U.S. CHAMBER OF COMMERCE

Competition & Antitrust Law Enforcement Reform Act (CALERA)

Mergers

General Overview

CALERA is far-reaching legislation that would dramatically alter long-established and incredibly important antitrust standards. Under its broad scope, CALERA undermines the consumer welfare approach to antitrust, provides short cuts to rigorous economic analysis, and leads to questionable expanded antitrust exposure for companies fueled by private litigation and treble damages. The Chamber opposes CALERA because of its unwarranted efforts to indiscriminately overhaul the antitrust laws.

CALERA's interest in a sweeping overhaul to the existing antitrust laws is unwarranted. While the case for additional resources for enforcement can be credibly made, there is a lack of evidence that the statutory framework for evaluating antitrust claims is deeply and structurally flawed. Beyond the need for more resources, CALERA fails to identify a specific problem, nor offer a tailored solution. Instead, it offers a blunt overhaul approach that if implemented would upend market-based competition.

The Chamber supports more resources for antitrust enforcement. But changes to antitrust law that would expand enforcement beyond the consumer welfare standard or create short-cuts to rule of reason analysis would harm consumers, our economy, incentives to innovate, and our global competitiveness.

This overview of CALERA examines the merger related provisions of the legislation, while other Chamber overviews examine CALERA's approach to exclusionary conduct and the introduction of civil fines.

Merger Review –Antitrust Agencies Already Wield Tremendous Power

Government Gets Advanced Warning

In any given year, thousands of mergers across the economy are proposed, the overwhelming majority of which do not raise any competitive concerns. The Hart-Scott-Rodino (HSR) Act requires mergers of a certain size be notified to the antitrust agencies before proceeding. Under

Clayton Act § 7, a merger is unlawful if its effect "may be substantially to lessen competition, or to tend to create a monopoly."

Even if the transaction falls below the HSR Act threshold, the merger can be challenged by antitrust authorities, including after it has been consummated. These cases are rare because the HSR Act sets the threshold for notification sufficiently low to capture far more transactions than are necessary to review. Below is a table that shows data related to HSR notifiable transactions in recent years.

Fiscal Year	**HSR Notified Transactions**	**2nd Requests as a % of HSR Transactions**	**Mergers Challenged**
2019	2,089	3% (63 transactions)	38
2018	2,111	2.2% (46 transactions)	39
2017	2,052	2.6% (53 transactions)	41
2016	1,832	3% (55 transactions)	47

Government Effectively Prevents Mergers from Proceeding with Second Requests.

Typically, about 2-3% of HSR notifiable mergers result in the issuance of a second request. Such a request signals the government is interested in learning more about the proposed transaction as it may have competition concerns. This also means that the vast majority of reportable mergers represent no material competition concerns.

Some critics may try and argue that the limited number of second requests suggest too many mergers are getting past the agencies. However, in practice, the agencies are very good at separating out those transactions that require further analysis from those that do not. And the merging parties are highly motivated to work with the agencies to address any competitive concerns by either refiling their HSR or, in some instances, notifying the agencies of the merger before they make their initial HSR filing. In these instances, the merging parties are willing to give the agencies more time to avoid a second request because complying with a second request is very burdensome on the merging parties.

For the relatively few cases that merit a second request, the antitrust agencies are effectively able to prevent the deal from moving forward until the parties produce evidence such that the government determines that the proposed transaction may proceed or proceed with modifications that would allay the government's concerns. Of course, the government may also determine that it will challenge the merger as anticompetitive. These highly leveraged negotiations are *tilted in favor of the government*, as the merging parties know they need to address the government's concerns. Giving the agencies more resources might translate to a few more second requests being made. The result again would be to further equip the agencies with everything they need to be effective in the area of merger review and enforcement.

Government Forces Settlements, Transactions Get Abandoned, or It Wins in Court

A second request puts the merging parties on notice that the government may have concerns about the anticompetitive effects of the proposed transaction and the parties need to satisfy the governments concerns or litigate the transaction before a court. Because most mergers are very time sensitive, the merging parties are highly motivated to work with the antitrust agencies to get approval for a transaction subject to a second request.

Sometimes with additional information the government lets the merger proceed, but in most transactions that receive a second request (represented in the chart above as mergers challenged) the merging parties must alter the transaction to get the government's blessing. As noted, these negotiations are tilted in favor of the government as the merging parties know they need to satisfy the government's concerns to avoid a protracted and burdensome investigation and/or litigation. Where parties are unable to agree to a negotiated settlement with the government, they are more likely to drop plans to merge than to litigate.

A premise of the proposed legislation under discussion is that it is "too hard" for the government enforcement authorities to block anticompetitive mergers. But the statistics show that this is completely incorrect: the enforcement *agencies already win the overwhelming majority of these merger challenges*. In the last 20 years, the federal enforcement agencies have challenged approximately 780 mergers.[1] In that same period, the merging parties have won in court only eleven times. In the remaining 770 cases, either the government has won in court, the parties abandoned the transaction, or the parties settled with the government (typically via divestiture).

Given this track record, the enforcement agencies already have the upper hand and it would be wrong to skew the playing field further in their favor. Doing so will have the effect of deterring ultimately procompetitive mergers and curtailing economic freedoms in the marketplace.

Hard to Justify Changes to the Law

Given the current merger review framework, one must ask why exactly the legal standard for merger review needs to be changed or why the burden needs to be shifted away from the government to prove its case. It is clear that the antitrust agencies hold more than enough leverage to scrutinize mergers. The agencies may need more resources, but the process created under the HSR Act and the legal standard by which mergers are evaluated under the Clayton Act are empirically backed sound legal frameworks.

