<a href="#">II-19</a>
e.	Fishing Immunities	<a href="#">II-20</a>
f.	Defense Preparedness	<a href="#">II-20</a>
g.	Newspaper Joint Operating Arrangements	<a href="#">II-20</a>
h.	Professional Sports	<a href="#">II-20</a>

i.	Small Business Joint Ventures .....	<a href="#">II-20</a>
j.	Local Governments .....	<a href="#">II-21</a>
2.	Statutes Relating to the Regulated Industries Activities of the Antitrust Division .....	<a href="#">II-21</a>
a.	Banking .....	<a href="#">II-22</a>
b.	Communications .....	<a href="#">II-24</a>
c.	Foreign Trade .....	<a href="#">II-25</a>
d.	Energy .....	<a href="#">II-26</a>
e.	Transportation .....	<a href="#">II-28</a>
3.	Statutes Relating to Joint Research and Development, Production, and Standards Development .....	<a href="#">II-29</a>
D.	Antitrust Division Guidelines .....	<a href="#">II-30</a>
1.	Merger Guidelines .....	<a href="#">II-30</a>
2.	Antitrust Guidelines for the Licensing of Intellectual Property .....	<a href="#">II-31</a>
3.	Antitrust Enforcement Guidelines for International Operations .....	<a href="#">II-31</a>
4.	Statements of Antitrust Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust .....	<a href="#">II-31</a>

## A. Statutes Enforced by the Antitrust Division

### 1. Sherman Antitrust Act, 15 U.S.C. §§ 1-7

**Sherman Act § 1, [15 U.S.C. § 1](#)** as amended by the [Antitrust Criminal Penalty Enhancement and Reform Act of 2004](#)

