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Expert Analysis

ANTITRUST TRADE AND PRACTICE

Midterm Congressional Legislative Wrap-up: Major Issues, Emerging Priorities

By **Shepard Goldfein** And **Karen Hoffman Lent**

Political debates over the future of antitrust policy have become increasingly widespread over the past several months, but the 115th session of Congress will likely conclude without any major antitrust legislation being enacted. Some bills have passed narrowly along party lines in the House of Representatives—only to be tabled in the Senate—while others receive bipartisan support in one chamber, yet lack the votes in the other. But even though Congress failed to enact any meaningful reform during this session, lawmakers in both parties regularly proposed a wide variety of antitrust legislation that could significantly alter several elements of current law and process. Notably, lawmakers in both parties have proposed major—albeit drastically different—reforms in the area of federal merger review. Further, with Democrats currently favored to gain a majority in at least one chamber in the upcoming midterm elections, it is likely that debates over reforming antitrust policy—and especially merger review—will continue to escalate based on the known priorities of the Democratic legislators poised to take over antitrust subcommittee chairmanships.

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Republican Priorities: From Merger Review to Class Action Reform. Over the past two years, the Republican-led House has been particularly active in pursuing antitrust legislation. In terms of merger policy, on May 9, 2018, the House passed the *Standard Merger and Acquisitions Reviews Through Equal Rules Act of 2018* (H.R. 5645) (SMARTER) by a vote of 230-185. The Act aims to harmonize merger review procedures between the two federal agencies charged with evaluating potential transactions—the DOJ and FTC. Currently, the FTC can challenge a merger using in-house administrative procedures under §13(b) of the Federal Trade Commission Act, while the DOJ can challenge a merger only in federal district court. The SMARTER Act would eliminate the FTC's in-house challenge authority and require the agency to pursue relief exclusively in federal court, greatly curtailing the FTC's ability to challenge mergers it deems harmful to competition. The SMARTER Act would also eliminate the FTC's "public interest" standard for obtaining preliminary injunctive relief, replacing it with the DOJ's equity-balancing test.

The House also pursued major class action reform, narrowly passing (220-201) the *Fairness and Class Action Litigation Act of 2017* (H.R.

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985) (FCALA) on March 9, 2017. If enacted, FCALA would substantially alter how class action lawsuits—particularly those with antitrust claims—can be litigated. Among other provisions, FCALA would codify ascertainability as a requirement of class certification, require potential class members to establish that they suffered the same type and scope of injury, prohibit law firms from representing the same client in multiple class actions, and stay discovery while any preliminary motions are pending. In effect, the reforms could limit the ability of plaintiffs to bring large, single-class actions, forcing plaintiffs to certify multiple subclasses, while also hampering law firms from utilizing the same named plaintiffs across multiple lawsuits.

Taken together, the two bills could significantly reshape both private antitrust lawsuits and FTC merger review. Given their narrow passage in the House, however, neither bill has received serious attention in the Senate, and it remains to be seen whether the bills can pass in their current form.

Limited Bipartisanship: Narrowing Antitrust Immunities. Not every piece of House-backed antitrust legislation has divided the chamber along party lines. One area where Democrats and Republicans have shown some interest in antitrust bipartisanship is in updating antitrust immunities. For example, during the unsuccessful effort to repeal the Affordable Care Act in 2017, the House overwhelmingly passed (416-7) the *Competitive Health Insurance Reform Act of 2017* (H.R. 372) to amend the McCarran-Ferguson Act in order to remove health insurance companies' immunity for certain forms of anticompetitive conduct under the Sherman and Clayton Acts. The bill died in the Senate, but if health care reform reemerges in the next session, it is possible that a version of this bill will be included.

Additionally, there is also bipartisan momentum in both chambers to eliminate longstanding antitrust immunity granted by judicial precedent to the Organization of the Petroleum Exporting Countries (OPEC)—a cartel comprised of several major oil-producing countries. Introduced in the House on May 22, 2018, the *No Oil Producing and Exporting Cartels Act* (H.R. 5904) (NOPEC) would permit the DOJ to sue OPEC for antitrust violations related to the production and sale of petroleum. A similar bill passed in both chambers in 2007, but it was never reconciled due to a veto threat from President Bush. This time around, Congress likely has the support of President Trump. Prior to becoming President, he voiced support for NOPEC in his 2011 book *Time to Get Tough*, and in September he explicitly condemned OPEC's impact on oil prices during a speech to the United Nations. Consequently, lawmakers from both parties are revisiting the bill. The House version has seven co-sponsors—five Republicans and two Democrats—and the companion Senate bill (S.3214) has four co-sponsors—two from each party. On Aug. 20, 2018, the Senate and House Judiciary Committee Chairmen wrote to Assistant Attorney General Makan Delrahim to request his views on the bill, and while Delrahim has not yet formally responded to the inquiry, in 2008, he wrote an op-ed in support of the 2007 NOPEC bill. Absent a dramatic reversal in the Executive Branch's views, NOPEC's passage could be a rare bipartisan achievement early in the next session.

