

Antitrust Bills Seek to Thwart Mega Mergers

IN SHORT

The Situation: Democrats have proposed legislation that would make it easier for antitrust agencies to challenge mergers.

The Background: This announcement followed a proposal made in August, known as the "Better Deal," which was also designed to broaden antitrust enforcement and included elements that were outside the bounds of antitrust law as it has traditionally been practiced.

Two months ago, Democrats in the United States Congress proposed to revamp U.S. antitrust law with a "Better Deal" economic plan that included measures at odds with key agency guidelines and decades of antitrust enforcement. See Jones Day *Commentary*, "[Democrats Seek Overhaul of Antitrust Merger Review with "Better Deal" Proposal](#)." Recently, Senator Amy Klobuchar, the top Democrat on the Senate Judiciary Subcommittee on Antitrust, along with nine Democratic cosponsors, announced new legislation to make it easier for the antitrust agencies to challenge mergers, and to increase the burden on merging parties following settlement with the antitrust agencies. As with the "Better Deal" proposal, it seems unlikely that the proposal will be realized, certainly not soon.

Senator Klobuchar announced two bills, the Consolidation Prevention and Competition Promotion Act of 2017 ("CPCPA" bill) and the Merger Enforcement Improvement Act ("MEIA" bill). The CPCPA makes it significantly easier for the antitrust agencies to challenge transactions. It includes the "Better Deal" proposal to shift the burden of proof in large mergers to the merging parties to prove that efficiencies, synergies, and other procompetitive benefits outweigh any anticompetitive harms. This contrasts to historical practice whereby the antitrust agencies bore the burden of proving the anticompetitive effects of the merger. In addition, the CPCPA would revise the Clayton Act to permit the antitrust agencies challenging a merger to have to prove only that the transaction "materially" lessens competition, instead of "substantially lessens" competition. This would overturn 100 years of antitrust jurisprudence concerning the Clayton Act's threshold language. No additional information is provided as to what counts as "material."



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The CPCPA also includes the "Better Deal" proposal to create a "Trust Buster," the Office of Competition Advocate, within the Federal Trade Commission, that would proactively recommend enforcement action against anticompetitive mergers. The MEIA bill would require parties settling with the antitrust agencies to report annual data on market pricing and efficiencies for five years. The bill would also increase funding for the antitrust agencies in 2018, index premerger notification filing fees, and provide the FTC and the Government Accountability Office the authority to study both merger remedies and the influence of institutional investors on concentrated markets.

The bill does not propose to amend the antitrust laws to explicitly add protections for small businesses, employee wages, employment, or consumer data privacy, which were targeted by the "Better Deal" economic proposal. This would be consistent with the recent comment by FTC Acting Chairman Maureen Ohlhausen that "There are many social and economic problems ... that antitrust is simply not well suited to address. Antitrust is a precision tool, designed to remedy specific harms to the *process* of competition, not to address macroeconomic issues."

According to Senators Richard Blumenthal and Klobuchar, the bill was required to "modernize laws to keep pace with the evolution of our industries," "amidst crushing private sector consolidation" that they say is "driving up costs for consumers and driving down innovation in business." The American Antitrust Institute, Public Knowledge, and Consumers Union all support the legislation. However, these bills are unlikely to become law under the current Republican-controlled White House and Congress and, given the radical change these would work in U.S. antitrust law, would face an uphill battle in any Congress and Administration.

TWO KEY TAKEAWAYS

1. The new bills are narrower than the Better Deal proposal but still make it significantly easier for antitrust authorities to challenge mergers. Merging companies would be required to show that the procompetitive benefits of the deal would outweigh any anticompetitive costs.
2. Like the Better Deal proposal, the CPCA and MEIA bills are unlikely to pass into law.

CONTACTS



J. Bruce McDonald
Houston/Washington



Paula W. Render
Chicago

[Laura E. Malament Dreyfuss](#), an associate in the Washington Office, assisted with the preparation of this Commentary.

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