Trusts, etc., in restraint of trade illegal; penalty

**Sherman Act § 2, [15 U.S.C. § 2](#)**

Monopolizing trade a felony; penalty

**Sherman Act § 3, [15 U.S.C. § 3](#)**

Trusts in Territories or District of Columbia illegal; combination a felony

**Sherman Act § 4, [15 U.S.C. § 4](#)**

Jurisdiction of courts; duty of United States attorneys; procedure

**Sherman Act § 5, [15 U.S.C. § 5](#)**

Bringing in additional parties

**Sherman Act § 6, [15 U.S.C. § 6](#)**

Forfeiture of property in transit

**Sherman Act § 7 (Foreign Trade Antitrust Improvements Act of 1982), [15 U.S.C. § 6a](#)**

Conduct involving trade or commerce with foreign nations

**Sherman Act § 8, [15 U.S.C. § 7](#)**

“Person” or “persons” defined

2. Wilson Tariff Act, 15 U.S.C. §§ 8-11

**Wilson Tariff Act § 73, [15 U.S.C. § 8](#)**

Trusts in restraint of import trade illegal; penalty

**Wilson Tariff Act § 74, [15 U.S.C. § 9](#)**

Jurisdiction of courts; duty of United States attorneys; procedure

**Wilson Tariff Act § 75, [15 U.S.C. § 10](#)**

Bringing in additional parties

**Wilson Tariff Act § 76, [15 U.S.C. § 11](#)**

Forfeiture of property in transit

3. Clayton Act, 15 U.S.C. §§ 12-27

**Clayton Act § 1, [15 U.S.C. § 12](#)**

Definitions; short title

**Clayton Act § 2, [15 U.S.C. § 13](#)**

Discrimination in price, services, or facilities

**Clayton Act § 3, [15 U.S.C. § 14](#)**

Sale, etc., on agreement not to use goods of competitor

**Clayton Act § 4, [15 U.S.C. § 15](#)**

Suits by persons injured

**Clayton Act § 4A, [15 U.S.C. § 15a](#)**

Suits by United States; amount of recovery; prejudgment interest

**Clayton Act § 4B, [15 U.S.C. § 15b](#)**

Limitation of actions

**Clayton Act § 4C, [15 U.S.C. § 15c](#)**

Actions by state attorneys general

**Clayton Act § 4D, [15 U.S.C. § 15d](#)**

Measurement of damages

**Clayton Act § 4E, [15 U.S.C. § 15e](#)**

Distribution of damages

**Clayton Act § 4F, [15 U.S.C. § 15f](#)**

Actions by Attorney General

**Clayton Act § 4G, [15 U.S.C. § 15g](#)**

Definitions

**Clayton Act § 4H, [15 U.S.C. § 15h](#)**

Applicability of parens patriae actions

**Clayton Act § 5 (Tunney Act), [15 U.S.C. § 16](#)**

Judgments

**Clayton Act § 6, [15 U.S.C. § 17](#)**

Antitrust laws not applicable to labor organizations

**Clayton Act §7, [15 U.S.C. § 18](#)**

Acquisition by one corporation of stock of another

**Clayton Act § 7A (Hart-Scott-Rodino Antitrust Improvements Act of 1976), [15 U.S.C. § 18a](#)**

Premerger notification and waiting period

**Clayton Act § 8, [15 U.S.C. § 19](#)**

Interlocking directorates and officers

**Clayton Act § 11, [15 U.S.C. § 21](#)**

Enforcement provisions

**Clayton Act § 12, [15 U.S.C. § 22](#)**

District in which to sue corporation

**Clayton Act § 13, [15 U.S.C. § 23](#)**

Suits by United States; subpoenas for witnesses

**Clayton Act § 14, [15 U.S.C. § 24](#)**

Liability of directors and agents of corporation

**Clayton Act § 15, [15 U.S.C. § 25](#)**

Restraining violations; procedure

**Clayton Act § 16, [15 U.S.C. § 26](#)**

Injunctive relief for private parties; exception; costs

**Clayton Act § 26, [15 U.S.C. § 26a](#)**

Restrictions on the purchase of gasohol and synthetic motor fuel

**Clayton Act § 27, [15 U.S.C. § 27](#)**

Effect of partial invalidity

4. Antitrust Civil Process Act, 15 U.S.C. §§ 1311-14

**Antitrust Civil Process Act § 2, [15 U.S.C. § 1311](#)**

Definitions

**Antitrust Civil Process Act § 3, [15 U.S.C. § 1312](#)**

Civil investigative demands

**Antitrust Civil Process Act § 4, [15 U.S.C. § 1313](#)**

Custodian of documents, answers and transcripts

**Antitrust Civil Process Act § 5, [15 U.S.C. § 1314](#)**

Judicial proceedings

5. International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. §§ 6201-12

**International Antitrust Enforcement Assistance Act § 2, [15 U.S.C. § 6201](#)**

Disclosure to a foreign antitrust authority of antitrust evidence

**International Antitrust Enforcement Assistance Act § 3, [15 U.S.C. § 6202](#)**

Investigations to assist foreign antitrust authority in obtaining antitrust evidence

**International Antitrust Enforcement Assistance Act § 4, [15 U.S.C. § 6203](#)**

Jurisdiction of district courts of United States

**International Antitrust Enforcement Assistance Act § 5, [15 U.S.C. § 6204](#)**

Limitations on authority

**International Antitrust Enforcement Assistance Act § 6, [15 U.S.C. § 6205](#)**

Exception to certain disclosure restrictions

**International Antitrust Enforcement Assistance Act § 7, [15 U.S.C. § 6206](#)**

Publication requirements applicable to antitrust mutual assistance agreements

**International Antitrust Enforcement Assistance Act § 8, [15 U.S.C. § 6207](#)**

Conditions on use of antitrust mutual assistance agreements

**International Antitrust Enforcement Assistance Act § 9, [15 U.S.C. § 6208](#)**

Limitations on judicial review

**International Antitrust Enforcement Assistance Act § 10, [15 U.S.C. § 6209](#)**

Preservation of existing authority

**International Antitrust Enforcement Assistance Act § 11, [15 U.S.C. § 6210](#)**

Report to Congress

**International Antitrust Enforcement Assistance Act § 12, [15 U.S.C. § 6211](#)**

Definitions

**International Antitrust Enforcement Assistance Act § 13, [15 U.S.C. § 6212](#)**

Authority to receive reimbursement

## 6. Miscellaneous

**[15 U.S.C. § 29](#)**

Appeals [U.S. is civil complainant, equitable relief sought]

**[28 U.S.C. § 1927](#)**

Counsel's Liability for Excessive Costs



## B. Statutes Used in Criminal Antitrust Investigations and Prosecutions

In addition to the Division's criminal enforcement activities under the Sherman Act, the Division investigates and prosecutes offenses that arise from conduct accompanying antitrust violations, as well as offenses that involve the integrity of the investigative process. The Division also uses statutes governing procedures, victim and witness rights, and sentencing.

### 1. Offenses that Arise from Conduct Accompanying a Sherman Act Violation

#### a. Conspiracy; Aiding and Abetting

**[18 U.S.C. § 2](#)**

Principals [aiding and abetting]

**[18 U.S.C. § 371](#)**

Conspiracy to commit offense or defraud the United States

**[18 U.S.C. § 1349](#)**

Attempt and conspiracy [mail and wire fraud]

#### b. Fraud

**[18 U.S.C. § 201](#)**

Bribery of public officials and witnesses

**[18 U.S.C. § 666](#)**

Theft or bribery concerning programs receiving Federal funds

**[18 U.S.C. § 1001](#)**

Statements or entries generally [false statements]

**[18 U.S.C. § 1341](#)**

Frauds and swindles [mail fraud]

**18 U.S.C. § 1343**

Fraud by wire, radio, or television [wire fraud]

c. Money Laundering

**18 U.S.C. § 1952**

Interstate and foreign travel or transportation in aid of racketeering enterprise

**18 U.S.C. § 1956**

Laundering of monetary instruments

**18 U.S.C. § 1957**

Engaging in monetary transactions in property derived from specified unlawful activity

d. Tax Offenses

**26 U.S.C. § 7201**

Attempt to evade or defeat tax

**26 U.S.C. § 7206**

Fraud and false statements

2. Offenses Involving the Integrity of the Investigative Process

a. Obstruction

**18 U.S.C. § 1503**

Influencing or injuring officer or juror generally

**18 U.S.C. § 1505**

Obstruction of proceedings before departments, agencies, and committees. This statute is used when there is obstruction of proceedings under the Antitrust Civil Process Act.

