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Senate

JOINT RESEARCH AND DEVELOPMENT VENTURES ACT

Mr. TSONGAS. Mr. President, U.S. technological leadership is eroding. Japan and European nations are vying with U.S. industry. As never before, the Japanese, in particular, have learned to capitalize on scientific research more effectively than we, granted that much of the basic research and development on which they rely is ours.

R&D is critical to technological innovation, industrial competitiveness, increased productivity and economic growth. We must expand the extent and diversity of U.S. R&D to maintain our leadership in basic research and to launch new efforts in manufacturing technology.

Research and development is often expensive, and results are highly uncertain. Basic research is unlikely to provide short-term returns on investments. Industry tends to focus on incremental product improvements that can return quick profits. Industries composed of small firms—say, housing—frequently spend very little on R&D and rarely achieve innovations. Improvements in technology—such as automation, machining, and chemical processing—are often important to an industry as a whole, but too costly and risky for a single firm to pursue. The social rate of return of R&D is often twice the private rate of return.

Industrywide, joint research and development ventures can surmount some of these barriers. In joint R&D ventures individual firms share risks, pool resources for large projects and undertake R&D on a scale that maximizes efficiency. Joint R&D ventures also can combine complementary resources and talents of different firms to accelerate innovation.

The Japanese are a case in point. They have used joint R&D efforts to accelerate technological development in a number of areas. One is the very large scale integration project in semiconductors. Another is the fifth generation computer project.

In Japan joint research and development projects are exempt from antimonopoly law. In the United States joint R&D ventures can pose serious antitrust problems. Ambiguities in the law and vagaries of enforcement create an uncertain legal environment that can expose a joint venture to Federal or State antitrust action, as well as to private suits.

In 1980, the Justice Department issued guidelines on the legality of joint R&D ventures and instituted a review procedure for firms contemplating joint R&D ventures. But the Justice Department's procedure is inadequate. It provides only a statement of present enforcement intentions and does not preclude eventual action that could be retroactive nor private suits. Though the Justice Department procedure provides substantial guidance, it still leaves uncertainty.

The legislation I am introducing today would clarify antitrust law by granting immunity to joint research and development ventures approved by the Attorney General. This bill is a modified version of a bill I introduced last year and incorporates some provisions of similar legislation.

The bill would require the Attorney General to approve a joint R&D venture when he finds:

First, participation in a joint R&D venture is open to all firms;

Second, the fruits of the research and development will be made available within 6 years to all firms on reasonable, nondiscriminatory terms;

Third, any restraints associated with the joint R&D venture are necessary to the lawful purpose of the agreement to form the venture and are not part of an overall pattern of anticompetitive, restrictive agreements;

Fourth, participants in a venture are not subject to restriction on their own research and development activities, nor are they obligated to provide the venture with results from previous or future research and development;

And, fifth, even if it is found that the joint research and development venture complies with these four conditions, the Attorney General shall not approve a venture if he concludes that it will lessen competition. Joint R&D ventures approved by the Attorney General would be immune from prosecution under Federal or State antitrust laws.

In a separate provision, the bill would allow a joint R&D venture to exclude foreign companies if their countries do not allow participation of U.S. firms in their joint research and development ventures.

The approach of this bill is by no means the only way to resolve the antitrust uncertainty that now deters the formation of joint R&D ventures. Last year, three bills aimed at reducing that uncertainty were introduced in the Senate: S. 2717, by Senators, GLENN and KENNEDY; S. 3116, by Senators MATHIAS and HART; and S. 2714, which I introduced. The bills differed in method of certification and level of immunity. It is my hope that the Judiciary Committee will hold hearings and invite industry representatives to identify those features of each bill, or combination of features, that would be most effective.

In any event, I feel that it is critical that we act on one version of this legislation or another to strengthen U.S. industrial competitiveness now—before it is too late.

Mr. President, I ask unanimous consent that a summary of provisions and a copy of the bill be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

AND DEVELOPMENT VENTURES ACT

PURPOSE

To encourage the formation of joint research and development ventures by providing immunity from prosecution under federal or state antitrust laws.

ATTORNEY GENERAL REVIEW

In order to receive antitrust immunity a joint research and development venture must obtain approval from the U.S. Attorney General. The Attorney General shall approve a joint research and development venture if he finds that:

1. participation in the joint research and development venture is open to all firms;

2. any firm can obtain on reasonable and nondiscriminatory terms the results of the research and development within six years after the venture receives title to such results;

3. restraints associated with a participant's involvement in the venture are not part of an overall pattern of restrictive agreements that restrain competition; and

4. the venture places no restrictions on the participants' individual research nor obligations to provide the venture the results of its previous or future research.

