

“Better Deal” Legislative Proposal Would Overhaul U.S. Antitrust Merger Review

IN SHORT

The Situation: Proposed legislation would rewrite U.S. antitrust law, expanding the criteria antitrust agencies would be required to use to evaluate proposed mergers well beyond traditional antitrust enforcement.

The Impact: Large mergers would be considered presumptively anticompetitive. Today, antitrust agencies bear the burden of proof regarding potential anticompetitive effects, but under the proposed legislation, the merging parties would be obliged to prove the procompetitive benefits of a merger.

Looking Ahead: Antitrust agencies would be required to retrospectively review consummated mergers and take corrective action to address any noncompetitive conditions.

A number of Democrats in Congress have proposed to revamp U.S. antitrust law with a "Better Deal" economic plan. The proposed legislation takes aim at large corporations and includes measures that are at odds with decades of antitrust jurisprudence. Given the current leadership in the White House and Congress, however, it seems unlikely that the proposal would ever get approved.

The "Better Deal" proposal would require rewriting key agency guidelines and dramatically shift antitrust enforcement in several respects. Since the 1982 revision to the Horizontal Merger Guidelines, the guidepost of American antitrust merger review has been consumer welfare, most often measured by reference to possible increases in customer prices.

Under the Better Deal plan, the antitrust agencies' concerns would be expanded to include scrutiny over reduced wages, job cuts, and consumer data privacy. Additionally, instead of the federal antitrust agencies bearing the burden of proof regarding the predicted anticompetitive effects of a merger, the new standard would make mergers of a certain size presumptively anticompetitive, with the burden on the merging parties to prove that efficiencies, synergies, and other procompetitive benefits outweigh any anticompetitive harms.



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The proposal also would require the agencies to retrospectively review consummated mergers to ensure competition has remained; if noncompetitive conditions are found, the proposal would require the agencies to take corrective action. The proposal would even create a new consumer competition "Trust Buster" to proactively and publicly recommend enforcement action against anticompetitive mergers, with the agencies then required to publicly justify the rationale for not proceeding with any recommendation.

Many of the merger harms targeted by the proposal are far outside the scope of "antitrust" harms that antitrust law in the United States seeks to prevent. The U.S. agencies' focus historically has been on protecting market competition and protecting consumers from increased prices and reduced output. The "Better Deal" economic proposal would explicitly add protections for small businesses, employee wages, employment, and consumer data privacy.

One difference between the proposal's goals and traditional antitrust thinking is visible in the treatment of job cuts. The Better Deal would consider employment reductions resulting from a merger as a consumer harm the agencies would be responsible for preventing; in contrast, traditional antitrust analysis would tend to view job reductions resulting from a merger as a potential cost synergy to be weighed against any anticompetitive effects. According to statements by Senator Elizabeth Warren and others, the Better Deal is aimed at stemming the "growing corporate influence" claimed to have harmed innovation and stifled small businesses.

This proposal is unlikely to become law and have any impact on antitrust merger enforcement, certainly not at any time when Republicans control either house of Congress or the White House. Putting aside whether there are merits to having the Better Deal's public interest factors considered in government regulation of mergers, the particular factors cited are outside the traditional scope of the "antitrust" laws of this country—as enforced in both Republican and Democratic administrations—and most other jurisdictions. Just as other types of federal and state laws take mergers as an opportunity to consider noncompetition factors (as in the public interest reviews of the Federal Communications Commission in telecom mergers and state public utility commissions in various regulated industries), new federal legislation aimed at protecting employees and small businesses is within the realm of possibility, but this would not be "antitrust" law as we know it.

Despite the odds against enactment of anything like the proposal, the Better Deal is having at least some political impact in Washington. Senator Warren reportedly has put a hold on voting for President Trump's nominee for Assistant Attorney General of the Justice Department's Antitrust Division, Makan Delrahim. Although voted out of the Senate Judiciary Committee by a vote of 19–1 in June, Mr. Delrahim's nomination now is stalled and will not be taken up by the full Senate until it reconvenes in September.

TWO KEY TAKEAWAYS

1. The legislation is unlikely to become law at a time when Republicans control either house of Congress or the White House.
2. Although federal and state law do take mergers as an opportunity to consider public interest factors outside of consumer prices, the factors introduced under the Better Deal legislation are outside of antitrust law as it has been understood and enforced by both Republican and Democratic administrations.

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