**18 U.S.C. § 1509**

Obstruction of court orders

**18 U.S.C. § 1510**

Obstruction of criminal investigations

**18 U.S.C. § 1512**

Tampering with a witness, victim, or an informant

**18 U.S.C. § 1519**

Destruction, alteration, or falsification of records in Federal investigations and bankruptcy

b. Perjury and False Statements

**18 U.S.C. § 1621**

Perjury generally

**18 U.S.C. § 1622**

Subornation of perjury

**18 U.S.C. § 1623**

False declarations before grand jury or court

c. Criminal Contempt

**18 U.S.C. § 402**

Contempts constituting crimes

**[18 U.S.C. § 3691](#)**

Jury trial of criminal contempts

**[Fed. R. Crim. P. 42](#)**

Criminal contempt

3. Procedural Statutes

**[18 U.S.C. § 3143](#)**

Release or detention of a defendant pending sentence or appeal

**Speedy Trial Act of 1974, [18 U.S.C. §§ 3161-3174](#)**

**Jencks Act, [18 U.S.C. § 3500](#)**

Demands for production of statements and reports of witnesses

**[18 U.S.C. §§ 6001-6005](#)**

Immunity of witnesses

4. Statutes of Limitation

**[18 U.S.C. § 3282](#)**

Offenses not capital

**[18 U.S.C. § 3285](#)**

Criminal contempt

**[18 U.S.C. § 3288](#)**

Indictments and information dismissed after period of limitations

**[18 U.S.C. § 3289](#)**

Indictments and information dismissed before period of limitations

[18 U.S.C. § 3292](#)

Suspension of limitations to permit United States to obtain foreign evidence

5. Victim and Witness Rights

a. Attorney General Guidelines

The Attorney General, in conformance with the requirements of the Victim and Witness Protection Act of 1982, the Crime Control Act of 1990, the Violent Crime Control and Law Enforcement Act of 1994, the Antiterrorism and Effective Death Penalty Act of 1996, the Victims Rights Clarification Act of 1997, and the Justice for All Act of 2004, has promulgated [Attorney General Guidelines for Victim and Witness Assistance](#) (AG Guidelines) to establish procedures to be followed by the federal criminal justice system in responding to the needs of crime victims and witnesses. The AG Guidelines serve as a primary resource for Department of Justice agencies, including the Antitrust Division, in the treatment and protection of victims and witnesses of federal crimes under these acts. In addition, the Division has published a [Victim Witness Handbook](#).

b. Statutes Governing Victims' Rights and Services for Victims

[18 U.S.C. § 3771](#)

Crime victims' rights

[42 U.S.C. § 10607](#)

Services to victims

6. Sentencing

The statutory provisions governing sentencing are implemented by the [Federal Sentencing Guidelines](#), which should be read together with the statutory provisions. Attorneys should be familiar with the Sentencing Guidelines in their entirety, as many provisions are interrelated. Useful sentencing provisions include:

a. General Provisions

[18 U.S.C. § 3013](#)

Special assessment on convicted persons

[18 U.S.C. § 3551](#)

Authorized sentences

[18 U.S.C. § 3552; Fed. R. Crim. P. 32\(d\)](#)

Presentence reports

[18 U.S.C. § 3553](#)

Imposition of a sentence

[18 U.S.C. § 3554](#)

Order of criminal forfeiture

[18 U.S.C. § 3555](#)

Order of notice to victims

[18 U.S.C. § 3556](#)

Order of restitution

[18 U.S.C. § 3557](#)

Review of a sentence

[18 U.S.C. § 3558](#)

Implementation of a sentence

[18 U.S.C. § 3559](#)

Sentencing classification of offenses

b. Probation

[18 U.S.C. § 3561](#)

Sentence of probation

[18 U.S.C. § 3562](#)

Imposition of a sentence of probation

[18 U.S.C. § 3563](#)

Conditions of probation

[18 U.S.C. § 3564](#)

Running of a term of probation

[18 U.S.C. § 3565](#)

Revocation of probation

[18 U.S.C. § 3566](#)

Implementation of a sentence of probation

c. Fines

[18 U.S.C. § 3571](#)

Sentence of fine

[18 U.S.C. § 3572](#)

Imposition of a sentence of fine and related matters

[18 U.S.C. § 3573](#)

Petition of the Government for modification or remission

[18 U.S.C. § 3574](#)

Implementation of a sentence of fine

d. Imprisonment

[18 U.S.C. § 3581](#)

Sentence of imprisonment

[18 U.S.C. § 3582](#)

Imposition of a sentence of imprisonment

[18 U.S.C. § 3583](#)

Inclusion of term of supervised release after imprisonment

[18 U.S.C. § 3584](#)

Multiple sentences of imprisonment

[18 U.S.C. § 3585](#)

Calculation of a term of imprisonment

[18 U.S.C. § 3586](#)

Implementation of a sentence of imprisonment

e. Restitution

[18 U.S.C. § 3663](#) and [18 U.S.C. § 3556](#)

Order of restitution

[18 U.S.C. § 3663A](#)

Mandatory restitution to victims of certain crimes



[18 U.S.C. § 3664](#)

Procedure for issuance and enforcement of restitution order

[U.S.S.G. § 5E1.1](#); [U.S.S.G. § 8B1.1](#)

f. Miscellaneous

[18 U.S.C. § 3661](#)

Use of information for sentencing

[18 U.S.C. § 3673](#)

Definitions for sentencing provisions

[18 U.S.C. § 3731](#)

Appeal by United States

[18 U.S.C. § 3742](#)

Review of a sentence

C. Statutes Affecting the Competition Advocacy of the Antitrust Division

1. Statutory Antitrust Immunities

a. Agricultural Immunities

**Clayton Act § 6**, [15 U.S.C. § 17](#). Section 6 of the Clayton Act permits, among other things, the operation of agricultural or horticultural mutual assistance organizations when such organizations do not have capital stock or are not conducted for profit.