Outside of NOPEC, it seems unlikely that any of the major antitrust legislation considered during the 115th session will be enacted during the next session, but even so, lawmakers continue to propose a variety of reforms to modernize antitrust enforcement. With the 2018 midterm elections approaching, it is possible that a shift in relevant committee leadership could lead to greater substantive action when Congress returns in January.

A 'Blue Wave' Could Bring New Antitrust Leaders, Priorities to the 116th Congress. It is always possible that the electoral landscape dramatically shifts in the final weeks leading up to election day, but current polling suggests that Democrats will likely win control in at least one congressional chamber. As of late September, FiveThirtyEight projects that Democrats have a roughly 80 percent chance of winning control in the House and a 30 percent chance in the Senate. If either chamber changes hands, congressional antitrust priorities—particularly in terms of merger review—could shift significantly based on new leadership.

In the House, David Cicilline (D-R.I.) is in line to take over as Chairman of the House Judiciary

Subcommittee on Regulatory Reform, Commercial and Antitrust Law. Since joining the House in 2011, Rep. Cicilline has been a major advocate of heightening congressional scrutiny of “mega-mergers” in telecom, retail, and entertainment industries by expanding traditional antitrust analysis to review a merger’s effects beyond its impact on consumer welfare. As one of three House Democrats to author the party’s new “Better Deal” platform to modernize antitrust enforcement, and a founding member of the recently formed Congressional Antitrust Caucus, Rep. Cicilline has repeatedly warned that the United States is experiencing a “monopoly moment” that requires comprehensive antitrust reform to combat what he sees as overwhelming economic concentration among major corporations. As part of his efforts, Rep. Cicilline has co-sponsored the *21st Century Competition Commission Act of 2017* (H.R. 4686), which would create a new government agency charged with evaluating the impact of major mergers and increased market concentration, and the *Merger Retrospective Act of 2017* (H.R. 4538), which would require the DOJ and FTC to conduct annual retrospective studies of how recent mergers impact jobs, wages, prices, and local economies. While Rep. Cicilline has been largely critical of several recent multibillion dollar mergers, he has not opposed every recent “mega-merger,” even voicing strong support for the proposed $69 billion vertical merger between CVS—based in his home state of Rhode Island—and Aetna. Nevertheless, if he becomes subcommittee chairman, it seems likely that he will push the committee to investigate major transactions more thoroughly going forward.

In the Senate, Amy Klobuchar (D-MN) would likely become Chairwoman of the Senate Judiciary Committee’s Subcommittee on Antitrust, Competition Policy and Consumer Rights. Like Rep. Cicilline, Sen. Klobuchar has recently proposed several efforts to strengthen merger review. One of Sen. Klobuchar’s most significant proposals is the *Consolidation Prevention and Competition Promotion Act of 2017* (S.1812), which would amend §7 of the Clayton Act to lower government enforcers’ burden when attempting to block a transaction, from having to show that the prospective merger would substantially lessen competition, to needing show only that it would cause more than a de minimus amount of harm to competition. For mergers that would lead to a significant increase in market concentration or surpass a statutorily defined threshold, the bill would shift the burden away from the government to the merging parties to prove that the deal would not harm competition in order to obtain government approval. Sen. Klobuchar’s and Rep. Cicilline’s proposals were immediately tabled, but suggest that they will continue to make merger reform a priority in the next session.

Ultimately, even if Democrats recapture majorities in one or both chambers, do not expect that any major antitrust legislation—with the possible exception of NOPEC—to pass given the continuing hyper-partisan legislative atmosphere, presumably slim majorities that would accompany Democratic gains, and the potential for a presidential veto.

Ultimately, even if Democrats recapture majorities in one or both chambers, do not expect that any major antitrust legislation—with the possible exception of NOPEC—to pass given the continuing hyper-partisan legislative atmosphere, presumably slim majorities that would accompany Democratic gains, and the potential for a presidential veto. Even so, if Rep. Cicilline and/or Sen. Klobuchar chair their respective subcommittees in January, companies considering significant mergers should expect that the subcommittees will use the full extent of their oversight capabilities to scrutinize major transactions going forward.

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