Antitrust Reform Legislation

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Antitrust legislation introduced recently by Sen. Amy Klobuchar (D-MN) received a lot of press for its application to Big Tech, but the bill is not limited to tech. The legislation would impact health systems, health insurers and pharmaceutical companies, as well other industries. Click here for S. 225, the Competition and Antitrust Law Enforcement Reform Act and here for the press release summarizing the bill.

As Chair of the Senate Judiciary Committee's Antitrust Subcommittee, Sen. Klobuchar is positioned to ensure the bill is heard in the Subcommittee. She also has a forthcoming book on the need for antitrust reforms, ensuring a broader platform for pushing the legislation.

The House Antitrust Subcommittee, chaired by Rep. David Cicilline (D-RI), spent much of last year investigating Big Tech and developing a 450-page report with recommendations. Click here for the report. Next week the subcommittee will begin hearings on modernizing antitrust law, focusing on the dominance of online platforms. Click here for additional information. Legislative proposals may extend beyond Big Tech.

Antitrust reform could gain some traction in the Biden Administration. We will follow any developments and keep you posted.

Key Provisions:

The bill authorizes $300 million in additional funding for the Federal Trade Commission (FTC), the Department of Justice (DOJ) and state attorneys general to provide resources for more cases.

Sec. 4 increases the bar for acquisitions:

- Amends Sec. 7 of the Clayton Act to prohibit acquisitions that "create an appreciable risk of materially lessening competition" rather than the current standard of "substantially to lessen" competition. "Materially" is defined as "more than a de minimis amount."

- Shifts the burden of proof for certain categories of acquisitions to the acquiring entity to prove the deal would not be anticompetitive or would not create a monopoly or monopsony. These categories include:
  - Acquisitions that significantly increase market concentration,
  - Acquisitions of competitors or nascent competitors by a dominant firm, or
  - Acquisitions valued at more than $5 billion.

Sec. 9 lowers the standard to show unlawful exclusionary conduct:

- Defines exclusionary conduct as conduct that:
  - materially disadvantages one or actual or potential competitors; or
  - tends to foreclose or limit the ability or incentive of one or more actual or potential competitors to compete.
- Under current law, to prevail, a regulator or a private party plaintiff must show that a competitor has been harmed by the defendant's alleged exclusionary conduct, and that the conduct has also had an appreciable, harmful impact on competition overall in the affected market.
- Under the bill it would be unlawful to engage in exclusionary conduct that presents "an appreciable risk of harming competition."
- The bill would create a rebuttable presumption that any entity with "a 50% or more share of any market" or that "otherwise has significant market power" violates the law by engaging in conduct that harms a competitor (without regard to overall impact on the market) unless it can proven by a preponderance of the evidence that the
  - "distinct procompetitive benefits" of the exclusionary conduct in the relevant market eliminate the risk of harming competition;
  - other competitors have entered or expanded their presence in the market notwithstanding the exclusionary conduct, or
  - the exclusionary conduct does not present an appreciable risk of harming competition.

Sec. 13 – Market Definition

Eliminates a requirement that claimants almost always define a relevant market to establish liability in antitrust cases.

Sec. 10 increases civil penalties:

- Permits the FTC and the DOJ to obtain civil fines for certain antitrust offenses of up to 15% of an offending party's overall annual revenues or 30% of the party's revenues in the affected line of commerce.
- These civil penalties are in addition to, and not in lieu of, any other remedy provided under federal law.
- The bill provides for the development of joint civil penalty guidelines and outlines factors to be considered.

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