[Capper-Volstead Agricultural Producers' Associations Act](#), 7 U.S.C. §§ 291-92. This act allows persons engaged in the production of agricultural products to act together for the purpose of “collectively processing, preparing for market, handling, and marketing” their products and permits cooperatives to have “market agencies in common.” The act also authorizes the Secretary of

Agriculture to proceed against cooperatives that monopolize or restrain commerce to such an extent that the price of an agricultural commodity is “unduly enhanced.”

**Capper-Volstead Cooperative Marketing Act of 1926**, 7 U.S.C. §§ 451-457. This act authorizes agricultural producers and associations to acquire and exchange past, present, and prospective pricing, production, and marketing data.

**Agricultural Marketing Agreement Act of 1937**, 7 U.S.C. §§ 601-627, 671-674. Under **7 U.S.C. § 608b**, the Secretary of Agriculture is authorized to enter into marketing agreements with producers and processors of agricultural commodities. These arrangements are specifically exempted from the application of the antitrust laws. The Secretary may also enter into marketing orders, except for milk, that control the amount of an agricultural product reaching the market and thus serve to enhance the price. Milk marketing orders differ from other orders since they provide a mechanism for the establishment of a minimum price for milk rather than establishing levels of maximum output.

b. Export Trade Immunities

**Export Trading Company Act of 1982**, 15 U.S.C. §§ 4001-4003. This act provides limited antitrust immunity for export trade, export trade activities, and methods of operation specified in a certificate of review issued by the Secretary of Commerce with the concurrence of the Attorney General. To obtain the certificate a person must show that the proposed activities:

- Will neither substantially lessen competition or restrain trade in the United States nor substantially restrain the export trade of any competitor of the applicant.
- Will not unreasonably enhance, stabilize, or depress prices in the United States of the class of goods or services exported by the applicant.
- Will not constitute unfair methods of competition against competitors engaged in the export of the class of goods or services exported by the applicant.
- Will not include any act that may reasonably be expected to result in the sale for consumption or resale in the United States of the goods or services exported by the applicant.

A certificate may be revoked or modified by the Secretary of Commerce if the Secretary or the Attorney General determines that the applicant's activities no longer comply with these standards. While a certificate is in effect, the persons named in it are immune from federal or state antitrust liability with respect to the conduct specified. However, parties injured by the conduct may sue for actual damages on the ground that the conduct does not comply with the statutory criteria. In addition, the Attorney General may sue under Section 15 of the Clayton Act "to enjoin conduct threatening a clear and irreparable harm to the national interest."

[Webb-Pomerene Act \(Export Trade Act\)](#), 15 U.S.C. §§ 61-66. This act provides antitrust immunity for the formation and operation of associations of otherwise competing businesses to engage in collective export sales. The immunity conferred by this statute does not extend to actions that have an anticompetitive effect within the United States or that injure domestic competitors of members of export associations.

c. Insurance Immunities

[McCarran-Ferguson Act](#), 15 U.S.C. §§ 1011-15. This act exempts from the antitrust laws the "business of insurance" to the extent "regulated by state law." The Sherman Act continues to be applicable to all agreements or acts by those engaged in the "business of insurance" to boycott, coerce, or intimidate.

d. Labor Immunities

**Clayton Act § 6**, [15 U.S.C. § 17](#). This statute provides that the labor of a human being is not a commodity or article of commerce, and permits labor organizations to carry out their legitimate objectives.

**Clayton Act § 20**, [29 U.S.C. § 52](#). Generally, this statute immunizes collective activity by employees relating to a dispute concerning terms or conditions of employment.

[Norris-LaGuardia Act of 1932](#), 29 U.S.C. §§ 101-115. This act provides that courts in the United States do not have jurisdiction to issue restraining orders or injunctions against certain union activities on the basis that such activities constitute an unlawful combination or conspiracy under the antitrust laws.

e. Fishing Immunities

[Fishermen's Collective Marketing Act](#), 15 U.S.C. §§ 521-22. This act permits persons engaged in the fisheries industry as fishermen to act together for the purpose of catching, producing, preparing for market, processing, handling, and marketing their products. This immunity is patterned after the Capper-Volstead Act. This act also provides for the enforcement by the Department of Justice of cease and desist orders issued by the Secretary of the Interior if interstate or foreign commerce is restrained or monopolized by any association of persons engaged in the fisheries industry as fishermen.

f. Defense Preparedness

**Defense Production Act of 1950**, 50 U.S.C. app. §§ 2061-2171. Under [50 U.S.C. app. § 2158](#), the President or his delegate, in conjunction with the Attorney General, may approve voluntary agreements among various industry groups for the development of preparedness programs to meet potential national emergencies. Persons participating in such an agreement are immunized from the operation of the antitrust laws with respect to good faith activities undertaken to fulfill their responsibilities under the agreement.

g. Newspaper Joint Operating Arrangements

[Newspaper Preservation Act of 1970](#), 15 U.S.C. §§ 1801-04. This act provides a limited exemption for joint operating arrangements between newspapers to share production facilities and combine their commercial operations. The newspapers are required to retain separate editorial and reporting staffs and to determine their editorial policies independently.

