S. 2557, the Oil and Gas Industry Antitrust Act of 2006: Brief Legal Analysis

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Summary

This report addresses one of several approaches to the issue of rising gasoline prices put forward in the 109th Congress. S. 2557 was introduced on April 6, 2006, by Senator Specter, Chairman of the Senate Judiciary Committee, reported by that committee on April 27, but was not scheduled for floor action. The bill sought to amend the antitrust laws to accomplish four things.

- Mitigate regional shortages of petroleum and natural gas products
- Mandate federal agency reviews to (a) fine-tune the statutory provision most concerned with mergers (Section 7 of the Clayton Act, 15 U.S.C. § 18, which makes unlawful any merger or acquisition in or affecting commerce that may "substantially" lessen competition or "tend to create a monopoly" in any line or commerce in any section of the country) so that it would be particularly applicable to mergers in the oil and gas industry, and (b) examine the effectiveness of the divestiture remedy for mergers in that industry
- Establish a federal-state task force to examine information-sharing in the oil and gas industries; and
- Make U.S. antitrust law applicable to certain actions carried out by the Organization of Petroleum Exporting Countries (OPEC).

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Brief Summary of S. 2557

Section 2 would have addressed the problem of regional shortages of petroleum and natural gas products by amending the Clayton Act[1] to make it unlawful for "any person to refuse to sell, or to export or divert, existing supplies of petroleum, gasoline, or other fuel derived from petroleum or natural gas with the primary intention of increasing prices or creating a shortage in a geographic market."[2] The provision set out the circumstances that were to be considered by a court in determining whether the actions made unlawful were done "with the intent of increasing prices or creating a shortage...."[3]

Sections 3-5 would have imposed review, reporting, and study requirements on the Federal Trade Commission (FTC), the Attorney General, and the Government Accountability Office (GAO). Section 3 would have required the FTC and the Attorney General, to (1) conduct a study of section 7 of the Clayton Act (15 U.S.C. § 18), the so-called antimerger section, in order to determine "whether [that] section ... should be amended to modify how that section applies to persons engaged in the business of exploring for, producing, refining ... or otherwise making available petroleum, gasoline or other fuel derived from petroleum or natural gas";[4] and, within 270 days of S. 2557's enactment, (2) report to Congress the study's findings, "including recommendations and proposed legislation, if any."[5] The report was to be based, in addition to the parties' own study of section 7 of the Clayton Act, on the Section 4-required GAO study. Section 4 would have required the GAO, within 180 days of enactment, to evaluate "the effectiveness of divestitures required under" consent decrees entered into within the past 10 years between either the FTC or the Department of Justice and "persons engaged in" the same segments of the petroleum or natural gas industries as those subject to study (as noted above) by the Attorney General and the FTC.[6] The GAO study, was to have been submitted to Congress, the Attorney General, and the FTC, within 180 days of S. 2557's enactment.[7] Further, section 4 of S. 2557 would have required that the Attorney General and the FTC, in addition to reviewing the report for purposes of their report to Congress mandated in section 3(b) of S. 2557, also "consider whether any additional action is required to restore competition or prevent a substantial lessening of competition occurring as a result of any transaction that was the subject of the [GAO] study...."[8]

Section 5 would have required the Attorney General and the FTC to establish a "joint federal-State task force" with any state Attorney General who chose to participate,

> to investigate information sharing (including [that facilitated] through the use of exchange agreements and commercial information services), among persons [described in the mandates for the above-cited studies, and] (including any person about which the Energy

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[1] 15 U.S.C. §§ 12-27.

[2] Proposed section 28(a) of the Clayton Act.

[3] Proposed section 28(b) of the Clayton Act.

[4] S. 2557, section 3(a).

[5] S. 2557, section 3(b).

[6] *Id.*, sections 4(a), (b).

[7] *Id.*, section 4(c).

[8] *Id.*, section 4(d).

> Information Administration collects financial and operating data as part of its Financial Reporting System).

