

AntitrustConnect Blog

New Administration, Congress Likely to Renew 'FTC Reform' Efforts

Jeffrey May (Wolters Kluwer) · Monday, November 21st, 2016

Long-stalled efforts proposed by some federal lawmakers to bring "reform" to the FTC will likely be reintroduced in the 115th Congress. With a Republican majority in both the House of Representatives and Senate, and President Donald J. Trump in the White House, measures that could not get sufficient support in the current Congress and faced a likely veto from President Barack Obama will certainly be back next year.

Much of the push for changes at the FTC took place in the House of Representatives, where House Republicans recently voted to maintain their current leadership. Rep. Michael C. Burgess (R-Tex.), who was re-elected to his seat, took the lead on a package of reform bills. As House Energy and Commerce Committee Commerce, Manufacturing and Trade Subcommittee chairman, Burgess said earlier this year that "we are long overdue to revisit the FTC Act and ponder some targeted adjustments," in light of the fact that it has been 20 years since Congress last reauthorized the FTC.

In July, House Energy and Commerce Committee approved a legislative package that included eight bills that Republicans said would help reform the FTC. At the July 14 markup, the panel voted for the FTC Process and Transparency Reform Act ([H.R. 5510](#)). The package consolidated the following bills: the Technological Innovation Through Modernizing Enforcement (TIME) Act (H.R. 5093), the Start Taking Action on Lingering Liabilities (STALL) Act (H.R. 5097), the FTC Robust Elderly Protections and Organizational Requirements to Track Scams Act (H.R. 5098), the Clarifying Legality and Enforcement Action Reasoning (CLEAR) Act (H.R. 5109), the Statement on Unfairness Reinforcement and Emphasis (SURE) Act (H.R. 5115), the Freeing Responsible and Effective Exchanges (FREE) Act (H.R. 5116), the Solidifying Habitual and Institutional Explanations of Liability and Defenses (SHIELD) Act (H.R. 5118), and the Revealing Economic Conclusions for Suggestions (RECS) Act (H.R. 5136).

The measures are intended to limit the agency's enforcement against an unlawful acts or practices to instances of substantial injury to consumers; require the agency to make an annual report on the status of investigations; mandate economic analysis for the agency's legislative and regulatory recommendations; prescribe that agency investigations terminate at the expiration of six months; and require the filing of an annual plan with Senate and House Committees.

FTC chairwoman's concerns

At a congressional hearing in May, FTC Chairwoman [Edith Ramirez](#) expressed concern that some of the measures might hamper the FTC's ability to fulfill its dual consumer protection and competition

missions. Among other things, the agency testimony defended the duration of FTC consent orders. The proposed TIME Act ([H.R. 5093](#)) would place an eight-year time limit on most administrative consent orders. Ramirez also raised questions about the proposed STALL Act ([H.R. 5097](#)), which contains provisions intended to relieve businesses of uncertainty as to whether an FTC investigation is still open, by requiring the FTC to send the company being investigated a verifiable written communication every six months. In addition, Ramirez expressed concern that an annual agency report on consumer protection investigations required by the proposed CLEAR Act ([H.R. 5109](#)) could result in information that identified companies that were the subject of closed investigations and needlessly harm their reputations and invite litigation.

The FTC will likely see a new FTC chair in 2017. That individual may very well have different views on these proposals.

SMARTER Act

House Republicans were able to win passage of another reform measure—the proposed “Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015” or “SMARTER Act” ([H.R. 2745](#))—which would impact FTC merger enforcement. The legislation, which passed the House in March, seeks to eliminate differences in the procedures used by the FTC and the Department of Justice Antitrust Division in challenging unconsummated acquisitions and mergers. The measure is stalled in the Senate. It will likely be back in the 115th Congress.

The bill would (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. The FTC would have to challenge unconsummated mergers in court, like the Justice Department.

The Obama Administration had issued a [statement](#) strongly opposing House passage of the bill. The Commission’s [testimony](#) before the Senate Judiciary Committee’s antitrust subcommittee in October 2015 called the measure “unnecessary” and said that it risked “undermining the beneficial role the Commission plays in merger enforcement.”

Even with a Republican majority, Senate approval of the SMARTER Act and the other measures is an open question in the next Congress. But chances of new legislation impacting the FTC’s enforcement efforts and procedures are much greater since the election.

President-elect Trumps “[100-day action plan to Make America Great Again](#)” calls for cutting back on federal regulations and efforts at regulatory reform will remain on the agenda in the Republican-dominated House.

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