h. Professional Sports

[Sports Broadcasting Act of 1961](#), 15 U.S.C. §§ 1291-95. This act exempts, with some limitations, agreements among professional football, baseball, basketball, and hockey teams to negotiate jointly, through their leagues, for the sale of television rights.

i. Small Business Joint Ventures

**Small Business Act**, 15 U.S.C. §§ 631-657f. [Section 638\(d\)\(2\)](#) authorizes the Small Business Administrator, after consultation with the Attorney General and

the Chairman of the FTC, and with the prior written approval of the Attorney General, to approve an agreement between small business firms providing for a joint program of research and development if the Administrator finds that the program will maintain and strengthen the free enterprise system and the national economy. Under [Section 638\(d\)\(3\)](#), the Administrator's approval confers antitrust immunity on acts and omissions pursuant to and within the scope of the agreement or program as approved. The Administrator or the Attorney General may prospectively withdraw or modify any such approval.

[Section 640\(b\)](#) confers antitrust immunity on joint actions undertaken by small business firms in response to a request by the President pursuant to a voluntary agreement or program approved by the President to further the objectives of the Small Business Act, if found by the President to be in the public interest as contributing to the national defense. The President is to furnish a copy of any such request to the Attorney General and the Chairman of the FTC. [Section 640\(c\)](#) permits the President to delegate the authority to make such requests to an official appointed with Senate confirmation, in which case the official is required to obtain the Attorney General's approval before making any such request. The request or Attorney General's approval, if required, may be withdrawn.

j. Local Governments

**Local Government Antitrust Act of 1984**, 15 U.S.C. §§ 34-36. Under [15 U.S.C. § 35](#), local governments and their officials and employees acting in official capacities have antitrust immunity with respect to actions brought under 15 U.S.C. § 15 for damages, fees, or costs. The act provides similar immunity for claims directed at a person, as that term is defined in 15 U.S.C. § 12, based on an official action directed by a local government. See [15 U.S.C. § 36](#), [15 U.S.C. § 34](#).

2. Statutes Relating to the Regulated Industries Activities of the Antitrust Division

The following statutes have a direct impact upon the regulatory activities of the Division. Although this list is not exhaustive, it indicates the major areas of federal regulation in certain industries with which the Division is especially concerned.

a. Banking

**Bank Merger Act, 12 U.S.C. § 1828(c).** This act creates a special procedure under which bank merger reviews are conducted by the appropriate banking agency—the Comptroller of Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, or the Office of Thrift Supervision. All merger applications involving a bank or savings association (including an application to acquire assets or assume liabilities) are to be forwarded to the Attorney General, who is to report to the banking agency on the proposed merger’s competitive effects within 30 calendar days of the date of the agency’s request. The banking agency must wait for the 30-day period to expire, or until it receives the Attorney General’s report, before it acts on the application. The banking agency can shorten this pre-approval waiting period to 10 days by notifying the Attorney General that an emergency exists requiring expeditious action; and the banking agency may dispense with the report and act immediately if necessary in order to prevent the probable failure of one of the banks or savings associations involved. In any case, the banking agency must notify the Attorney General immediately when it approves a merger.

This act also imposes a post-approval waiting period, requiring that the bank merger not be consummated before the 30th calendar day after the date of approval by the appropriate banking agency. This 30-day waiting period may be shortened to a period of not less than 15 days, with the concurrence of the Attorney General, if the banking agency has not received an adverse competitive effects report from the Attorney General; may be shortened to 5 days if the banking agency has notified the Attorney General that an emergency exists requiring expeditious action; and may be dispensed with entirely if the banking agency has determined that it must act immediately to prevent the probable failure of one of the banks or savings associations involved and therefore dispensed with the pre-approval reports on competitive effects. If a suit under the antitrust laws is not instituted during the 30-day (or shortened) period, the merger may be consummated and thereafter will be exempt from antitrust challenge except under Section 2 of the Sherman Act. (This means that a merger approved immediately to prevent a probable bank failure may not be subject to antitrust challenge at all.)

If a suit is instituted during the applicable period, it results in an automatic stay of the merger. In any such suit, there is a special defense that allows an anticompetitive merger to go forward if the court finds that its anticompetitive

effects will be clearly outweighed by the merged entity's ability to meet the convenience and needs of the community to be served.

Mergers requiring advance competitive review and approval under the Bank Merger Act are exempt under Section 7A(c)(7) from the reporting and waiting period requirements of the HSR statute.

**Bank Holding Company Act of 1956**, 12 U.S.C. §§ 1841-50, 1971-78. Section 3 of this act, [12 U.S.C. § 1842](#), sets forth the same substantive competition standards for the Federal Reserve Board to apply in reviewing applications by bank holding companies to acquire other bank holding companies, banks, or bank assets as those set forth in the Bank Merger Act. While the pre-approval waiting period does not involve a statutorily required notice to the Attorney General, in practice the Board does notify the Attorney General, and the Attorney General furnishes the Board with a report on competitive effects. Similar standards apply to Section 3 applications as in the Bank Merger Act regarding notice to the Attorney General of any approval, the post-approval waiting period, antitrust immunity once that period has expired, the automatic stay, and the convenience and needs defense. As with the Bank Merger Act, an acquisition, or portion of an acquisition, that is subject to banking agency review under Section 3 is exempt from the HSR reporting and waiting period requirements.

