House Passes Bill to Lessen FTC Merger Enforcement Powers in Name of Standardization

There seems to be a fair amount of disagreement in Washington lately over the federal merger review process. On the one hand, the American Antitrust Institute is [calling for](#) increased merger enforcement from the next presidential administration, and on the other, the House just passed [H.R. 2745](#), a bill that limits the Federal Trade Commission's enforcement authority. The bill, which is opposed by Democrats and the White House, passed in the House 235-171, largely along party lines. House Republicans claim the bill addresses their concerns that a proposed merger is treated differently depending on whether it is handled by the FTC or the Department of Justice. Historically, the "antitrust agencies" have tended to divide cases along industry lines, and once one agency has developed expertise as to a particular industry, it tends to be assigned that industry's new cases. After the merger is assigned to either the FTC or DOJ, if it is challenged, the challenge is conducted under the procedures and standards unique to the assigned agency. Disparities can arise after case assignment because the FTC has some additional enforcement procedures including its own Article I (administrative) courts, and a practice of challenging injunctions in federal court by preliminary injunction, which has a lower standard of proof than other law suits. Concerned that these disparities in enforcement raise fairness concerns, the bill's supporters seek to harmonize the procedures and standards involved in federal merger enforcement.

Fair enough. But, why err on the side of less—and not more—enforcement? The move feels especially reckless during a time when concern over market consolidation is growing (well, at least among some of us). The bill harmonizes merger enforcement by conforming it to current DOJ procedures—*i.e.*, dismantling the FTC's administrative courts and eliminating the preliminary injunction option. According to the Commonwealth Fund, "[House Judiciary Chariman Robert W.] Goodlatte said the bill is meant to help smaller companies because they don't have the resources to fight the government in court, unlike large corporations that can hire lawyers and economists to make their case." But, democrats counter that "the bill will apply to less than 1 percent of mergers, and is only going to strengthen 'big business' and hurt consumers."

Indeed, the FTC's 2016 Hart-Scott-Rodino mergers thresholds are in the multimillion-dollar ranges, meaning most small businesses don't even have to notify the Antitrust Agencies when merging. The bill certainly appears to help big—not small—business, and less merger enforcement would likely mean higher prices for consumers. We will be watching as the Senate considers this huge change to merger enforcement!