Antitrust Alert

Akin Gump
STRAUSS HAUER & FELD LLP

Senate Democrat Introduces Sweeping Antitrust Legislation

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On Thursday, February 4, Senator Amy Klobuchar (D-MN), Chair of the Senate Judiciary Committee's Subcommittee on Antitrust, Competition Policy and Consumer Rights, announced the introduction of a sweeping antitrust reform bill to set the stage for her tenure as one of the top senators in the antitrust arena in the 117th Congress.

The bill, the Competition and Antitrust Law Enforcement Reform Act (CALERA), is broader and more ambitious than the collective bills the Chairwoman introduced in the 116th Congress, and the legislation likely will be a jumping-off point for increased Congressional discussions on changes in antitrust laws and enforcement.

CALERA would amend the standard for preventing mergers from requiring the government to prove that a deal would "substantially lessen competition" to demonstrating that it would "create an appreciable risk of materially lessening competition," with "materially" defined as "more than a de minimis amount." This proposed change to the antitrust merger laws would broadly affect acquisitions or merger transactions.

For dominant firms, defined as having a market share of more than 50 percent market share or possession of "significant market power," CALERA would shift the burden of proof to the merging parties to show a merger would **not** create an appreciable risk of materially lessening competition or tend to create a monopoly or monopsony for transactions. It would similarly shift the burden for all transactions valued at more than $5 billion or involving companies with assets, net revenue or market capitalizations of greater than $100 billion and involving an acquisition valued at $50 million or more.

Thus, enactment of the legislation would result in dramatic changes in antitrust merger enforcement that would stretch beyond Big Tech. If CALERA had been in place in recent years, many of the transactions with the largest valuations or involving leading companies, across many industries, that closed with a U.S. antitrust agency consent or without any antitrust agency action, likely would have been challenged and blocked by the courts, or not been pursued by the parties.

Outside of the merger context, the measure would transform the playing field for companies with a market share of greater than 50 percent or "otherwise significant

Contact Information

If you have any questions concerning this alert, please contact:

Ed Pagano
Partner
epagano@akingump.com
Washington, D.C.
+1 202.887.4255

Corey W. Roush
Partner
croush@akingump.com
Washington, D.C.
+1 202.887.4115

Haidee L. Schwartz
Partner
hschwartz@akingump.com
Washington, D.C.
+1 202.887.4080

James Romney Tucker Jr.
Partner
jtucker@akingump.com
Washington, D.C.
+1 202.887.4279

Casey Christine Higgins
Senior Policy Advisor
cchiggins@akingump.com
Washington, D.C.
+1 202.887.4223

Taylor M. Daly
Senior Public Policy Specialist
tdaly@akingump.com
Washington, D.C.
+1 202.416.5541

Christina Barone
Senior Public Policy Specialist
cbarone@akingump.com
Washington, D.C.
+1 202.416.5543

market power," because it creates a rebuttable presumption, with limited exceptions, that exclusionary conduct presents an "appreciable risk of harming competition." In other words, a company with more than 50 percent market share or "otherwise significant market power" that engages in "exclusionary conduct," such as exclusive dealing contracts or preventing competitors from using its products or platform, would have the burden of proving that its conduct does not have "an appreciable risk of harming competition."

The bill also would give the antitrust agencies, for the first time, fining authority for civil conduct violations, a significant expansion of their current ability to fine companies for consent violations or Hart–Scott–Rodino Antitrust Improvements (HSR) Act violations.

The legislation proposes an extra approximately $300 million in funding for each the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ), close to doubling the FTC budget and more than doubling that of the Antitrust Division of the DOJ, a move that would significantly alter the landscape for U.S. antitrust enforcement. With the additional funding, the legislation would require both agencies to conduct additional competition studies, collect and analyze substantial data, and for the FTC to create an independent office of Competition Advocate, with a Division of Market Analysis and a Data Center. The proposed legislation also includes several other provisions, including, but not limited to, (1) requiring parties to a merger settlement to provide significant post-merger data to the antitrust agencies, (2) narrowing implied immunity from antitrust laws under federal statute, or any rule or regulation promulgated in accordance with federal statute, and (3) whistleblower protections for individuals reporting antitrust violations and incentives for individuals reporting certain criminal antitrust actions to the Department of Justice.

Joining Chairwoman Klobuchar in introducing the bill are Sens. Cory Booker (D-NJ), Richard Blumenthal (D-CT) and Ed Markey (D-MA). The Chairwoman has also indicated that she is coordinating with her Democratic counterparts on the House Judiciary Committee's Subcommittee on Antitrust, Commercial and Administrative Law, who released a report last Congress unveiling sweeping legal proposals, including boosting the authority of antitrust agencies, codifying bright-line rules for merger enforcement to place the burden of proof upon merging parties and requiring mergers by dominant platforms to be presumed anticompetitive unless companies can demonstrate that the transaction is necessary.

Receptiveness to some elements of such proposals are not unique to Democrats—in December, Assistant Attorney General for Antitrust Makan Delrahim, a Trump appointee, expressed support for tightening restrictions with respect to merger laws for dominant companies. These remarks—in conjunction with statements indicating openness to the idea from Congressional Republicans such as Rep. Ken Buck (R-CO), Ranking Member of the House Antitrust Subcommittee—demonstrate that there may be bipartisan interest in changing the standard for some subset of mergers in the 117th Congress, despite opposition from industry groups.

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