

# AntitrustConnect Blog

## Prospects Dim for Quick Passage of NOPEC, Railroad Antitrust Exemption Repeal

Jeffrey May (Wolters Kluwer) · Thursday, March 8th, 2012

Federal legislative proposals that would have repealed the antitrust exemption enjoyed by freight railroads and would have permitted the U.S. Department of Justice to sue Organization of Petroleum Exporting Countries (OPEC) members for price fixing will not pass the Senate as part of the Surface Transportation Bill.

Senator Herb Kohl (D-Wisconsin) last month introduced two antitrust amendments to the long-stalled “Moving Ahead for Progress in the 21st Century America Fast Forward Financing Innovation Act of 2011” or “MAP-21” (S. 1813)—the two-year surface transportation bill. However, a compromise to move the legislation forward excludes the proposals.

Today, Senator Harry Reid (D-Nevada) [announced](#) that an agreement had been reached between Democrats and Republicans to advance MAP-21. Under the agreement, 30 amendments would come up for a vote. However, the antitrust amendments were not among them.

### Railroad Antitrust Exemption

On February 14, Senator Kohl introduced Amendment 1591 to the transportation bill, which was identical to the proposed “Railroad Antitrust Enforcement Act of 2011” (S. 49). S. 49 was introduced on January 25, 2011, and was approved by the Judiciary Committee on March 28, 2011.

The measure would bring railroad mergers and acquisitions under the purview of the Clayton Act, allowing the federal government, state attorneys general, and private parties to file suit to enjoin anticompetitive mergers and acquisitions. Railroad mergers and acquisitions are currently reviewed by the Surface Transportation Board (STB). Moreover, the proposal would eliminate the exemption that prevents FTC scrutiny of railroad common carriers and the antitrust exemption for railroad collective ratemaking.

### NOPEC

As gas prices spiked, Senator Kohl on February 28 introduced a second amendment to the transportation bill: the proposed “No Oil Producing & Exporting Cartels (NOPEC) Act.” The amendment tracked the language of S. 394, which was introduced on February 17, 2011, and passed the Senate Judiciary Committee on April 7, 2011. The proposal would permit the Justice Department to bring actions against foreign states—such as OPEC members—for collusive practices in setting the price or limiting the production of oil. The NOPEC amendment had bi-

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partisan support, according to Kohl.

Both measures have been championed by Senator Kohl over the last few sessions of congress, but have failed to gain broad support. In fact, various versions of the NOPEC bill have been considered by Senate lawmakers for more than a decade.

With the exclusion of the antitrust amendments from the transportation bill, final passage of these proposals in the current congress is looking less and less likely. And with Kohl leaving the Senate at the end of his current term in January 2013, it is possible that the measures might need a new champion in the upper house of congress to become law.

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