The Attorney General may deny approval if he finds that the venture will lessen competition.

Although a venture must apply for approval, once approved it doesn't walk the legal tightrope of uncertainty. Attorney General approval guarantees certainty.

The Attorney General may at any time commence withdrawal of approval if the venture strays from compliance. The Attorney General must give notice to the venture and provide it with the opportunity to move back into compliance.

This affords joint ventures the chance to avoid the expense and inconvenience of starting the lengthy application process anew. If the joint venture fails to make the necessary corrections, the Attorney General shall give final notice of withdrawal or modification of such previous approval.

The Court of Appeals for the District of Columbia may review the Attorney General's withdrawal, modification, or denial of an application for approval of a joint research and development venture or amendment thereof.

This discourages arbitrary Attorney General decision-making. Review by the Court of Appeals for the District of Columbia fosters uniform judicial decision-making. Promoting certainty of immunity from Federal or state antitrust prosecution encourages U.S. firms to pursue joint research and development ventures.

The Attorney General may approve a joint research and development venture which excludes firms if their countries do not allow U.S. firms to participate in their joint research and development ventures.

This encourages foreign countries to allow U.S. firms to participate in joint research and development ventures on an equal basis with their foreign counterparts.

IMMUNITY

Approved joint research and development ventures are immune from the prohibitions of sections 1 and 2 of the Sherman Antitrust Act, sections 7 and 16 of the Clayton Act, the Federal Trade Commission Act and relevant state laws.

Awarding court costs to the defendants of spurious litigation discourages antitrust claims against approved joint research and development ventures.

TECHNOLOGY TRANSFER

The Attorney General must withdraw approval of all or part of a joint venture failing to provide, within six years, access on reasonable terms to any innovation or knowledge resulting from its approved activities.

This withdrawal allows the Attorney general to treat the venture as if it never received immunity.

Many patents lose their usefulness within 10 years of their issuance. The six year exclusivity period to such innovation or knowledge allows the joint venture to reap the harvest of its labor while minimizing its negative impact on competition.

REPORTING REQUIREMENT; AMENDMENT OF APPROVED VENTURES

Approved joint research and development ventures must promptly report to the Attorney General any change relevant to its prior approval.

To remain safe from antitrust prosecution the joint venture must submit an application to amend its approval to reflect such change.

Providing an amendment process allows the joint venture to avoid the expense and inconvenience of reapplying for initial approval. Requiring the joint venture to undertake such processes prevents such venture from abusing the privilege of antitrust immunity.

DISCLOSURE OF INFORMATION

Information submitted by an applicant or approved joint research and development venture is exempt from public disclosure as required by the Freedom of Information Act.

This prevents U.S. firms from the possible loss of competitive advantages stemming from the disclosure of confidential information. It provides U.S. firms with an incentive to engage in joint ventures.

No United States officer or employee shall disclose information submitted by an applicant or an approved joint research and development venture except upon a Congressional request, in a judicial or administrative proceeding, with the consent of the person who submitted the information, where the Attorney General deems disclosure necessary to making the determination, or in accordance with any federal statutory requirement. The Attorney General may also disclose such information to Federal or state agencies promising not to disclose the information.

Allowing such disclosure insures that governmental operations shall continue without interruption of the flow of information.

S. 568

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Joint Research and Development Ventures Act".

FINDINGS

SEC. 2. The Congress finds that—

(1) research and development are major factors in the growth and progress of our industry and national economy;

(2) many firms are unable to perform their desired level of research and development due to the capital intensive nature of such research and development programs;

(3) the expense of carrying on certain research and development programs is prohibitive for many businesses;

(4) a firm's or an industry's ability to commit capital to research and development programs is sometimes dependent upon such firm or industry being able to share the risks which such projects often entail;

(5) to the extent that new information or products are brought forward as a result of

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(4) a firm's or an industry's ability to commit capital to research and development programs is sometimes dependent upon such firm or industry being able to share the risks which such projects often entail;

(5) to the extent that new information or products are brought forward as a result of

such sharing, there are genuine procompetitive benefits; and

(6) the uncertainty of interpretation and enforcement of present antitrust laws discourages cooperative research and development, often where such cooperative activity would foster innovation and enhance competition.

PURPOSES

SEC. 3. The purposes of this Act are to—

(1) encourage business concerns to undertake and obtain the benefits of research and development in order to strengthen the national economy and the United States international industrial competitive position;

(2) encourage greater use of joint research and development ventures by the private sector as a means of augmenting the total amount of research and development performed as well as increasing the diversity of research;

(3) provide immunity under the antitrust laws of the United States or any State to an applicant from any prosecution from the moment the Attorney General approves a joint research and development venture until the completion of programs of such venture, or the Attorney General considers it injurious to the competitive balance for such venture to continue and terminates such venture; and

(4) enhance competition by enabling participants in joint research and development ventures, and nonparticipants, on reasonable terms, to have access to and use base technologies resulting from such joint venture.

