U.S. CHAMBER OF COMMERCE

Competition & Antitrust Law Enforcement Reform Act (CALERA)

Liability Implications

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 liability implications that arise from the bill's provisions as well as the introduction on civil fines, while other Chamber overviews examine CALERA's approach to merger review and exclusionary conduct.

Existing Antitrust Liability Sufficiently Deters Unlawful Conduct

Violators of antitrust law already find themselves exposed to a tremendous amount of liability. That liability acts not only to compensate those who were harmed, but also to deter against future anti-competitive conduct. Arguably, the United States has the most stringent liability system for antitrust in the world.

Under current antitrust laws hard-core cartel activity is treated as criminal and violations can be met with prison sentences and criminal fines. The United States is rare in the world as few jurisdictions criminalize such conduct.

For civil cases brought by the federal agencies, the available remedy is focused on restoring competition to the market in the form of structural or behavioral remedies. However, cases brought by the federal agencies often pave the way for private litigation. In fact, for every case the federal agencies bring, approximately ten antitrust cases are brought by private plaintiffs.

As a result, private litigation arguably plays a larger role in enforcement than the federal agencies. Successful litigation or settlements result in both conduct remedies and monetary compensation. Private antitrust litigation thus not only more than adequately compensates those that were harmed by the anti-competitive conduct, but also deters future antitrust violations by awarding punitive treble damages.

CALERA Introduces Abusive Fines

Where antitrust law is violated, monetary remedies are important to compensate those impacted and to deter future violations – both aims are sufficiently accomplished through private enforcement.

CALERA introduces civil fines for both violations of the Sherman Act and for CALERA's new exclusionary conduct provisions. Specifically, CALERA directs the federal antitrust agencies to adopt guidelines for administering government issued civil fines that are capped at either:

- 15 percent of U.S. revenues from the previous calendar year; or
- 30 percent of U.S. revenues for "any line of commerce affected or targeted by the unlawful conduct during the period of the unlawful conduct."

CALERA provides no adequate rationale for layering fines on top of existing antitrust liability, nor does it speak to the interface between these proposed fines and the compensation and treble damages that could also be awarded through private litigation.

Its introduction of civil fines for antitrust violations is abusive, particularly in conduct cases that are often anything but clear-cut violations of the law. In many cases, a reasonable person would not readily identify the conduct in question as anticompetitive. Only after the conduct has been litigated might it be determined that the anticompetitive harm outweighs any procompetitive benefits. Under CALERA, these types of cases would still result in a government-issued fine, potentially amounting to billions of dollars, which would still be followed by private litigation, including compensatory and treble damages.

What About Europe?

Some have pointed to Europe and its use of civil fines as a potential model. However, there are several respects in which Europe's regime is not an apt model for the United States. *First*, private litigation plays a much smaller role in Europe and antitrust violations do not lead to treble damages.

Second, European policymakers have deliberately chosen to avoid our litigation culture. The European Commission has described the features of the U.S. legal regime as a "toxic cocktail" that should *not* be replicated in Europe. As a result, civil fines necessarily play a central role in European enforcement system.

Private antitrust litigation in Europe:

- Only allows compensation akin to restitution. **It does not allow for punitive damages.**
- Deploys a "loser-pays" fee-shifting mechanism, in contrast to the pro-plaintiff fee-shifting regime in U.S. antitrust cases in which the plaintiff basically bears no risk when it brings a case.
- Does not allow plaintiffs to take the extremely broad (and costly) discovery of defendants that has become a hallmark of U.S. litigation.
- Largely prohibits or sharply limits contingency fees.

It is also important to note that Europe does not treat cartel activity as a criminal violation, arguably making government-fining authority more important. Europe also caps its civil fines at 10% of annual revenue.

Given that the United States has criminalized certain conduct under the antitrust laws and has created numerous incentives for private antitrust litigation, including treble damages, the United States is without question already a harsher and more punitive environment for persecuting antitrust offenses than what exists in Europe – even without the new provisions in CALERA.

CALERA wrongly layers massive civil fines overtop of the U.S., while at the same time changing the substantive legal standard to make it easier to bring more litigation.

CALERA Encourages Expanded Private Litigation

CALERA changes how exclusionary conduct claims would be evaluated under the law. Many conduct cases are incredibly complex and challenged conduct may both result in harm to competition and be supported by procompetitive justifications. The existing antitrust laws, through the rule of reason analysis, effectively balance these considerations, with the burden of showing net harm to competition placed squarely on the government or the plaintiff.

CALERA seeks to upend this sensible system and put a heavy thumb on the scale in favor of those that bring complaints, irrespective of whether the complaint is brought by the government or private plaintiffs. CALERA's substantive changes not only expanded the likelihood that the federal agencies might prosecute the conduct in question, but also are likely to cause an explosion in the number of private cases.

Suddenly, cases that should require careful consideration become one sided in nature, allowing those who bring complaints to have a straightforward path to litigating their case. While this may sound appealing, it not only will unleash more private litigation, but it will also deeply chill business decision-making that will adversely impact investment and innovation. It will also harm consumers, as CALERA gives less weight to the procompetitive justifications that provide lawful bases for companies’ actions under the current legal framework.