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The SMARTER Act and Its Impact on Federal Merger Enforcement

Jeffrey May (Wolters Kluwer) · Monday, November 30th, 2015

Federal lawmakers are currently considering legislation that would eliminate differences in the procedures used by the Federal Trade Commission (FTC) and the Department of Justice Antitrust Division in challenging unconsummated acquisitions and mergers. The proposed "Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015" or "SMARTER Act" is intended to address concerns that parties to a proposed merger or acquisition currently face different preliminary injunction standards in court challenges, as well as different processes, depending upon which federal antitrust agency reviews the transaction.

The so-called SMARTER Act has two main objectives: (1) equalize the standards for the two federal antitrust agencies for obtaining a preliminary injunction against a proposed merger or acquisition; and (2) eliminate the FTC's ability to pursue administrative adjudication to challenge a proposed transaction when it seeks a preliminary injunction in court. In effect, it would attempt to standardize the processes used by the two agencies to block a proposed merger or acquisition that raises competition concerns. It would not impact FTC challenges to consummated mergers or other antitrust violations.

Injunctive Relief

Under Section 15 of the Clayton Act, 15 U.S.C. §25, the Justice Department can seek to enjoin a transaction on the grounds that the acquisition would substantially lessen competition. However, the provision does not define the standard of review for the Justice Department's preliminary injunction motion. Consequently, a traditional equitable standard applies. This means that the Justice Department must make a showing of a substantial likelihood that the transaction violates Section 7 of the Clayton Act.

On the other hand, a different injunction standard applies for the FTC. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the agency to bring a federal court action, seeking injunctive relief against a violation of any law that the agency enforces, "pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final . . ."

Under this provision, a preliminary injunction may be granted "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest . . .." This "public interest" standard is considered to be a

more lenient standard than the test imposed on the Justice Department in seeking preliminary injunctive relief.

The SMARTER Act would amend Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), to exclude the FTC from seeking a preliminary injunction in a case brought under Section 7 of the Clayton Act, 15 U.S.C. §18. To ensure that the FTC has authority to challenge proposed mergers, the proposal would amend Section 15 of the Clayton Act, 15 U.S.C. §25, which grants the Justice Department the authority to seek to enjoin a proposed merger, to provide that the Clayton Act duties and authorities under this provision extend to the FTC. Because Section 15 does not specify the standard of review for the government's preliminary injunction motion, a traditional equitable standard would apply for both agencies.

Administrative proceedings

In addition to facing different standards for preliminary injunctions, the FTC and the Justice Department have different processes for challenging proposed mergers and acquisitions. While the Justice Department's ability to challenge mergers is limited to court proceedings, the FTC has the authority to pursue administrative proceedings and to seek a cease and desist order or divestiture relief under Section 5 of the FTC Act, 15 U.S.C. §45, and Section 11 of the Clayton Act, 15 U.S.C. §21.

It has been the practice of the Justice Department to dismiss merger challenges after the denial of injunctive relief. This is true for both preliminary injunction and permanent injunction proceedings. Often the Justice Department and merging parties agree to forego the preliminary injunction phase of the case and proceed directly to a trial on the merits in order to obtain permanent injunctive relief under Rule 65(a)(2) of the Federal Rules of Civil Procedure.

While the FTC also has authority to seek permanent injunctive relief in federal court, the agency' approach is to seek preliminary injunctive relief to maintain the status quo while the agency proceeds with administrative proceedings, sometimes called Part 3 litigation, to challenge the merits of a proposed transaction. The FTC has the ability to pursue administrative proceedings, even if the agency is denied a preliminary injunction in federal court. While the agency has not pursued administrative litigation after the denial of a preliminary injunction in more than two decades, the SMARTER Act aims to take away this authority from the FTC. Uncertainty for merging parties about whether the FTC will abandon its objections to a transaction following the denial of a preliminary injunction or pursue administrative action is among the major concerns that the Act is intended to address.

The SMARTER Act would amend Section 5 of the FTC Act, 15 U.S.C. §45, which allows the FTC to initiate an administrative proceeding to evaluate an "unfair method of competition," to exclude the initiation of a proceeding on the basis of a merger review.

Section 5(b)'s first sentence would read as follows:

> Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition ***(excluding the consummation of a proposed merger, acquisition, joint venture, or similar transaction that is subject to section 7 of the Clayton Act (15 U.S.C. 18), except in cases where the Commission approves an agreement with the parties to***

> ***the transaction that contains a consent order)*** or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. (Emphasis on amendment text added.)

In addition, the measure would amend Section 11 of the Clayton Act, 15 U.S.C. §21, which authorizes the enforcement of compliance with certain sections of the Clayton Act by federal agencies including the FTC, to add a new paragraph (m) to exclude the FTC's enforcement of Section 7. However, the proposal would ensure that, if the FTC reaches a proposed consent order with the parties to the transaction with respect to a violation of section 7, the Commission would enforce compliance in accordance with Section 11.

FTC Response

In testimony before the Senate Judiciary Committee's antitrust subcommittee on October 7, 2015, FTC Chairwoman Edith Ramirez said that the SMARTER Act risks "undermining the beneficial role the Commission plays in merger enforcement."

Chairwoman Ramirez said that the agency's main concern was with provisions in the legislation that remove certain aspects of the FTC's adjudicative function. Further, she noted that the legislative efforts to harmonize the preliminary injunction standards imposed on the FTC and the Department of Justice were not needed because the courts already impose the same standard in practice.

Three of the four current FTC members oppose the measure. Commissioner Maureen K. Ohlhausen, on the other hand, supports harmonization of standards for seeking a preliminary injunction. In a speech, entitled "A SMARTER Section 5," Commissioner Ohlhausen said that she generally supported legislative efforts at making the merger review process as similar as possible across the two antitrust agencies. Regarding proposed changes to the agency's administrative procedures, she cautioned against making the FTC subordinate to the Justice Department in challenging unconsummated mergers or otherwise impinging on the independence of the FTC.

The Current Status of the Legislation

The House version of the measure (H.R. 2745) was introduced by Rep. Blake Farenthold (R-Texas) on June 12, 2015. It was approved by the House Judiciary Committee with a vote of 18-10 on September 30, 2015. The vote was along party lines with the exception of one Democrat—Rep. Scott Peters of California—voting in favor of reporting the bill.

Companion legislation in the Senate (S. 2102) was introduced by Senators Mike Lee (R-Utah), Chuck Grassley (R-Iowa), and Orrin Hatch (R-Utah) on September 30, 2015. The Senate Judiciary Committee's antitrust subcommittee held a hearing on the proposal on October 7 at which Chairwoman Ramirez delivered the Commission's testimony discussed above.

Even if the measure does not pass in this Congress, it will most like appear in the next. Moreover, the FTC will continue to feel pressure from federal lawmakers to streamline processes and remove

uncertainty for businesses. This could impact, and potentially already has impacted, the Commission's decisions in the merger enforcement area.

A more detailed paper, considering the SMARTER Act and how it would transform the FTC's merger enforcement program, as well as registration information for a complimentary 30-minute webinar on the topic to be held on December 9, is available here.

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