Section 4 of the Bank Holding Company Act, [12 U.S.C. § 1843](#), governs acquisitions of a nonbank or thrift institution by a bank holding company. There is no required notice to the Attorney General. Generally, a Section 4 acquisition is not subject to Board approval, and is subject to HSR reporting and waiting period requirements; but if it is a type of acquisition subject to Board approval (or disapproval) under Section 4, it is exempt from HSR requirements if copies of all information and documents filed with the Board are also filed with the Division and the FTC at least 30 days prior to consummation of the acquisition, in accordance with Section 7A(c)(8) of the Clayton Act. Section 4 acquisitions are subject to the ordinary operation of the antitrust laws.

The Gramm-Leach-Bliley Act (Financial Services Modernization Act of 1999) amended the Bank Holding Company Act to create a new "financial holding company" under Section 4(k), permitted to engage in certain financial activities, including insurance and securities underwriting and insurance agency activities, that were previously off-limits to bank holding companies. At that time, Sections 7A(c)(7) and (8) were amended to make clear that if a portion of an acquisition

falls under Section 4(k) and is not subject to Board approval under Section 3 or Section 4, it is not exempt from HSR reporting and waiting period requirements. Like other Section 4 acquisitions, Section 4(k) acquisitions are subject to the ordinary operation of the antitrust laws.

The Bank Holding Company Act also prohibits certain tying arrangements by banks, as well as certain exclusive dealing agreements with customers. [12 U.S.C. §§ 1971-78](#). These prohibitions are in addition to, and do not supersede, the antitrust laws.

## b. Communications

[Communications Act of 1934](#), as amended by the Telecommunications Act of 1996, 47 U.S.C. §§ 151-161, 201-231, 251-261, 271-276, 301-339, 351-363, 381-386, 390-399b, 401-416, 501-510, 521-522, 531-537, 541-549, 551-561, 571-573, 601, 604-615b. This act established the Federal Communications Commission (FCC), which is responsible for regulating “interstate and foreign commerce in communication by wire and radio.” [47 U.S.C. § 151](#). The FCC’s authority encompasses telecommunications common carriers, radio and television broadcasting, and cable communications. Under [Section 402\(a\)](#) of the act, and [28 U.S.C. §§ 2341-2351](#), the United States, represented by the Antitrust Division, is automatically a party respondent, separate from the FCC, in proceedings for review of most FCC orders (except licensing and license transfer orders) in the courts of appeals.

The stated purpose of the Telecommunications Act of 1996 was “to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.” To that end, the 1996 act provided for opening local telephone markets to competition and repealed provisions of the Communications Act that had provided express antitrust exemptions for telephone company mergers approved by the FCC. The 1996 act also included an express antitrust savings clause, Section 601(b)(1), [47 U.S.C. § 152 note](#), making clear that, in all other respects, the 1996 act does not “modify, impair, or supersede the applicability of any of the antitrust laws.”

[Cable Communications Policy Act of 1984](#), as amended by the **1996 Telecommunications Act**, 47 U.S.C. §§ 521-573. These acts generally reduced the level of regulation in the cable industry. The FCC was given authority to approve transfers of cable television relay service licenses. Although the parties



are not immunized from challenge under the antitrust laws, governmental entities are immune from claims for damages under any federal law for conduct related to the regulation of cable services after October 2, 1992.

c. Foreign Trade

[Tariff Act of 1930 § 337](#), 19 U.S.C. § 1337. Under this statute, the International Trade Commission (ITC) evaluates claims of unfair trade practices involving the importation of articles into the United States (primarily with regard to intellectual property rights). The ITC is required to seek the Department's advice before making a final determination. The Department may also participate in the interagency group that advises whether to disapprove the ITC's findings and proposed relief.

[Trade Act of 1974 § 201](#), 19 U.S.C. § 2252, allows American businesses claiming serious injury substantially caused by increased imports to petition the ITC for tariff and quota relief under the so-called "escape clause." Once the ITC makes a determination of whether such injury occurred and formulates appropriate relief, the Department may participate in the interagency committee that advises the President whether to institute or modify the import relief urged by the ITC.

[Trade Act of 1974 § 301](#), 19 U.S.C. § 2411, provides that the President may take action, including restricting imports, to enforce rights of the United States under any trade agreement or to respond to unfair practices of foreign governments that restrict U.S. commerce. Interested parties may initiate such actions through petitions to the U.S. Trade Representative. The Department participates in the interagency committee that makes recommendations to the President on what actions, if any, should be taken.

[Trade Act of 1974 § 406](#), 19 U.S.C. § 2436, provides that businesses claiming injury relating to imports from communist countries may also petition the ITC under the so-called "market disruption statute." The Department may participate in the interagency committee that advises the President whether to institute or modify the import relief urged by the ITC.

[Trade Expansion Act of 1962 § 232](#), 19 U.S.C. § 1862, requires the President to take action to control any imports that the President and the Secretary of Commerce determine are threatening to impair national security because of their impact on defense-related domestic producers. Interested parties may initiate

these actions through petitions to the Secretary of Commerce. The Department may participate in the interagency committee that makes recommendations to the President on what actions, if any, should be taken.

**Countervailing Duties Imposed.** [19 U.S.C. § 1671](#) provides that American manufacturers, producers, wholesalers, unions, and trade associations may petition for the imposition of offsetting duties on subsidized foreign imports. Duties will be imposed if the Department of Commerce determines that a foreign country is subsidizing the foreign import and, in almost all cases, if the ITC determines that a domestic industry is materially injured or threatened with injury by the foreign merchandise. Although the statute permits the Division to apply to appear as a party in proceedings before the ITC, the Division has not utilized this option for many years. On occasion, the Division has provided informal advice to the Department of Commerce on request.

