

Antitrust and a new administration: Update on legislative proposals

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As bipartisan support for antitrust reform gains steam, legislative proposals from both sides of the aisle have proliferated. To date, Congress has advanced to a vote only relatively modest changes to the antitrust laws. But Congress is also now considering a number of much more significant changes. There are substantial differences among competing proposals, however, potentially suggesting an extended legislative process.

This year has been marked by a flurry of legislative proposals that would dramatically overhaul antitrust law and enforcement. So far this legislative session, the Senate has passed a modest proposal to increase pre-merger filing fees and to increase appropriations for antitrust agencies. As bipartisan support for antitrust reform continues to swell, we expect at least some of the more significant proposals to begin to advance. We also expect, however, extended debate and discussion moving forward, as well as significant opposition from the business community. Accordingly, we discuss here two significant, recent sets of proposals¹:

- First, on June 11, 2021, Antitrust Subcommittee Chairman David N. Cicilline (D-RI) and Ranking Member Ken Buck (R-CO) announced their legislative agenda, “A Stronger Online Economy: Opportunity, Innovation, Choice,” which included the introduction of five separate bills—four of which appear focused on large online platforms and adopt several proposals resulting from the House Antitrust Subcommittee’s investigation into competition in the digital economy in 2019-2020.
- Second, on June 14, 2021, Senators Mike Lee (R-UT) and Chuck Grassley (R-IA) proposed the Tougher Enforcement Against Monopolies Act, which proposes significant changes to antitrust enforcement and remedies for violations of the law. The bill also proposes relatively modest changes to antitrust law (e.g., codification of existing case law and agency guidance on certain issues).

We discuss both sets of legislative proposals in greater detail below.

“A Stronger Online Economy: Opportunity, Innovation, Choice”

Four of the bills that the House Antitrust Subcommittee announced on June 11, 2021 are targeted at “Covered Platforms.” These bills define a “Covered Platform” as an “Online Platform”² that (i) has at least 50 million monthly active consumer users or at least 100 thousand business users in the United States; (ii) is owned or controlled by a person with net annual sales or a market capitalization greater than \$600 billion; and (iii) is a “critical trading partner”³ for the sale or provision of any product or service offered on or directly related to the online platform.

The four bills that target “covered platforms” are as follows:

- **Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act.** Among other things, the proposed legislation would establish various requirements for “covered platforms” relating to data portability and interoperability (i.e., the ability of online platforms or applications to exchange information). Under the act, the Federal

Trade Commission (FTC) is empowered to enforce failures to comply with these requirements, and penalties range from civil penalties to equitable remedies including injunctions, restitution, disgorgement, and forfeiture of revenue. This act is sponsored by Congresswoman Mary Gay Scanlon (D-PA) and co-sponsored by Congressman Burgess Owens (R-UT).

- **American Innovation and Choice Online Act.** The act would prohibit “covered platforms” from self-preferencing their own products, utilizing platform data to compete with businesses on the platform, or engaging in other specified discriminatory conduct, with violations enforceable by the FTC, the U.S. Department of Justice (DOJ), or state attorneys general. The act provides that divestiture is a possible remedy where “a violation of this Act arises from a conflict of interest related to the covered platform’s concurrent operation of multiple lines of business” Other remedies available under the law include civil penalties, disgorgement, and injunctions, and the bill also creates a private right of action with the potential for trebled damages. This act is sponsored by Antitrust Subcommittee Chairman David N. Cicilline (D-RI) and co-sponsored by U.S. Rep. Lance Gooden (R-TX).
- **Ending Platform Monopolies Act.** This bill proposes to bar a “covered platform” from owning another line of business that utilizes the covered platform in competition with third-party business users of that platform and where the covered platform would be incentivized to advantage its own products over those provided by a third party. The FTC and DOJ would have enforcement power and could seek civil penalties. Congresswoman Pramila Jayapal (D-WA) is the primary sponsor and Congressman Lance Gooden (R-TX) is the co-sponsor.
- **Platform Competition & Opportunity Act.** This bill would adopt a rebuttable presumption that acquisitions by “covered platforms” are unlawful. To rebut this presumption, a covered platform would need to show by clear and convincing evidence that the acquired company or asset was not an actual, nascent, or potential competitor of the covered platform and that the acquisition would not otherwise enhance the covered platform’s market position or ability to maintain its market position. Violations are enforceable by the FTC, DOJ, or state attorneys general, as well as through private action with the potential for trebled damages. The act is sponsored by Congressman Hakeem Jeffries (D-NY) and co-sponsored by Congressman Ken Buck (R-CO).