Section 6 would have created the "No Oil Producing and Exporting Cartels Act of 2006" ("NOPEC") as an amendment to the Sherman Antitrust Act (15 U.S.C. §§ 1-7) by inserting new provisions to make illegal, and an antitrust violation, actions by "any foreign state, or any instrumentality or agent of any foreign state, … to act collectively or in combination with any other foreign state, ... or any other person, whether by cartel or any other association or form of cooperation or joint action—" to engage in certain, specified actions with respect to natural gas or petroleum products, including those to (1) limit either "the production or distribution," (2) "set or maintain the price of," or (3) "take any [other] action in restraint of trade"—*if* any of those actions "has a direct, substantial, and reasonably foreseeable effect on" U.S. commerce.[9] Pursuant to proposed section 8(c) of the Sherman Act, the doctrine of sovereign immunity would not protect any foreign state from "the jurisdiction or judgments" of U.S. courts in any action brought on account of conduct alleged to be in violation of the foregoing prohibitions. Proposed section 8(d) would prohibit use of the act of state doctrine as a court's rationale for "declin[ing] ... to make a determination on the merits in an action brought under this section." The final provisions of section 6 would add language to 28 U.S.C. § 1605(a), which lists exceptions to the Foreign Sovereign Immunities Act, to clarify that sovereign immunity does not apply in instances "in which [an] action is brought under section 8 of the Sherman Act."

Brief Analysis

Technical matters concerning references to existing statutes[10] or to statutory provisions (several of which have been renumbered in the past several years, including editorial renumbering after enactment)[11] are best addressed by the Senate Office of Legislative Counsel. Similarly, that Office might also best provide U.S. Code citations to accompany the statutory section references so as to clarify exactly *which* provisions are being named, amended, or added. In addition, that Office's familiarity with legislative drafting considerations should enable them to suggest the most advantageous placement of proposed provisions.

Diversion of Gasoline to Ameliorate Regional Shortage

Making it unlawful for "any person to refuse to sell, export or divert, existing supplies of petroleum..." would likely be challenged by those who would note that the courts, beginning with the Supreme Court's 1919 decision in *United States v. Colgate* & Co., have long acknowledged the right of an individual businessman to do business, or not, with whomever he likes, and on whatever terms and conditions he deems acceptable:

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[9] Proposed sections 8(a), (b) of the Sherman Act.

[10] E.g., the Clayton Act is more usually cited as 15 U.S.C. §§ 12-27, rather than, as in section 2 of S. 2557, "15 U.S.C. 12 et seq." (*See*, e.g., the listing for the Clayton Act in the "Popular Name Acts" of the United States Code). Similarly, the Sherman Act is more usually cited as 15 U.S.C. §§ 1-7, rather than, as in section 6(b) of S. 2557, "15 U.S.C. 1 et seq."

[11] E.g., P.L. 105-297, the "Curt Flood Act of 1998," which enacted the baseball/labor-antitrust measure as 15 U.S.C. § 27a, was editorially renumbered and can now be found at 15 U.S.C. § 26b.

> In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell.[12]

Section 1 of the Sherman Act prohibits "contracts or conspiracies in restraint of trade"[13]—in other words, collusion. Section 2 prohibits "monopolization" or "attempted monopolization"—which may entail unilateral, "guilty behavior" by either a would-be monopolist in his quest to become one (attempt), or an existing monopolist acting to maintain his monopoly position by other than the "superior product, business acumen, or historic accident"[14] which served to create the monopoly in the first place. Presently, absent either the collusion (joint action) made unlawful by section 1 of the Sherman Act, or the "guilty behavior" which might constitute violation of section 2, there is not any statutory constraint on unilateral business decisions, and the courts have been reluctant to infer one.[15]

Review, Reporting Requirements

The Federal Trade Commission has released two reports—in July 2005 and March 2006 - concerning the gasoline industry. The former "analyze[d] in detail the multiple factors that affect supply and demand—and thus prices for gasoline ...;[16] the latter, an interim report, was produced in response to Congressional directives, and outlines the Commission's rationale and methods for combining the mandated studies.[17] Tasking the FTC with the study and reporting requirements

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[12] 250 U.S. 300, 307. With respect to the difference between being a monopolist (not unlawful in itself) and unlawfully monopolizing a market, *see* CRS Report RS20241, *Monopoly and Monopolization - Fundamental But Separate Concepts in U.S. Antitrust Law*, by (name redacted).