**Imposition of Antidumping Duties.** [19 U.S.C. § 1673](#), provides that antidumping duties shall be imposed on foreign merchandise that is being, or is likely to be, sold in the United States at “less than its fair value,” if the Commerce Department determines that such sales have occurred or will occur and the ITC determines that a domestic industry is materially injured or threatened with material injury by imports of the foreign merchandise. Although the statute permits the Division to apply to appear as a party in proceedings before the ITC, the Division has not utilized this option for many years. On occasion, the Division has provided informal advice to the Department of Commerce on request.

d. Energy

[Department of Energy Organization Act](#), 42 U.S.C. §§ 7101-7352. This act provides for the organization of the Department of Energy and the transfer of functions from other agencies to that Department. The act determines that it is in the national interest to promote the interest of consumers through the provision of an adequate and reliable supply of energy at the lowest reasonable cost and to foster and assure competition among parties engaged in the supply of energy and fuels.

The Department of Energy Organization Act established the Federal Energy Regulatory Commission (FERC) as an independent regulatory commission within the Department of Energy. FERC establishes rates for the transmission and sale of electric energy and the transportation and sale of natural gas; it also

regulates gas and oil pipelines. FERC has authority to regulate mergers and acquisitions, except for acquisitions of voting securities of natural gas companies, under the Federal Power Act and the Natural Gas Act.

The Division often intervenes as a competition advocate in FERC proceedings and in other proceedings involving Department of Energy activities.

**Atomic Energy Act of 1954**, 42 U.S.C. §§ 2011-2297g-4. Under [42 U.S.C. § 2135](#), the Department is required to advise the Nuclear Regulatory Commission whether granting a license as proposed or certifying a plant would create or maintain a situation consistent with the antitrust laws. If the Department recommends a hearing, the Department may participate as a party.

**Federal Coal Leasing Amendments Act of 1976**, 30 U.S.C. §§ 201-209. Under [30 U.S.C. § 184\(i\)\(1\)-\(2\)](#), the Department reviews the issuance, renewal, or modification of federal coal leases to ensure they are consistent with the antitrust laws.

**Outer Continental Shelf Lands Act Amendments of 1978**, 43 U.S.C. §§ 1331-1356a. This act requires that the Departments of the Interior and Energy consult with the Attorney General regarding offshore lease analysis, pipeline rights of entry, review of lease transfers, and review of regulations and plans that the Departments of the Interior and Energy formulate for offshore leasing that may affect competition in the acquisition and transfer of offshore leases.

**Naval Petroleum Reserves Production Act of 1976**, 10 U.S.C. §§ 7420-7439. Under [10 U.S.C. § 7430\(g\)-\(i\)](#) and [10 U.S.C. § 7431\(b\)\(2\)](#), the Secretary of Energy must consult with and give due consideration to the views of the Attorney General prior to promulgating any rules and regulations or plans of development and amendments thereto, and prior to entering into contracts or agreements for the production or sale of petroleum from the naval petroleum and oil shale reserves. If the Attorney General advises the Secretary within the 15 days allowed for review that any proposed contract or agreement would create or maintain a situation inconsistent with the antitrust laws, then the Secretary may not enter into that arrangement. The Attorney General is also required to report on the competitive effects of any plans or substantial amendments to ongoing plans for the exploration, development, and production of naval petroleum and oil shale reserves.

**National Petroleum Reserves in Alaska.** Under [42 U.S.C. § 6504\(d\)](#) and [42 U.S.C. § 6506](#), no contract for the exploration of the National Petroleum Reserve in Alaska may be executed by the Secretary of the Interior if the Attorney General advises the Secretary within the 30 days allowed for review that such contract would unduly restrict competition or be inconsistent with the antitrust laws. The Attorney General is also required to report on the competitive effects of any new plans or substantial amendments to ongoing plans for the exploration of the reserve. Whenever development leading to production of petroleum is authorized, the provisions of 10 U.S.C. § 7430(g)-(i) apply.

[Deepwater Port Act](#), 33 U.S.C. §§ 1501-24. The granting of deepwater port licenses, used to load and unload oil for transportation to the United States, is entrusted to the Secretary of Transportation. Before such action is taken, the Secretary must obtain the opinion of the Attorney General and the FTC as to whether the grant of the license would adversely affect competition or be otherwise inconsistent with the antitrust laws. The Secretary only needs to notify the Attorney General and FTC before amending, transferring, or renewing a license.

e. Transportation

**Interstate Commerce Commission Termination Act**, Pub. L. No. 104-88, 109 Stat. 803. This act dissolved the Interstate Commerce Commission (ICC) which, until 1976, exercised regulatory control over entry, rates, routings, classifications, intercarrier mergers, and collective ratemaking activities, which the ICC could approve and immunize from antitrust exposure. Its few remaining functions were transferred to the Surface Transportation Board within the Department of Transportation, and the Secretary of Transportation. Although most of the areas formerly under the ICC's jurisdiction are now deregulated, very limited antitrust immunity is still available in some of these areas. *See, e.g.*, Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), 45 U.S.C. §§ 801-836.