DEFINITIONS

SEC. 4. For the purposes of this Act—

(1) the term "applicant" means an individual who is a citizen of the United States or an association, partnership, corporation, or other legal entity organized under the laws of the United States or any State or territory of the United States seeking approval of a joint program for research and development;

(2) the term "research and development program" means a program which is—

(A) a systematic, intensive study directed toward greater knowledge or understanding of the subject studied;

(B) a systematic study directed specifically toward applying new knowledge to meet a recognized need; or

(C) a systematic application of knowledge toward the production of useful materials, devices, and systems or methods, including design, development, and improvement of prototypes and new processes to meet specific requirements;

(3) the term "joint research and development venture" means an association, corporation, partnership, or other multifirm entity organized under the laws of the United States or any State or territory of the United States established to carry out cooperative research and development programs;

(4) the term "State" shall have the meaning given it in section 4G of the Clayton Act (15 U.S.C. 15g);

(5) the term "Attorney General" means the Attorney General of the United States or his designee; and

(6) the term "United States firm" means an individual who is a citizen of the United States or an association, partnership, corporation, or other legal entity organized under the laws of the United States or any State or territory of the United States.

ATTORNEY GENERAL REVIEW

SEC. 5. (a) Except as provided in subsection (1) prior to the initiation of any joint research and development venture, the applicants must request and obtain the approval of the Attorney General in order to gain an antitrust exemption pursuant to section 6.

(b) The request required by this section shall be in such form and contain such information and documentary materials as the Attorney General shall by general regulations prescribe pursuant to section 553 of title 5, United States Code.

(c)(1) The Attorney General shall notify the applicants of his decision within 60 days after the filing of such request.

(2) Such decision shall be accompanied by Attorney General's findings.

(d) The Attorney General shall approve any joint research and development venture—

(1) if he finds that—

(A) participation in all programs in the joint research and development venture is open to all United States firms and domestic subsidiaries of foreign firms to the extent provided in subsection (k);

(B) the results of all joint research and development programs will be made available within 6 years after the participants in such venture receive title pursuant to section 7 (a) (4) to all firms on reasonable and nondiscriminatory terms whether such firms are members of such venture or not;

(C) any restraints associated with the joint research and development venture—

(i) are necessary to the lawful main purpose of the agreement to form the joint research and development venture;

(ii) have a scope and duration no greater than is necessary to achieve that purpose; and

(iii) are not part of an overall pattern of restrictive agreements that have unwarranted anticompetitive effects; and

(D) no participant in any joint research and development venture is subject to—

(i) any restriction on its own individual research and development activities; or

(ii) any obligations to provide the venture results from its previous or future research and development; and

(2) unless he finds that any of the joint research and development programs will lessen existing or potential competition between firms to such an extent as to foreclose the existing or potential competitors from participating in such market.

(e) Any approved joint research and development venture obtained by fraud is void ab initio.

(f) If the Attorney General denies an application for the approval of a joint research and development venture and thereafter receives from the applicants a request for the return of all documents submitted by the applicant or applicants in connection with the issuance of such approval, the Attorney General shall return to the applicant, not later than 30 days after receiving the request, the documents and all copies of the documents available to the Attorney General, except to the extent that the information contained in a document has been made available to the public.

(g) The Attorney General may at any time commence withdrawal of approval of all or any part of the joint research and development venture by giving to such venture a written copy of findings and a preliminary notice of the withdrawal or modification of such pervious approval. Such notice shall—

(1) include a statement of the circumstances underlying, and reasons in support of, the determination; and

(2) state with specificity any actions required in order for the venture of program to come into compliance.

(h) If the program or venture fails to take the actions specified by the Attorney General within 30 days after notice by the Attorney General is given, the Attorney General shall immediately issue to such venture final notice of the withdrawal or modification of such previous approval.

(i) Such withdrawal, modification, or denial of an application for approval of a joint research and development venture or amendment thereof is reviewable by the Court of Appeals for the District of Columbia to determine if the Attorney General's findings were clearly erroneous.

(j) Except as provided in subsection (i) no determination made by the Attorney General with respect to issuance, amendment, modification, or revocation of approval of a joint research and development venture shall be admissible in evidence in any administrative or judicial proceeding in support of any claim under the antitrust laws.

(k) The Attorney General may approve a joint research and development venture which fulfills the requirements of subsection (d) even if it does not provide access to participation to domestic subsidiaries of firms of another nation if it is found that such nation does not provide access to participation in joint research and development efforts to United States firms operating in such nation equivalent to the access provided domestic firms of that nation.

