

How Smart Is the Proposed Merger Review SMARTER Act?

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On May 9, the Standard Merger and Acquisition Reviews Through Equal Rules (SMARTER) Act passed the House of Representatives by a 230-185 vote. Shortly thereafter, the Senate introduced its own version of the bill. Aimed at amending the Clayton Act, the SMARTER Act would streamline the Federal Trade Commission's merger review process and historically align the FTC and Department of Justice standards for obtaining preliminary injunctions. Similar legislation has failed before. Has the SMARTER Act's time finally arrived?

Coordinating Merger Review

Under the Clayton Act, the DOJ and the FTC share jurisdiction to review mergers for antitrust violations. Both agencies review deals to determine whether they "substantially" "lessen competition" or "tend to create a monopoly." Under a long-standing agreement between the two agencies, the DOJ and FTC jointly decide which agency will handle a given transaction based, in large part, on which agency has more experience in the particular industry at issue. As explained by the FTC, "transactions requiring ... review are assigned to one agency on a case-by-case basis depending on which agency has more expertise with the industry involved."

In 2002, the DOJ and FTC announced long-awaited updated "clearance procedures" to govern disputes over jurisdiction. These new procedures adjusted and further clarified which agency would take responsibility for which industries. Today, the FTC generally handles mergers implicating health care, building materials, automobiles, computer hardware, supermarkets, pharmaceuticals, and professional services, among others. The DOJ generally handles mergers implicating agriculture, computer software, financial services and markets, media and entertainment, national defense, telecommunications, and transportation, among others.

Different Agency Procedures

The FTC and DOJ's shared jurisdiction is more than a trivial bureaucratic wrinkle. As a cabinet-level executive agency that reports directly to the president, the DOJ is obliged to challenge mergers in federal court. The Clayton Act mandates bench trials in such cases, and the losing party may appeal to the local federal circuit court. By contrast, as a quasi-judicial, theoretically independent regulatory body run by a bipartisan commission, the FTC has the option (and invariably does) challenge mergers internally (often referred to as Part 3 proceedings) by filing an administrative complaint. Cases are first heard by an administrative law judges (ALJ) appointed under the authority of the Office of Personnel Management. If parties wish to dispute an ALJ decision, they can appeal to the FTC Commission and then to the federal circuit courts.

The FTC review process becomes more complicated if the FTC decides to pursue a preliminary injunction to block a merger pending final review. Under the Clayton Act, the FTC may only obtain a preliminary injunction in federal court. As a result, companies to a potential merger often find themselves litigating on two fronts—the FTC administrative process for the case in chief and federal district court for the preliminary injunction. Oddly enough, the preliminary injunction case is usually the tail that wags the dog. If a preliminary injunction is granted, one or both companies frequently abandon the often time sensitive merger if a preliminary injunction is denied, the FTC rarely pursues further administrative relief.

Another key difference between DOJ and FTC review is the standard the agencies must satisfy to obtain preliminary injunctive relief. While both the DOJ and FTC must demonstrate a reasonable likelihood of success on the merits, the other elements are different. The

DOJ must show “irreparable harm,” while the FTC must show that an injunction is “in the public interest.” These different standards are especially important in merger cases where deals are frequently won or lost at the preliminary injunction stage.

As one can imagine, the FTC’s merger review process has often been criticized. In 1989, the American Bar Association opined: “No thoughtful observer is entirely comfortable with the FTC’s ... combining of prosecutory and adjudicatory functions.” In 2016, former FTC Commissioner Joshua Wright bluntly pointed out “the FTC has ruled for itself in 100 percent of its cases over the past three decades—though it is reversed more often than the decisions of federal court judges.” Similarly, critics contend the FTC’s “public interest” preliminary injunction standard is more lenient than the DOJ “irreparable harm” standard. Regardless, one would be hard pressed to formulate a genuinely meritorious reason for applying different procedures to different mergers—based entirely on which agency the industry has by historical happenstance been assigned to.

SMARTER Act Proposal

The SMARTER Act would transform FTC merger review in two significant ways:

First, it would standardize the merger review process by mandating a uniform procedure for challenging mergers, regardless of whether the FTC or DOJ takes the case. Both the House and the Senate bills would require the FTC to “exercise authority with respect to mergers ... only in the same procedural manner as the Attorney General exercises.” Simply put, under the SMARTER Act, the FTC would be obliged to challenge mergers in federal court instead of via its internal administrative review process.

Second, the bill would align the DOJ and FTC standards for obtaining preliminary injunctive relief by scrapping the “public interest” test in favor of the DOJ’s traditional equity-balancing test. Under the SMARTER Act, the FTC would need to demonstrate irreparable harm to obtain an injunction, like any other litigant.

The SMARTER Act’s sponsors trumpet the bill as a way to dispose of a dated and arbitrary procedural imbalance between two agencies tasked with applying the same laws. According to the Senate bill’s co-sponsor, Sen. Mike Lee, these “minor design flaws” serve no purpose—“there’s no good reason for two agencies to be governed by different rules when applying the same laws.” The bill’s detractors, including the American Antitrust Institute, claim the bill is a “solution in search of a problem” and that current law imposes sufficiently rigorous burdens on both the DOJ and FTC, even if they are not identical.

The question remains: will the SMARTER Act pass in Congress, and will merger-centric [President Donald Trump veto or approve it](#)? The bill has been around in one form or another for several years. By now, the House Judiciary Committee has approved various iterations of the SMARTER Act in the last four legislative sessions. Yet, each time it has stalled after receiving withering criticism. In 2015, while testifying before the Senate, former FTC Chairwoman Edith Ramirez, a Democrat appointed by President Barack Obama, called the bill “unnecessary” and argued that it threatened to “undermine the beneficial role the commission plays in merger enforcement.” There was also speculation that President Obama would have vetoed the bill, had it crossed his desk.

This time around, the outcome may be different. Historically, support for SMARTER Act legislation has been (not surprisingly) partisan. Republicans have voted nearly unanimously in favor of the bill, but Democrats have voted mostly against it. This time around, Republicans control both the House and the Senate, at least for the time being.

Moreover, in 2017, the Senate confirmed a whole new lineup of five FTC commissioners who may be more receptive to the legislation. In confirmation hearings, Sen. Mike Lee asked each commission nominee to share his or her opinion of the SMARTER Act. While the nominees stopped short of throwing their full support behind the bill, they each acknowledged the logic of standardizing the merger review process. For example, new FTC Chairman Joseph Simmons clearly stated: “I don’t see any reason why there should be two

standards.” He continued: “In terms of where the FTC files its merger challenges, I think generally it should be in the federal court [and] there should be one bite at the apple. The litigation should occur in the federal court. And if the agency loses there, they shouldn’t then be going to administrative trial.”

One thing is crystal clear, if the SMARTER Act finally passes in Congress and is approved by the President, it will fundamentally transform the FTC merger review process and seriously impact those industries falling under its merger review jurisdiction. Stay tuned.

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