[1]This aggregate number of challenges was compiled from the Annual Reports to Congress Pursuant to The HartScott-Rodino Antitrust Improvements Act of 1976, by the FTC and the DOJ, available at https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports.

CALERA's Unwarranted Changes

CALERA seems to start from the flawed premise that mergers and acquisitions create harm, when in fact the vast majority of mergers clearly produced tangible benefits to consumers and our economy.

CALERA makes three significant changes with regard to mergers, all of which are difficult to justify, but taken together they are designed to vastly expand government regulatory control and chill pro-competitive merger activity.

Monopsony Power

Antitrust law already takes monopsony power into consideration where it is consistent with the consumer welfare standard. However, CALERA arguably seeks to extend "monopsony power" claims under the Clayton Act beyond traditional consumer welfare concerns. The consumer welfare standard considers price, output, quality and continued innovation among other factors. That said, expanding the consumer welfare standard to allow government to second guess the merits of a transaction would give government too much influence in the boardroom.

Under CALERA issues that are and should remain outside the scope of antitrust could become captured as part of merger review through an expanded view of monopsony power. Under such an expanded view, mergers could be blocked based on speculation that the new entity would be too effective in bargaining for lower prices from suppliers, or that the parties might keep wages lower or reduce staffing post-merger. Expansive views like these are given voice as part of CALERA's legislative findings.

Monopsony power views like these are completely antithetical to the fundamental purpose of antitrust. Vigorous competition is valued because it can increase the quality, quantity and value of goods and services while conserving scarce economic resources. Mergers that reduce supply-chain costs and allow other resource savings, including labor, are in full accord with the key antitrust objective of preserving competition.

Rewriting the Legal Standard

CALERA seeks to change the legal standard under which mergers would be evaluated, despite the fact that the agencies already enjoy tremendous advantages under current law. The change in the legal standard would apply to all proposed mergers, moving away from a "substantially lessen competition" test to "create an appreciable risk of materially lessening competition" standard. The modification of long-established legislative language is apparently intended to lower the government's burden that it must meet when it decides to challenge a transaction as anticompetitive. This change would bring in large swaths of transactions posing no competitive harms, tying up agency resources that would otherwise focus on truly problematic mergers.

Any transaction that potentially might be a "close call" is represented within those transactions that receive a second request. However, given what we know about transactions that proceed to a second request, which includes those that may be deemed to be "close calls," the government is the heavy favorite to extract concessions, force the parties to abandon the transaction altogether, or ultimately win the case following litigation. For these reasons, there is no clear evidence that there are cases that are "too close to call" and thus require Congress to further tilt the process and the legal standard in favor of the government.

CALERA's new "create an appreciable risk of materially lessening competition" standard is also a confusing and garbled formulation that would spawn unnecessary litigation and create uncertainty for both the enforcement agencies and merging parties—it would likely require decades of litigation for courts to settle on how this new formulation differs from established precedent. The courts have a long history of precedents interpreting the current standard under Section 7 of the Clayton Act. The proposed legislation would throw out those precedents and require decades of new litigation to interpret a confusing new legal standard.

Presumption of Illegality

CALERA also looks to shift the burden to merging companies, forcing them to prove that certain transactions are procompetitive instead of placing the burden on the government to prove that a transaction is likely to be harmful. The bill does so by adopting presumptions of illegality for certain merger categories that are irrelevant, arbitrary, and potentially harmful to procompetitive merger activity, including:

- Any transaction over $5 billion in value, simply because of the price agreed between the parties, even if the transaction affects completely unrelated markets, or a manufacturer wants to buy a distributor.
- Transactions where one party "has assets, net annual sales, or a market cap of greater than $100 billion" and it purchases "an aggregate total amount of the voting securities and assets" of another party "in excess of $50 million."

These proposed presumptions of illegality for mergers involving large companies or transactions are simply arbitrary and counterproductive. They would deter mergers that are economically beneficial and procompetitive. They would also likely have the unintended effect of advantaging private equity buyers over strategic buyers, with possible resulting negative effects on jobs, investments, R&D, etc.

Moreover, the second presumption effectively means that CALERA creates an arbitrary "penalty box" for 140+ of the most successful companies—in industries ranging from insurance, to automobiles, to banking, to pharmaceuticals, and many more—based on market capitalization whose $50 million+ transactions would be arbitrarily presumed to be unlawful at the outset. Such a list would have a sizeable chilling effect on investment. The proposals to ease the government's burden in merger challenges and to adopt presumptions of illegality for certain categories of mergers are unwarranted. In essence, CALERA will make certain companies "guilty until proven innocent" simply because they are large and successful. That is antithetical to America's values.

In other instances, CALERA would assume merges to be unlawful where:

- The merger would lead to a "significant increase" in market concentration in the relevant market. However, CALERA does not define what qualifies as a significant increase.

Such a vague provision could be used to target mergers that produce even modest market share thresholds.

- An acquiring firm with more than 50% of the market targets an acquisition in the same relevant market or the merged parties combined would result in a market share greater than 50%. One could argue that in either of these scenarios, CALERA is unwarranted as the courts, in practice, already shift the burden to the merging parties.

Finally, CALERA declares mergers are unlawful where:

- A merger might result in the removal of an emerging or potential future competitor that otherwise would "prevent, limit, or disrupt coordinated interactions among competitors or a reasonable probability of doing so;" or

- The merger would materially increase the probability of coordinated interaction among competitors in any relevant market.

Under either of these prongs, CALERA is unnecessary as both arguments can already be made by the government under the current antitrust legal framework. However, by shifting the burden, the government presumes such mergers to be anti-competitive and avoids doing the economic analysis that could easily show that the transactions might produce stronger competitive forces in the relevant market that are ultimately in the consumer's best interest.