Insight

Updating the Tunney Act: Proposal Comes With Risks

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Executive Summary

- Senator Amy Klobuchar (D-MN) has introduced the Antitrust Accountability and Transparency Act to bolster transparency surrounding antitrust settlements and subject the Federal Trade Commission to the same review requirements as the Department of Justice.
- The bill would amend the Tunney Act, which requires federal courts to review and approve antitrust settlements, amid growing concerns about the current process.
- While intended to increase transparency, the proposal would likely introduce added regulatory risks – delay deal closings, increase litigation costs, discourage open dialogue among parties, and strip executive branch prosecutorial discretion.

Introduction

Senator Amy Klobuchar (D-MN) has introduced the Antitrust Accountability and Transparency Act to increase transparency surrounding antitrust settlements. The bill would amend the Tunney Act, which requires a federal court to review and approve antitrust settlements.

In announcing the bill, Senator Klobuchar cited a recent antitrust settlement between the Department of Justice (DOJ) and Live Nation-Ticketmaster as a key motivation. Policymakers, including Sen. Klobuchar, have raised similar concerns regarding allegations of impropriety in the merger between Hewlett Packard Enterprises and Juniper Networks.

Currently, the Tunney Act applies to antitrust settlements involving the DOJ. The proposed legislation would subject the Federal Trade Commission (FTC) to the same requirements,

modify the standard of judicial review, disrupt the timing of mergers, strengthen the role of state attorneys general, and strip prosecutorial discretion from the executive branch.

Taken together, these proposed changes could create an atmosphere in which firms are hesitant to engage in open discussions with the federal government, cause delays in deal closings, and increase litigation costs.

Tunney Act

Prior to the Tunney Act, the judicial review of DOJ antitrust settlements was merely a formality, consisting of signing the decree for it to become a court order. Yet during the Nixon Administration, the DOJ settled antitrust lawsuits challenging International Telephone & Telegraph Corporation's (ITT) mergers with several corporations. The settlement prompted allegations of impropriety by ITT because the relief was decidedly less severe than was sought in the original complaint and came after a $400,000 donation by ITT to the Republican National Committee.

Senator John Tunney pointed to the details of the settlement as the inspiration, in part, for what would become the Antitrust Procedures and Penalties Act, commonly referred to as the Tunney Act.

Passed in 1974, the Tunney Act sought to bring transparency to consent decree procedures. It mandated rules for the notification of consents, afforded third parties the opportunity to provide comments, and required a judicial review of the agreement by a federal district court. Specifically, the DOJ must file simultaneously a complaint and a competitive impact statement with the proposed consent decree explaining the alleged antitrust violation and remedy. These documents are to be published in the Federal Register at least 60 days prior to the effective date of the consent decree (15 U.S.C. §§ 16(b)) for public comment. Before entering into the consent, "the court shall determine that the entry of such judgement is in the public interest" (15 U.S.C. §§ 16(e)). The court will assess the competitive impact, including the duration of relief sought, the anticipated effects of alternative remedies considered by the DOJ, and "any other competitive considerations bearing upon the adequacy" of the decree (15 U.S.C. §§ 16(e)(1)(A)). Moreover, the judiciary must determine the impact of the consent on the competition in the relevant market "upon the public generally and individuals alleging specific injury" from the alleged violations (15 U.S.C. §§ 16(e)(1)(B)).

Courts have generally deferred to the DOJ and approved consent decrees.

Antitrust Accountability and Transparency Act: Intent

Senator Klobuchar's proposal would make several changes to current antitrust enforcement procedures.

Perhaps most notable is that the legislation would subject the FTC to the same Tunney Act requirements as the DOJ.

The bill also seeks to increase dramatically the transparency of civil antitrust settlements by increasing disclosure requirements. Currently, the DOJ is required to submit a competitive impact statement that describes the nature of the case, the proposed remedy, the anticipated competitive effects, and alternative proposals that were considered. It is also mandated that each defendant file a description of lobbying contacts with the government, excluding contacts with the counsel of record with the DOJ. The legislation would extend the scope of disclosures to include the Executive Office of the President. In total, these measures are to ensure that any agreements outside of the written settlement are fully disclosed.

In proceedings brought under Section 7 of the Clayton Act – which prohibits mergers and acquisitions where the effect may be substantially to lessen competition – the proposal would establish a mandatory 90-day "hold-separate" requirement. Often, companies are allowed to close a deal and begin integrating during the Tunney Act review, which could act as a barrier for a court to reject the consent agreement as unwinding already consummated transactions poses significant challenges. This holding requirement would force companies to keep the merged or acquired assets separate while the court reviews the settlement agreement.

The standard courts use in their determination under Tunney Act review would also be changed under the proposed legislation. The current assesses the competitive impact and whether the consent is "in the public interest." Typically, courts have deferred to the DOJ and approved consent decrees. The bill would strengthen the court's role in reviewing these agreements, requiring it to determine whether "provisions of the consent judgement are reasonably tailored to the violations of the antitrust laws alleged in the complaint" and that it "does not permit any transaction, merger, agreement, business practice, or other course of conduct that creates a material risk of violating the antitrust laws."