The fifth bill, the **Merger Filing Fee Modernization Act**, proposes to decrease pre-merger filing fees under the Hart-Scott-Rodino Act for transactions less than \$1 billion but to increase substantially the filing fees for transactions over \$1 billion. For example, for transactions valued at \$5 billion or greater, the filing fee will be \$2.25 million, compared to \$280,000 today. The bill also would increase appropriations from \$166.8 million in 2020 to \$252 million for the Antitrust Division of the DOJ and from \$331 million in 2020 to \$418 million for the FTC. This bill is sponsored by Congressman Joe Neguse (D-CO) and co-sponsored by Congresswoman Victoria Spartz (R-IN). This bill is identical to the Merger Filing Fee Modernization Act of 2021 proposed by Senator Klobuchar on February 4, 2021, and passed by the Senate on June 8, 2021 as part of the Endless Frontiers Act.

Taken as a whole, these provisions would significantly alter the antitrust enforcement regime for the small number of companies qualifying as “covered platforms” if enacted.

Tougher Enforcement Against Monopolies Act

The Tougher Enforcement Against Monopolies Act, or the TEAM Act, proposed by Senators Lee and Grassley, is a comprehensive antitrust reform bill that ostensibly would apply to all sectors. Some notable provisions of the proposed bill include:

- Consolidation of all antitrust enforcement authority within the DOJ. The FTC’s antitrust resources and personnel would be transferred to the DOJ. Further, the Federal Communications Commission, state commissions, and local franchising authorities would be prohibited from undertaking a competition review of proposed transactions.
- Adoption of an *irrebuttable* presumption that mergers resulting in a market share of 66% or higher are anticompetitive and unlawful, unless serious harm to the national economy would result from failure to consummate the proposed transaction, as well as a rebuttable presumption that a merger resulting in a market share of 33% or greater is anticompetitive and illegal which can be rebutted by demonstrating by a preponderance of the evidence the absence of an increase in market power or anticompetitive effects, or that the anticompetitive effects are clearly outweighed by procompetitive benefits.
- Overturning the Supreme Court’s decisions in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which would allow indirect purchasers to have standing under the antitrust laws and recover damages. Any damages to the direct purchaser would be reduced by the amount of any overcharge resulting from the anticompetitive conduct that was passed on to the indirect purchaser, with the burden on the defendant of showing that amount.

- Limitation of the scope of implied immunity to antitrust laws based on other federal regulation to only where federal agencies explicitly require or authorize the defendant to undertake the subject conduct, amongst other requirements.
- Enhancement of antitrust remedies by (1) authorizing civil penalties for “knowing violations” of the antitrust laws of up to 15% of revenues for each year when the violation occurred, (2) allowing recovery of trebled damages by the DOJ on behalf of consumers, (3) providing the right to trebled prejudgment interest in private litigation, and (4) prohibiting government contracts from being awarded to antitrust violators.

Takeaways

These and other recent legislative proposals demonstrate bipartisan agreement that changes to the antitrust laws are warranted, but there are differing views on the scope of needed changes. It is likely that it will take some time to reach agreement in the divided Congress on substantial changes to the law beyond increasing pre-merger filing fees and appropriations to the antitrust agencies. We will continue to stay abreast of these and other legislative changes.

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- ¹ As discussed in our February 2021 client update, Senator Amy Klobuchar (D-MN) also proposed the Competition and Antitrust Law Enforcement Reform Act (CALERA), which would substantially overhaul merger laws and create a new regime against exclusionary conduct. See Davis Polk, Antitrust and a New Administration: Important Developments (Feb. 4, 2021), <https://www.davispolk.com/insights/client-update/antitrust-and-new-administration-important-developments>.
- ² The bills define an "online platform" as "a website, online or mobile application, operating system, digital assistant, or online service that—(A) enables a user to generate content that can be viewed by other users on the platform or to interact with other content on the platform; (B) facilitates the offering, sale, purchase, payment, or shipping of goods or services, including software applications, between and among consumers or businesses not controlled by the platform; or (C) enables user searches or queries that access or display a large volume of information."
- ³ The bills define a "critical trading partner" as any platform that "has the ability to restrict or impede— (A) the access of a business user to its users or customers; or (B) the access of a business user to a tool or service that it needs to effectively serve its users or customers."