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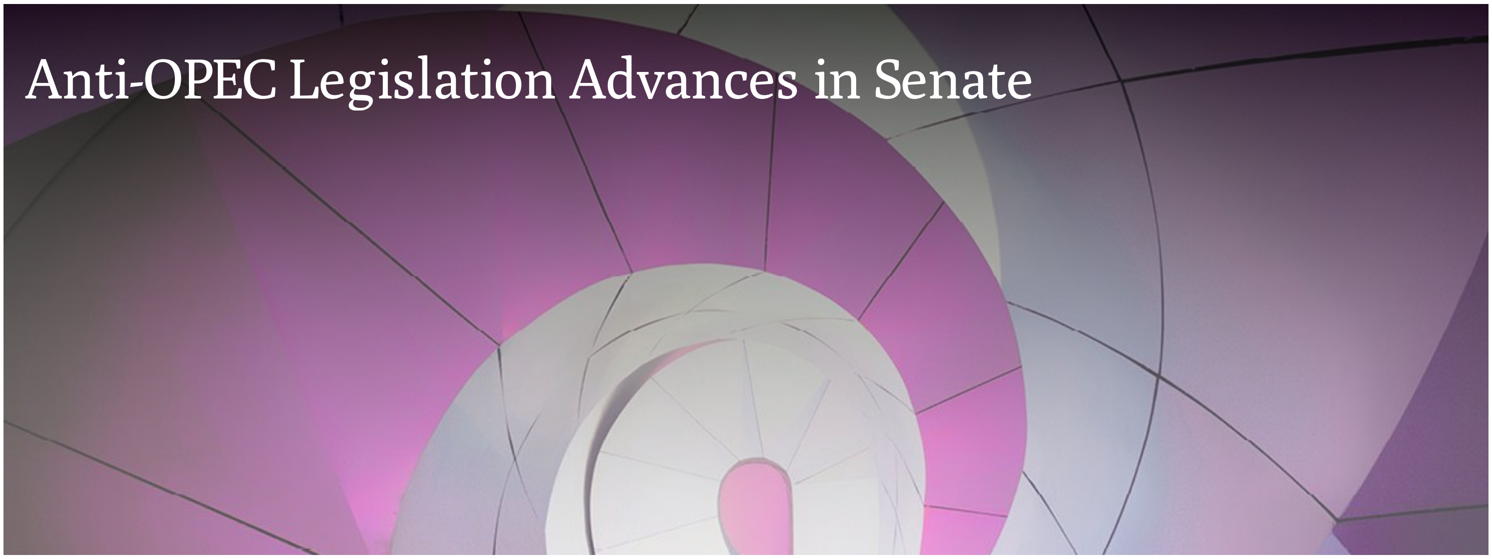
BLOG

Anti-OPEC Legislation Advances in Senate



MAY 11, 2022

On May 5, 2022, the Senate Judiciary Committee advanced Senate Bill 977, titled No Oil Producing and Exporting Cartels Act (NOPEC), legislation that targets OPEC and other oil cartels that up until now have evaded antitrust enforcement. The bipartisan bill—introduced last year by Senator Chuck Grassley (R-IA) and co-sponsored by Senators Amy Klobuchar (D-MN), Mike Lee (R-UT), and Patrick Leahy (D-VT)—is a short and simple text that could have far-reaching implications. The bill would amend the Sherman Act to add a new section 7A that would prohibit foreign states or their instrumentalities or agents from (1) limiting production or distribution of oil, natural gas, or other petroleum products; (2) setting or maintaining the prices of any petroleum products; or (3) “otherwise tak[ing] any action in restraint of trade” of those same products. NOPEC would also invalidate legal defenses traditionally used by sovereign countries that make up OPEC in antitrust cases, including the act of state, political question, or foreign sovereign compulsion doctrines. The bill would also give the U.S. attorney general authority to enforce the new provisions of the Sherman Act.

The bill’s passage and implementation would complicate decades of OPEC’s influence on the oil and gas production industry. OPEC’s member countries meet to discuss production limits and quotas openly and often, and OPEC’s operation as a quasi-sanctioned cartel has thus far been immune from U.S. federal prosecution given that the actions taken by its member states are all protected by the sovereign immunity doctrine, which prevent prosecution of foreign entities. The bill would also affect foreign relations with those member nations.

NOPEC comes at a time when gas prices have risen in response to the ongoing conflict between Russia and Ukraine. White House Press Secretary Jen Psaki said on May 5 that the “potential implications and unintended consequences of this legislation require further study and deliberation,” particularly in light of the changes in the energy market brought on by Russia’s invasion of Ukraine. But the White House does not yet have an official position on NOPEC.

NOPEC’s implications on energy companies around the world also remain unclear. Many global energy companies work closely with the sovereign nations that make up OPEC, either in joint ventures where private and public interests collide or in refinement and distribution operations further downstream from production. Nothing in the current bill would prevent those energy companies from being defined as “instrumentalities or agents” of the sovereign nations that make up OPEC. It is possible, then, that participating in the distribution of products that were created from artificial production limits could create liability for those private entities. If further amendment and debate do not provide clarity on those issues, it may be up to the federal judiciary to create enforcement guardrails if the legislation is enacted.

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