Simpson Thacher

To read the proposed legislation, please click here.

Report from Washington

The House Judiciary Committee Again Approves Legislation to Align FTC and DOJ Merger Reviews

April 7, 2017

"A Bill . . . to provide that the Federal Trade Commission shall exercise authority with respect to mergers . . . only in the same procedural manner as the Attorney General exercises such authority."

– H.R. 659

On April 5, 2017, the U.S. House Judiciary Committee again approved legislation to harmonize merger review processes and standards, regardless of whether the U.S. Department of Justice ("DOJ") or Federal Trade Commission ("FTC") conducts the review. Among other changes, the legislation would prevent the FTC from challenging unconsummated mergers through administrative adjudication, and it would require the FTC to meet the traditional preliminary injunction standard rather than a more relaxed standard to block a proposed merger.

Called the Standard Merger and Acquisition Reviews Through Equal Rules ("SMARTER") Act of 2017, the proposed bill is substantively identical to legislation passed in the House, and introduced in the Senate, in the previous Congress. The previous bill passed the House by a 235-171 vote nearly along party lines (with 230 Republicans and only 5 Democrats voting for it).

This time around, the SMARTER Act likely stands a much better chance of being enacted than in the past. While the Obama Administration opposed the proposed legislation—with its Democratic-led FTC testifying against it before the Senate Judiciary Committee in 2015—current FTC Acting Chairman Maureen Ohlhausen supports the SMARTER Act. And with Republican control of both houses of Congress and the Presidency, the SMARTER Act may soon become law.

Background

For most plaintiffs, obtaining a preliminary injunction requires meeting a traditional four-part test: (1) likelihood of success on the merits, (2) irreparable injury in the absence of an injunction, (3) the balance of the equities weighs in the plaintiff's favor, and (4) the injunction is in the public interest. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2007). When the DOJ seeks to enjoin a proposed merger, it sues under Section 15 of the Clayton Act,

which does not provide a standard of review. 15 U.S.C. § 25. Therefore, courts apply the traditional preliminary injunction standard to DOJ merger challenges. *United States v. Gillette Co.*, 828 F. Supp. 78, 80 (D.D.C. 1993).

In contrast, the FTC has an arguably lower bar for obtaining a preliminary injunction. Under the FTC Act, it is required to show only that "weighing the equities and considering the Commission's likelihood of ultimate success, [a preliminary injunction] would be in the public interest." 15 U.S.C. § 53(b). As such, the FTC does not need to show irreparable harm. *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1159 (9th Cir. 1984). Courts have interpreted the FTC's preliminary injunction standard as requiring it only to "raise[] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC [administrative adjudication process] in the first instance and ultimately by the Court of Appeals." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714–15 (D.C. Cir. 2001).

As indicated by the standard articulated in *Heinz*, another difference between FTC and DOJ practice is that the FTC can use its administrative adjudication to decide the ultimate merits of a merger. In contrast, the DOJ often pursues preliminary and permanent injunctions simultaneously in federal court, which requires it to prove an antitrust violation, rather than just a likelihood of success in proving such a violation. *See, e.g.*, *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 44, 49 (D.D.C. 2011) (reviewing a DOJ permanent injunction suit on the merits).

The SMARTER Act Provisions and Controversy

If enacted in its current form, the SMARTER Act would change the forum and preliminary injunction standard for FTC challenges to proposed mergers. Specifically, it would amend the FTC Act to (1) prevent the FTC from challenging unconsummated mergers through administrative adjudication and (2) no longer apply the FTC's lower preliminary injunction standard to unconsummated mergers. It would not affect other antitrust or consumer protection actions, such as challenges to conduct violations or consummated mergers, nor would it prevent the FTC from using administrative adjudication to reach consent agreements with merging parties. The SMARTER Act would also amend the Clayton Act to enable the FTC to challenge mergers in the same manner as the DOJ challenges them.

Supporters of the bill argue that it will ensure merger review consistency, predictability, and fairness. The division of jurisdiction between the FTC and DOJ is decided "on a case-by-case basis depending on which agency has more expertise with the industry involved," so it is not always clear which agency will review a merger. *See* FTC, Merger Review. Therefore,

Without the SMARTER Act, companies would continue being "subjected to fundamentally different processes and standards based on the flip of a coin."