**Airlines.** Under the Federal Aviation Act of 1958, the Civil Aeronautics Board (CAB) exercised extensive regulatory control over entry, fares, mergers, interlocking directorates, and agreements among air carriers until 1978. In 1978, Congress passed the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, which phased out CAB and many of its functions. The Division now reviews domestic airline mergers, acquisitions, and interlocking directorates under the antitrust laws as it does in other industries. The Department of

Transportation approves and may grant antitrust immunity to agreements between U.S. and foreign carriers.

[Shipping Act of 1984](#), 46 U.S.C. app. §§ 1701-19. This act provides that tariffs filed by international ocean shipping conferences and other agreements among carriers engaged in international ocean shipping are immunized from the operation of the antitrust laws if filed with the Federal Maritime Commission.

### 3. Statutes Relating to Joint Research and Development, Production, and Standards Development

[National Cooperative Research and Production Act](#), 15 U.S.C. §§ 4301-06. The National Cooperative Research and Production Act (NCRPA) clarifies the substantive application of the U.S. antitrust laws to joint research and development (R&D) activities, joint production activities and, since it was amended by the Standards Development Organization Advancement Act of 2004, Pub. L. No. 108-237, 118 Stat. 661 (2004), conduct by a qualifying standards development organization (SDO) while engaged in a standards development activity. Originally drafted to encourage research and development by providing a special antitrust regime for joint R&D ventures, the NCRPA requires U.S. courts to judge the competitive effects of a challenged joint R&D or production venture, or standards development activity engaged in by a qualifying SDO, in properly defined relevant markets and under a rule-of-reason standard. The statute specifies that the conduct “shall be judged on the basis of its reasonableness, taking into account all relevant factors affecting competition, including, but not limited to, effects on competition in properly defined, relevant research, development, product, process, and service markets.” [15 U.S.C. § 4302](#).

The NCRPA also establishes a voluntary procedure pursuant to which the Attorney General and the FTC may be notified of a joint R&D or production venture or a standards development activity engaged in by a qualifying SDO. The statute limits the monetary relief that may be obtained in private civil suits against the participants in a notified joint venture or against a qualifying SDO to actual rather than treble damages, if the challenged conduct is covered by the statute and within the scope of the notification. With respect to joint production ventures, the National Cooperative Production Amendments of 1993, Pub. L. No. 103-42, 107 Stat. 117, 119 (1993), provide that the benefits of the limitation on recoverable damages for claims resulting from conduct within the scope of a notification are not available unless (1) the principal facilities for the production

are located within the United States or its territories, and (2) “each person who controls any party to such venture (including such party itself) is a United States person, or a foreign person from a country whose law accords antitrust treatment no less favorable to United States persons than to such country’s domestic persons with respect to participation in joint ventures for production.” [15 U.S.C. § 4306 \(2\)](#).

The National Cooperative Production Amendments of 1993 also exclude from the act’s coverage, and thus leave subject to the ordinary applicability of the antitrust laws, using existing facilities for the production of a product, process, or service by a joint venture unless such use involves the production of a new product or technology.

## D. Antitrust Division Guidelines

Several official sets of guidelines have been issued by the Antitrust Division. In addition to the guidelines described below, the Division also issued non-price vertical restraint guidelines in 1985, but those guidelines no longer reflect Division policy.

### 1. Merger Guidelines

The [Horizontal Merger Guidelines](#), issued jointly by the Division and the Federal Trade Commission (FTC) on April 2, 1992, largely replace the guidelines that were issued on June 14, 1984. The [Non-Horizontal Merger Guidelines](#) from Section 4 of the 1984 Merger Guidelines remain in effect for non-horizontal mergers (i.e., vertical mergers; mergers that eliminate potential competitors). The Horizontal Merger Guidelines are designed to outline the Division’s standards for determining whether to oppose mergers or acquisitions with a horizontal overlap under Section 7 of the Clayton Act. On April 8, 1997, the Division and FTC issued a revision to the Guidelines involving the treatment of efficiencies.

### 2. Antitrust Guidelines for the Licensing of Intellectual Property

The [Antitrust Guidelines for the Licensing of Intellectual Property](#) (IP Guidelines) were jointly issued by the Division and FTC on April 6, 1995. The IP Guidelines state the two agencies’ enforcement policy with respect to the

licensing of intellectual property protected by patent, copyright, and trade secret law.

### 3. Antitrust Enforcement Guidelines for International Operations

The [Antitrust Enforcement Guidelines for International Operations](#) (International Guidelines) were jointly issued by the Division and FTC in April, 1995, and replaced the international guidelines issued by the Department in 1988. The International Guidelines provide antitrust guidance to businesses engaged in international operations on questions that relate to the two agencies' international enforcement policy. The International Guidelines address such topics as subject matter jurisdiction over conduct and entities outside the United States, comity, mutual assistance in international antitrust enforcement, and the effects of foreign governmental involvement on the antitrust liability of private entities.

### 4. Statements of Antitrust Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust

The [Statements of Antitrust Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust](#) (Health Care Policy Statements) were jointly issued by the Division and FTC on August 28, 1996. They revise policy statements jointly issued by the agencies on September 27, 1994, which were themselves a revision and expansion of joint policy statements issued on September 15, 1993. The Health Care Policy Statements consist of nine statements that describe antitrust enforcement policy with respect to various issues in the health care industry. Most of the statements include guidance in the form of antitrust safety zones, which describe conduct that the agencies will not challenge under the antitrust laws, absent extraordinary circumstances.