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New Antitrust Bill Would Strengthen Regulators' Powers to Block Mergers and Acquisitions

In Numerous Transactions, Burden of Proof Would Shift to Merging Companies, Instead of Regulators

SUMMARY & IMPLICATIONS

On February 4, 2021, Senator Amy Klobuchar, chair of the Antitrust Subcommittee of the Senate Judiciary Committee, introduced a bill entitled "The Competition and Antitrust Law Enforcement Reform Act" (the "Bill"). If enacted, the Bill would fundamentally revise longstanding U.S. federal antitrust laws by forcing the merging parties to shoulder the burden of proof in a variety of common combination scenarios, and would provide regulators with various other powers and augmented resources. In particular, the Bill would position regulators to more aggressively pursue transactions involving nascent or potential competitors, which have also faced heightened scrutiny under European competition laws.

The Bill incorporates and expands on proposals sponsored by Senators Klobuchar and Warren, and Representative Ocasio-Cortez in 2019 and 2020. Certain provisions of the Bill reflect a focus on large technology firms, including concerns identified in the October 2020 House Majority Report entitled "Investigation of Competition in Digital Markets," which targeted allegedly anticompetitive practices of Google, Amazon, Facebook, and Apple, as well as certain arguments underlying federal enforcement actions now being brought against Google and Facebook. The Bill, however, would extend well beyond the tech sector, and its provisions have the potential to negatively affect domestic and international business combinations across all industries.

Bill's Key Implications for Mergers

Since the 1914 enactment of Clayton Act, the government and private plaintiffs have borne the burden of proving that a proposed transaction is likely to result in a substantial lessening of competition. The Bill would reverse this longstanding paradigm in the context of lawsuits brought by federal and state antitrust enforcers by shifting the burden of proof onto the merging parties to demonstrate that a merger does not harm competition in several situations:

1. "the acquisition would lead to a significant increase in market concentration in any relevant market";
2. "the acquiring person has a market share of 50 percent . . . or as a result of the acquisition, the acquiring person would obtain control over entities or assets that have a market share of greater than 50 percent";
3. "the acquisition would lead to the combination of entities or assets that compete or have a reasonable probability of competing in a relevant market";
4. "the acquisition would likely enable the acquiring person to unilaterally and profitably exercise market power or materially increase its ability to do so . . . or would materially increase the probability of coordinated interaction among competitors in any relevant market"; or
5. "the acquisition is not a transaction that is described in Section 7A(c); and as a result of such acquisition, the acquiring person would hold an aggregate total amount [of shares] . . . in excess of $5,000,000,000 . . . or the person acquiring or the person being acquired has assets, net annual sales, or a market capitalization greater than $100,000,000,000 . . . and as a result of such acquisition, the acquiring person would hold an aggregate total amount of the voting securities and assets of the acquired person in excess of $50,000,000[.]"

In merger litigation, such a shifting of the burden of proof from the government to the merging parties would have a significant effect on outcomes and timing. Particularly because merger analysis is forward-looking and predictive, the party that bears the burden has the weighty task of developing economic and factual evidence about what is likely to happen in the future if the transaction is consummated. In close call cases—e.g., where the evidence is mixed or where evidence about the future effects of a transaction are difficult to establish—the party that bears the burden typically loses. Historically, as the bearer of the burden, that has been the government. Under the Bill, the merging parties would likely lose these close cases.

In another significant departure from existing law, the Bill would also amend Section 7 of the Clayton Act's "substantially lessen competition" standard, which is applicable to both government and private actions, to instead forbid mergers that "create an appreciable risk of materially lessening competition." That watered-down formulation is likely to make it harder for proposed mergers to obtain antitrust clearance. Transactions involving nascent or potential competitors, which have required plaintiffs to bear the burden of proof under existing law, would be particularly affected by this change.

The Bill would further amend Section 7 to add language promoting enforcement activity directed toward mergers that could purportedly result in monopsony power (i.e., the power to drive down prices paid for production inputs, such as wages paid by an employer). This amendment of Section 7 could have an impact on enforcement in the agricultural sector in particular, where allegations of so-called "buyer power" are relatively frequent. Similarly, it could increase the ability of plaintiffs to attack mergers that could possibly have an adverse impact on workers by giving employers enhanced bargaining power.

Agency Funding

Citing economic growth that has outpaced agency resources and the demands of increased numbers of merger filings, the Bill would add $300 million each to the DOJ and FTC budgets (for total fiscal year 2022 appropriations of $484,500,000 and $651,000,000, respectively).

The Bill would also create a new division within the FTC that would focus on conducting market studies to enable the FTC to better understand latent antitrust violations. The creation of a new division with this specific mission would expand the FTC's ongoing efforts to examine the historical effects of non-reportable acquisitions or acquisitions of nascent competitors in the technology sector. With expanded resources for such studies, the FTC might also engage in retrospective work to better understand the competitive effects of vertical transactions. Finally, under the new administration, these powers might be deployed to develop the FTC's thinking about the effects of merger activity on labor markets, and issues of socioeconomic or racial equality not traditionally thought to be within the purview of antitrust analysis.

Bill's Implications for Imposition of Civil Penalties

Contending that the current regime of civil remedies for violations of the Sherman Act, including injunctions, equitable monetary relief, and private damages have proven insufficient on their own to deter anticompetitive activity, the Bill would create the first set of U.S. civil monetary penalties above $100 million for antitrust violators. These fines would amount to up to 15% of a company's total annual U.S. revenues, or 30% of a company's U.S. revenues in the affected markets. This change would align the practice in the U.S. with that in Europe, where massive fines—calibrated to a company's "turnover"—have become increasingly common.

Conclusion

Consequential antitrust reform is a significant probability in the near term, and the Bill highlights the areas of most interest to senior Democratic lawmakers and to the regulators themselves. Whether the Bill is enacted in its current form or otherwise, parties considering M&A activity should prepare to encounter aggressive antitrust enforcers empowered to block mergers based on a much more permissive standard than those which recently prevailed. Shifting the burden of proof to the merging parties to demonstrate that their transaction is not anticompetitive, where historically, the government and private plaintiffs, as the burden bearers, have lost, increases the odds that more transactions will now be blocked.

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