– Representative Robert Goodlatte (R-Va.), Chairman of the House Judiciary Committee

according to Judiciary Committee Chairman Robert Goodlatte (R-Va.), the SMARTER Act is necessary to prevent companies from being "subjected to fundamentally different processes and standards based on the flip of a coin." Similarly, Acting Chairman Ohlhausen has said the FTC gets undue leverage, such as in negotiating settlements, from the prospect of using administrative adjudication and a lower preliminary injunction standard. Remarks of Maureen Ohlhausen, *A SMARTER Section 5*, at 3, 17 (Sept. 25, 2015).

But critics argue that the bill is a "solution in search of a problem" on the grounds there is no real divergence between FTC and DOJ standards and procedures. The American Antitrust Institute, *Antitrust Enforcement Data Shows SMARTER Act is Not So Smart*, at 2. While only the DOJ technically needs to show irreparable harm to obtain a preliminary injunction, courts have generally presumed irreparable harm in DOJ actions. *See, e.g.*, *Gillette*, 828 F. Supp. at 85 (finding irreparable injury based on "tak[ing] plaintiff's representations at full value"). When under Democratic leadership, the FTC testified that "while the preliminary injunction standard prescribed for the FTC . . . is worded differently than the one that applies to DOJ," both agencies are "required to make a robust evidentiary and legal showing that the transaction would likely be anticompetitive in order to obtain a preliminary injunction." Prepared Statement of FTC Before the U.S. Senate Judiciary Committee at 14 (Oct. 7, 2015). Even Acting Chairman Ohlhausen agrees that "in practice, the courts largely apply the same standard" to challenges by the FTC and the DOJ. Remarks of Maureen Ohlhausen, *A SMARTER* Section 5, at 15 (Sept. 25, 2015).

"[I]n practice, the courts largely apply the same standard" to preliminary injunction "actions brought by the FTC and DOJ."

– FTC Acting Chairman Maureen K. Ohlhausen

Critics also point out that administrative adjudication occurs only rarely for unconsummated mergers. If the FTC loses at the preliminary injunction stage, it generally does not continue to pursue administrative adjudication. Prepared Statement of FTC Before the U.S. Senate Judiciary Committee at 14 (Oct. 7, 2015) ("Significantly, in the last 20 years, the Commission has not proceeded administratively following a loss at the preliminary injunction stage."). Similarly, companies whose mergers are preliminarily enjoined generally abandon their deals rather than pursue administrative adjudication. *See FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 110 n.3 (D.D.C. 2016) ("Because the administrative process before the FTC is so time consuming, most corporations, like Defendants in this case, cannot secure financing to keep the deal together pending the administrative trial on the merits.").

While agreeing that administrative adjudication is rare in unconsummated merger cases, Acting Chairman Ohlhausen argues that this "cuts both ways: it also means the Commission would not be losing a frequently used tool." Remarks of Maureen Ohlhausen, *A SMARTER Section 5*, at 17 (Sept. 25, 2015).

Implications

While having a unified Republican government makes it more likely that the SMARTER Act will become law than in the past, this is still far from certain. If the bill becomes law, it will likely increase the consistency between FTC and DOJ review of unconsummated mergers, keeping all litigation in federal court and making clear that both agencies must meet the traditional preliminary injunction standard to prevent consummation of a proposed merger.

For further information about this legislation, please contact one of the following members of the Firm's Antitrust Practice.

WASHINGTON, D.C.

Abram J. Ellis
+1-202-636-5579
aellis@stblaw.com

Andrew M. Lacy
+1-202-636-5505
alacy@stblaw.com

Sara Y. Razi
+1-202-636-5582
sara.razi@stblaw.com

Peter Thomas
+1-202-636-5535
pthomas@stblaw.com

NEW YORK CITY

Peter Guryan
+1-212-455-2750
peter.guryan@stblaw.com

PALO ALTO

Jason M. Bussey
+1-650-251-5272
jbussey@stblaw.com

Harrison J. (Buzz) Frahn
+1-650-251-5065
hfrahn@stblaw.com

LONDON

David E. Vann
+44-(0)20-7275-6550
dvann@stblaw.com

Simpson Thacher Worldwide

UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Houston
600 Travis Street, Suite 5400
Houston, TX 77002
+1-713-821-5650

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.
900 G Street, NW
Washington, D.C. 20001
+1-202-636-5500

EUROPE

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA

Beijing
3901 China World Tower
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Seoul
25th Floor, West Tower
Mirae Asset Center 1
26 Eulji-ro 5-Gil, Jung-Gu
Seoul 100-210
Korea
+82-2-6030-3800

Tokyo
Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino
Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000