



H.R. 5645 – Standard Merger and Acquisition Reviews Through Equal Rules Act of 2018 (SMARTER Act) (Rep. Handel, R-GA)

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FLOOR SCHEDULE:

Expected to be considered on May 9, 2018, under a structured [rule](#). The amendment makes in order one amendment.

The rule also provides for consideration of H.R. 2152, the Citizens Right to Know Act of 2017, and S.J. Res. 57.

TOPLINE SUMMARY:

[H.R. 5645](#) would amend the [Clayton Act](#) and the [Federal Trade Commission Act](#) to improve transparency and predictability in the antitrust merger review process to provide the FTC the same authority as the Department of Justice in seeking an injunction against a proposed merger in Federal court and harmonize the legal standards for such proceedings. Specifically, this legislation would: (1) equalize the standards for the Federal Trade Commission (FTC) and the Department of Justice Antitrust Division for obtaining a preliminary injunction against a proposed merger or; acquisition and, (2) would prohibit the FTC from using administrative adjudication to challenge a proposed transaction when attempting to obtain a preliminary injunction in court.

COST:

A Congressional Budget Office (CBO) estimate is not yet available.

The [CBO previously estimated](#) that similar legislation would not have a significant impact on discretionary spending.

CONSERVATIVE CONCERNS:

- **Expand the Size and Scope of the Federal Government?** No.
- **Encroach into State or Local Authority?** No.
- **Delegate Any Legislative Authority to the Executive Branch?** No.
- **Contain Earmarks/Limited Tax Benefits/Limited Tariff Benefits?** No.

DETAILED SUMMARY AND ANALYSIS:

The [Antitrust Division of the DOJ](#) and the [FTC](#) both share responsibility in enforcement of federal antitrust laws. Under Section 7 of the Clayton Act, mergers and acquisitions that would greatly lessen competition or would essentially create a monopoly are prohibited. Each division is able to enforce Section 7 under the

[Hart-Scott-Rodino Antitrust Improvements](#) Act (HSR Act). Each agency is notified of a chance for review, with only one agency taking responsibility for review of a proposed action. Generally, the agencies will grant an early termination of the statutory waiting period, or will allow it to expire without taking action, allowing the transaction to proceed to consummation. If the consummation is determined to violate Section 7, the agencies will pursue an injunction in federal court. If an injunction is granted, the parties will generally abandon the merger. If an injunction is not granted, the consummation moves forward.

Presently, the FTC and the DOJ use different standards in seeking a preliminary injunction. According to a past committee [report](#), in looking at the FTC requests, the courts typically apply Section 13(b) of the FTC Act, which states, “[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, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond.” A DOJ request is considered under Section 15 of the Clayton Act, which does not include a standard for review. Therefore, the DOJ must meet preliminary injunction standards as applied in the circuit courts, which typically require a reasonable likelihood for success on the merits and a balance of equities that favors the DOJ. According to the committee report, some believe these standards are more lenient for the FTC than the DOJ.

In attempting to prevent a proposed transaction, the DOJ typically agrees with transaction parties to combine proceedings for the preliminary injunction and the permanent injunction before the district court. While the FTC has the authority to similarly consolidate, it typically refuses to do so in order to preserve its ability to pursue administrative litigation, which is typically filed simultaneously with the request for an injunction, in the event of a denial of a preliminary injunction. If the injunction is denied, the parties could consummate their transaction while the administrative litigation is proceeding, but must unwind the transaction if the FTC prevails in the administrative litigation. The DOJ does not have the ability to conduct administrative litigation.

In 2003, the [Antitrust Modernization Commission](#) was formed to examine the state of antitrust laws. The commission noted that the disparities in preliminary injunction standards could cause differences in how parties interact with agencies. On March 13, 2015, the FTC announced its intentions to readopt the [“Pitofsky Rule,”](#) which states that if the FTC does not succeed in preliminary injunction proceedings, it will not automatically proceed to administrative litigation—rather, it will consider doing so on a case-by-case basis. It also provides for an automatic stay of administrative litigation following a preliminary injunction denial in court, though the FTC retains the authority to use administrative litigation.

The SMARTER Act provides the same authority pertaining to preliminary injunctions to the FTC as is presently enjoyed by the DOJ under the Clayton Act. It also would require the FTC to petition a district court when seeking a preliminary injunction, rather than using an internal administrative litigation process, though the FTC will retain administrative litigation capabilities in some contexts. Both the DOJ and the FTC will be able to seek preliminary and permanent injunctions, under identical standards applied by the courts. These standards that will apply to both the DOJ and FTC include: (1) notification by the Attorney General to the state attorneys general of relevant antitrust actions; (2) in cases brought by the United States, including the FTC, with final judgements against the defendant, the judgements can be used as prima facie evidence of antitrust violations, when similar facts are brought by other parties; (3) the suspension of the statute of limitations for private and state rights of action concerning the conduct in question during a US proceeding and for a year following for most claims, and for four years for certain claims; (4) identical enforcement procedures applicable to the Attorney General; (5) similar ability to issue subpoenas; and (6) a similar duty to initiate lawsuits. The FTC would still have the ability to enter into Section 7 consent decrees with parties of the proposed transaction.

This legislation would also amend the FTC Act, so that the FTC is precluded from initiating an administrative proceeding against a proposed transaction. It also would be amended to provide for the FTC to submit an application to the courts for a writ of merger case review, if the FTC finds an activity in question constitutes an unfair method of competition. It would also exclude the ability of the FTC to seek a

preliminary injunction under the FTC Act, because the FTC would have this ability under the Clayton Act. Finally, the FTC Act would be amended to give the FTC authority to issue subpoenas and take depositions in prosecuting Section 7 cases.

A past legislative bulletin can be found [here](#).

AMENDMENTS:

[Goodlatte](#) (R-VA) Manager's Amendment: This Amendment would make several technical corrections to the legislation, including prohibiting the Federal Trade Commission from using the procedures for administrative adjudication set forth in subsection (b) to "prevent the consummation of a proposed merger, acquisition, joint venture, or similar transaction that is subject to section 7, unless the complaint is accompanied by a consent agreement between the Commission and a party to the transaction that resolves all the violations alleged in the complaint." The Federal Trade Commission would be permitted to institute district court proceedings under section 15 to prevent the consummation of a transaction.

COMMITTEE ACTION:

H.R. 5645 was introduced on April 27, 2018, and was referred to the House Committee on the Judiciary.

Identical text was passed last Congress as H.R. 2745 by a vote of [235 - 171](#).

ADMINISTRATION POSITION:

A Statement of Administration Policy is not available at this time.

CONSTITUTIONAL AUTHORITY:

According to the sponsor, Congress has the power to enact H.R. 5645 pursuant to: Article I, Section 8, Clause 3 and 18 of the U.S. Constitution.

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