Another proposed change to the judicial process would involve civil antitrust cases that are voluntarily dismissed by the FTC or DOJ. Under the legislation, these dismissals would be required to be filed with the district court and published in the Federal Register not less than 45 days prior to the effective date of the voluntary dismissal. "The case," according to the proposal, "shall be stayed during this 45-day period." Moreover, state attorneys general may file a motion for substitution with the court during this 45-day period and the court

must grant the motion unless "presented with clear and convincing evidence by the parties that there are no genuine issues of material fact that could support any claim in the proceeding or that the defendant would be entitled to judgement as a matter of law." In other words, state attorneys general can step in and take over the case.

Furthermore, the legislation would empower state attorneys general to intervene in Tunney Act proceedings. First, the court would be required to consider any state agency, including any state attorney general, when determining whether to conduct an evidentiary hearing – which is a court proceeding where a judge hears testimony and reviews evidence to determine if a DOJ settlement serves the public interest. The Tunney Act, by contrast, does not "require the court to permit anyone to intervene."

Allegations of Impropriety at DOJ

The introduction of the bill followed a series of controversies at the DOJ.

On February 25, 2026, House Judiciary Committee Ranking Member Jamie Raskin (D-MD) and Subcommittee on the Administrative State, Regulatory Reform, and Antitrust Ranking Member Jerrold Nadler (D-NY) wrote a letter to Attorney General Pam Bondi "demanding" a briefing on the "forced resignation" of DOJ Antitrust Division Assistant Attorney General (AAG) Gail Slater.

In the letter, the representatives noted a series of departures from the DOJ including the resignation of Principal Deputy AAG Mark Hamer, and the firings of AAG Slater's previous Principal Deputy AAG Roger Alford and the Antitrust Division's Head of Merger Enforcement Bill Rinner. They claimed that the firings came "after career DOJ lawyers raised concerns about irregularities and potential corruption" at the DOJ regarding Hewlett-Packard Enterprises' (HPE) proposed acquisition of Juniper Networks. The representatives also noted that after his firing, Alford warned of the influence lobbyists have within the DOJ. Speaking directly about the HPE/Juniper merger, Alford claimed that these lobbyists "perverted justice," which resulted in actions "inconsistent with the rule of law." He labeled the current relationship between enforcers and lobbyists as "pay-to-play."

The representatives also cited reports that suggested DOJ leadership and lobbyists "improperly interfered with the Division's challenge to a controversial merger between American Express Global Business Travel (Amex GBT) and CWT Holdings." They claimed that the "Division was ordered to dismiss the matter, in order to avoid settlement disclosure requirements under the Tunney Act which 'could expose the deep involvement of corporate lobbyists and pay-to-play policymaking to the light of day.'" Moreover, they alleged that the "dismissal may have also been prevented the disclosure of contacts between DOJ officials

and Ballard Partners, a lobbying firm with close ties to President Trump."

More recently, the DOJ – along with five states – settled an antitrust case involving Ticketmaster and Live-Nation. Yet the trial resumed as 36 states and the District of Columbia rejected the terms of the agreement. Senator Klobuchar pointed to the "weak" deal as an impetus for the Antitrust Accountability and Transparency Act.

Antitrust Accountability and Transparency Act: In Practice

As a matter of process, the proposed legislation would align the rules governing consent decree review between the DOJ and FTC and remove an arbitrary distinction between the agencies.

The transparency measures, however well-intended, come with risks. Settlements are a tool used by both the government and firm(s) involved in an antitrust suit to avoid costly litigation by arriving at a compromise. If all previous versions of settlement offers – and even the side-deals – require disclosure, it could have a chilling effect on settlements. This could yield several results including a greater number of cases that go to a full trial or the agency forgoing a case altogether. The government is often outmatched in terms of financial resources and personnel, especially when a case involves a large, well-resourced firm. Agreeing to a settlement rather than litigating permits the agencies to redirect scarce resources to other potential cases. In a more dire outcome, agencies may simply forgo investigating or trying a case. This situation could arise in marginal cases where the outcome is highly uncertain. Rather than engaging in an open dialogue with the firms and proposing one or a series of settlements in good faith, the firms could opt to fully litigate, which could force the agency to drop the case.

The increased importance of state attorneys general could also lead to uncertainty for companies involved in antitrust cases. By empowering states to pick up cases abandoned by federal enforcers, firms face a situation where they must continue to litigate. Moreover, this could lead to state attorneys general leveraging a politically popular case, even if federal enforcers determined it has little merit.

The legislation's 90-day waiting period for mergers introduces an added layer of deal risk. Often, deals are determined by current market conditions. A lengthy waiting period limits the ability of merging firms – that have already received clearance from the FTC or DOJ – to capitalize on the benefits of integration. This could, conceivably, cause some deals to fall apart. It could also result in a chilling effect in cases where the added cost of the 90-day pause makes a pro-competitive merger too expensive to attempt.

New review requirements that move away from a public interest standard – which largely

defers to the DOJ's conclusion – to assessing market-specific facts and complex economic analysis place a large burden on the judiciary. These requirements could lead to inconsistent outcomes that could elevate the uncertainty a firm(s) faces when a settlement is under Tunney Act review.

Conclusion

Considering recent allegations of impropriety at the DOJ, the Antitrust Accountability and Transparency Act seeks to increase the transparency of the Tunney Act review while subjecting the FTC to the same requirements.

The proposed legislation would likely also introduce additional regulatory risks – delayed deal closings, increased litigation costs, discouraged open dialogue among parties – and strip executive branch prosecutorial discretion.