



A LexisNexis® Company

News, cases, companies, firms

Search

Advanced Search



News

Rankings

Jobs

Cases

Tracking

Platform Tools

wcollins@she... ▼



Printable Version



Share Article



Rights/Reprints



Editorial Contacts

Lawmakers Eye Plan To Align DOJ, FTC Merger Tests

By **Melissa Lipman**

0 Comments

Share us on:

Law360, New York (April 03, 2014, 6:01 PM ET) -- Lawmakers floated a bill Thursday that would require the U.S. Department of Justice and the Federal Trade Commission to clear the same bar to win preliminary injunctions against mergers and do away with the FTC's administrative process for merger challenges.

Several antitrust experts told the U.S. House Judiciary subcommittee tasked with antitrust oversight Thursday that they largely supported the proposal, known as the Standard Merger and Acquisitions Review Through Equal Rules Act of 2014. Generally, the proposal to align the preliminary injunction tests won broader support than the plan to eliminate the FTC's administrative avenue for merger.

"The premise of SMARTER is simple: A merger should not be treated differently depending on which antitrust enforcement agency happens to review it," Covington & Burling LLP's Deborah Garza said in written testimony. "Regulatory outcome should not be determined by a flip of the merger agency coin."

Garza, a DOJ veteran who led the Antitrust Modernization Commission in the mid-2000s, applauded lawmakers' efforts to implement one of the key bipartisan reforms the commission backed in 2007.

For the DOJ to win a preliminary injunction against a deal, it must meet the traditional requirement of showing that allowing the deal to go forward would cause irreparable harm. The FTC, on the other hand, has a separate test laid out by the FTC Act that allows the agency to argue that blocking the deal would be in the public interest.

And while the DOJ generally agrees with the parties to consolidate preliminary and permanent injunction proceedings, the FTC has insisted on seeking only preliminary injunctions from the federal courts and proceeding with the merits of cases in their own administrative proceedings, according to Garza's testimony

The problem, Garza said, is that companies "are justifiably concerned that their fates may be different" depending on which agency is in charge of reviewing their transaction.

O'Melveny & Myers LLP antitrust chair Richard Parker, who served in the FTC during the Clinton administration, also voiced support for aligning the two agencies' merger tests, saying the FTC's litigation chops proved that it didn't need any special advantage.

Moreover, Parker warned that it was unfair that companies whose industries happened to be the expertise of the FTC should face a tougher merger challenge than those in sectors that the DOJ covers.

"It is fundamentally unfair and serves no legitimate enforcement objective for an 'FTC industry' to have a more difficult time in court than a 'DOJ industry,'" Parker said in written testimony. "As I know from experience representing clients, that is a very hard point to explain, much less defend, to an executive whose company happens to be an FTC industry for merger review purposes."

Documents

Draft Legislation

Related

Sections

- Competition
- Mergers & Acquisitions
- Public Policy

Law Firms

- TRACK Covington & Burling
- TRACK Latham & Watkins
- TRACK O'Melveny & Myers

Government Agencies

- TRACK Antitrust Modernization Commission
- TRACK Federal Trade Commission
- TRACK U.S. Department of Justice

Latham & Watkins LLP's Abbott Lipsky Jr. defended the FTC's track record since it clarified how it applied the public interest test in 1995, saying that since that time, the agency had not used its administrative processes to fight deals in cases where courts had rejected a preliminary injunction request.

But given the costs for companies of going through the administrative challenges and the flexibility the FTC has to make its own rules, Lipsky said it made sense to codify that 1995 statement.

"Legislation that largely embodies the approach taken by the FTC following issuance of the 1995 policy statement is warranted in light of this experience," Lipsky said in written testimony. "Existing law gives the FTC extraordinary flexibility to determine how and when it will pursue administrative litigation challenging structural transactions."

Seattle University School of Law professor John Kirkwood, however, told the subcommittee that applying the same preliminary injunction standards to both agencies made more sense than doing away with the FTC's administrative option.

"This may be an opening wedge in an attack on dual enforcement, a system that Congress created, that it has maintained for a hundred years and that has generally worked well, providing some competition, so to speak, in federal antitrust enforcement," Kirkwood said in written testimony. "From this perspective, the elimination of the FTC's administrative power in the merger area would be disturbing and likely to harm consumers."

Rep. Spencer Bachus, R-Ala., told the attorneys at a hearing Thursday that their testimony would inform the subcommittee's discussions of the proposal.

The measure has not yet been introduced and has no formal sponsor attached to it at this point, according to a spokesman for Bachus' office.

--Editing by Philip Shea.

0 Comments

[Terms of Service](#)

Your name will appear next to your comment. Your email address will not be visible to the public.

Submit