(l) For any joint research and development venture established prior to the date of enactment of this Act the Attorney General shall approve any such venture retroactive to the date such venture satisfied the requirements of subsection (d).

IMMUNITY

SEC. 6. (a) No act or failure to act pursuant to and within the scope of any Attorney General approved joint research and development venture shall be construed to be within the prohibitions of sections 1 and 2 of the Sherman Act, sections 7 and 16 of the Clayton Act, the Federal Trade Commission Act, or any State law in pari materia.

(b) None of the participants in a joint research and development venture, nor the venture, shall be liable under section 16 of the Clayton Act with respect to threatened loss or damage by a violation of the antitrust laws if the threatened loss or damage arises from conduct undertaken in connection with the operation of an approved joint research and development venture.

(c) If, with respect to any claim brought by a person under the antitrust laws against the joint research and development venture, its employees, or the participants, or employees of such participants, the court finds that the violation alleged arises from conduct undertaken in connection with the operation of an approved venture, and—

(1) the venture was formed and operated in conformance with the characteristics set forth in section 5 of this Act, or

(2) the conduct alleged to violate the antitrust laws does not violate the antitrust laws,

then the court shall award to the person or persons against whom the claim is brought the cost of suit attributable to defending against the claim, including reasonable attorney fees.

(d) Upon notice of withdrawal of the approval of the Attorney General, the provisions of this section shall not apply to any subsequent act or failure to act pursuant to such program.

TECHNOLOGY TRANSFER

SEC. 7. (a) Pursuant to subsections (g) and (h) of section 5, the Attorney General shall withdraw approval of all or part of the joint research and development venture if any of the following terms are not satisfied:

(1) all inventions and knowledge developed in the course of a research and devel-

opment program are promptly reported by the venture to the participant firms;

(2) applications for patents on patentable inventions and methodology are made by the venture on behalf of program participants and the venture retains the title to all inventions, patents and methodologies,

(3) any firm that is a participant in a program at the time of an invention, or the time a methodology is developed is at such time entitled to access to all such resulting patents, inventions and methodologies; and

(4) no later than six years after the venture receives title to any invention, patent or methodology, it shall make access available to any other United States firms, such invention, patent or methodology on reasonable, fair and nondiscriminatory terms in light of the risks assumed and resources expended by the participants.

REPORTING REQUIREMENT; AMENDMENT OF APPROVED VENTURE

SEC. 8. (a) An approved joint research and development venture—

(1) shall promptly report to the Attorney General any change or update relevant to the matters specified under section 5(d), and shall annually submit to the Attorney General a report in such form and at such time as the Attorney General requires; and

(2) shall, in order to maintain immunity under section 6, submit to the Attorney General an application to amend the terms or scope of the previously approved venture to reflect the fact and effect of the change on the conduct specified in the previously approved venture.

(b) For purposes of section 5, an application for an amendment to an approved venture shall be deemed to be a request for approval of a venture, except that the Attorney General shall give written notification of his decision to the applicants within 30 days after the filing of such request. Such applicants decision shall be accompanied by the Attorney General's written findings.

DISCLOSURE OF INFORMATION

SEC. 9. (a) Information submitted by any person in connection with the issuance, amendment, modification, or revocation of the Attorney General approval shall be exempt from disclosure under section 552 of title 5, United States Code.

(b)(1) Except as provided in paragraph (2), no officer or employee of the United States shall disclose commercial or financial information submitted in connection with the issuance, amendment, modification of revocation of Attorney General approval if the information is privileged or confidential and if disclosure of the information would cause harm to the person who submitted such information.

(2) Paragraph (1) shall not apply with respect to information disclosed—

(A) upon a request made by the Congress or any committee of the Congress,

(B) in a judicial or administrative proceeding,

(C) with the consent of the person who submitted the information,

(D) in the course of making a determination with respect to the issuance, amendment, modification, or revocation of Attorney General approval, if the Attorney General deems disclosure of the information to be necessary in connection with making the determination,

(E) in accordance with any requirement imposed by a statute of the United States, or

(F) in accordance with any rule issued under section 10 permitting the disclosure of the information to an agency of the United States or of a State on the condition that the agency will disclose the information only under the circumstances specified in subparagraphs (A) through (E).

ISSUANCE OF GENERAL REGULATIONS

SEC. 10. Not later than 90 days after the date of enactment of this Act, the Attorney General shall issue rules to carry out this Act.

EFFECTIVE DATE

SEC. 11. This Act shall take effect on the date of enactment and shall also apply to any joint research and development venture established prior to such date.