[13] 15 U.S.C. § 1.

[14] U.S. v. Grinnell, 384 U.S. 563, 571 (1966). Evidence of "guilty behavior" could be, e.g., predatory pricing by a market entity in order to drive competitors from the market, in the hopes that he (the predator) might either (a) secure a monopoly position in that market; or (b) maintain an existing one.

[15] Ownership or control of an "essential facility" has been thought to constitute the one instance in which a monopolist might not validly refuse to deal with a potential competitor. (An "essential facility" exists where a necessary component of a potential competitor's business (not merely a desirable one) is both (a) unavailable from any source other than a particular competitor *and* (b) cannot be duplicated—either at all, or other than at great expense and/or time, by the potential competitor seeking access to it. "Bottleneck monopoly"—which phrase was used to describe e.g., the situation which existed when a single (telephone) company controlled all access to homes—is another way to describe an "essential facility."). The continuing viability of the "essential facilities" doctrine in antitrust law, was called into question by the Supreme Court in Verizon Communications, Inc. v. Trinko, 540 U.S. 398, 411 (2004): "[w]e have never recognized such a doctrine, see Aspen Skiing Co. [v. Aspen Highlands Skiing Corp.], 472 U.S. [585,] 611, n. 44 [1985]...; AT & T Corp. v. Iowa Utilities Bd., 525 U.S. [1133,] 428 [1999] ... and we find no need either to recognize it or to repudiate it here." *See* CRS Report RS21723, *Verizon Communications, Inc. v. Trinko: Telecommunications Consumers Cannot Use Antitrust Laws to Remedy Access Violations of Telecommunications Act*, by (name redacted).

[16] Gasoline Price Changes: the Dynamic of Supply, Demand, and Competition" (hereinafter referred to as "FTC July 2005 Report"). The Report, which is available at http://www.ftc.gov/reports/gasprices05/050705gaspricesrpt.pdf, counts among those factors "growing foreign demand (especially from China and India), the impact of OPEC (although not a fully effective cartel, one that contributes to higher prices and clearly would be per se illegal if engaged in by private companies), boutique fuel requirements, the mistake of banning below-cost sales, regional differences in the availability of refined petroleum products, and oil company profits." Concurring statement of Commissioner Liebowitz, who says that the Report puts the various factors in "context." (There is no page number given for Commissioner Liebowitz' concurrence, but it is available at the FTC website, http://www.ftc.gov).

[17] "Interim Report on Gasoline Pricing: A Report to Congress." Reports to Congress concerning gasoline pricing in the aftermath of Hurricanes Katrina and Rita are mandated in section 1809 of the Energy Policy Act of 2005, P.L. 109-58 § (continued...)

contained in sections 3 and 4, in addition to those contained in other legislation, might result in the Commission's inability to conduct timely enforcement activities and/or continue its program to monitor "weekly average gasoline and diesel prices in 360 cities nationwide to find and, if necessary, recommend appropriate action on pricing anomalies that might indicate anticompetitive conduct."[18]

No Oil Producing and Exporting Cartels Act of 2006

Provisions similar to the NOPEC provisions of S. 2557, an apparent attempt to nullify the courts' refusal, in 1979, to sanction a suit against OPEC by the International Ass'n of Machinists and Aerospace Workers (IAM),[19] would not necessarily accomplish the presumed goal of precluding OPEC's influence on gasoline prices. First, a provision that would add language to the Sherman Act to make certain actions unlawful under that statute, may be redundant: those actions taken abroad by a non-sovereign[20] that have the requisite effect on U.S. commerce are already reachable under the U.S. antitrust laws, even absent specific statutory authorization. As stated by the United States Court of Appeals for the Second Circuit in 1945:

> We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States. American Banana Co. v. United Fruit Co., 213 U.S. 347, 357, ... *On the other hand*, it is *settled law* ... that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.[21]

In addition, the Foreign Sovereign Immunities Act (FSIA) of 1976 contains a commercial activity exception to the general rule that a foreign state is protected from the jurisdiction of U.S. courts by the doctrine of sovereign immunity.[22] There is no sovereign immunity, according to existing statute (28 U.S.C.A. § 1605(a)(2)), in circumstances

> in which the [judicial] action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(...continued)

1809, and section 632 of the Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, P.L. 109-108 § 632. Pursuant to the Energy Policy Act, the FTC "shall conduct [within 90 days of enactment] an investigation to determine if the price of gasoline is being artificially manipulated by reducing refinery capacity or by any other form of market manipulation or price gouging practices"; the Appropriations directive requires the Commission "to conduct an immediate investigation into nationwide gasoline prices in the aftermath of Hurricane Katrina ...."

[18] FTC March 2005 Report, *supra*, note 16, Executive Summary.

[19] International Ass'n of Machinists and Aerospace Workers, (IAM) v. Organization of Petroleum Exporting Countries (OPEC), 477 F.Supp. 553 (D.C. Cal. 1979).

[20] E.g., section 6(b)'s "any other person."

[21] U.S. v. Aluminum Co. of America 148 F.2d 416, 443 (2d Cir. 1945) (some citations omitted; emphasis added). The appeals court decided the case after receiving it on transfer from the Supreme Court because the Court did not have the necessary quorum to issue an opinion.

[22] 28 U.S.C.A. § 1605(a)(2); the full act is codified at 28 U.S.C. §§ 1602-1611.

S. 2557, for example, would have stated specifically that actions brought pursuant to the Sherman Act do not trigger sovereign immunity, but the provision did not define OPEC as a "country" for purposes of the act; such a lack could present a problem for two reasons. The S. 2557 language did not, seemingly, add meaningfully to the general "commercial activity exception" language of FSIA. The IAM's unsuccessful attempt to use FSIA to sue OPEC for, *inter alia*, price fixing under the antitrust laws is a useful illustration; it foundered for reasons that do not seem to have been remedied by the bill's proposed statutory provisions. The district court found that because OPEC was not a country, FSIA was inapplicable, and no action could be brought against OPEC under it. Further, and perhaps more important, the court found that the "indirect purchaser" doctrine[23] denied the IAM standing to sue (477 F.Supp. at 560-61). Congress has not granted indirect purchasers standing under the federal antitrust laws, although several states have done so with regard to their own antitrust laws. Although proposed section 8(e) of the Sherman Act would allow suits to be brought by the Attorney General, it would not alter a current prohibition on private actions—the indirect purchaser doctrine. Affirming the district court's dismissal of the IAM suit, the appeals court reasoning was based on non-FSIA, non-antitrust factors, and couched in language that does specifically mention the act of state doctrine, indicating the questionable effectiveness of proposed section 8(d)'s direction that courts not "decline, based on the act of state doctrine, to make a determination on the merits in an action brought on this section."

> While the case is formulated as an anti-trust action, the granting of any relief would in effect amount to an order from a domestic court instructing a foreign sovereign to alter its chosen means of allocating and profiting from its own valuable natural resources. On the other hand, should the court hold that OPEC's actions are [antitrust] legal this "would greatly strengthen the bargaining hand" of the OPEC nations in the event that Congress or the executive chooses to condemn OPEC's actions.[24]

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[23] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), held that only one who had purchased directly from an alleged price-fixer could sue, unless he could show that the direct purchaser had passed on the unlawful charge to him.

[24] IAM v. OPEC, 649 F.2d 1354, 1361 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

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