

Labor Markets (Sept. 23, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-public-workshop-competition>.

⁴It is worth noting for purposes of counseling clients that several investigations of no-poach agreements appear to have been initiated by DOJ after detecting the conduct during the course of merger reviews rather than through more typical means of cartel detection, such as leniency, customer complaints, and whistleblowers. *Civil Investigations Uncover Evidence of Criminal Conduct*, U.S. Dep't of Just., Office of Public Affairs, Division Update Spring 2017, <https://www.justice.gov/atr/division-operations/division-update-spring-2017/civil-investigations-uncover-evidence-criminal-conduct>.

⁵The indictment also alleged one count of obstruction of proceedings (18 U.S.C. § 1505) and was superseded in April 2021 to add a second defendant, who was employed by defendant Jindal. See, e.g., *United States v. Jindal and Rodgers*, No. 4:20-cr-00358-ALM-KPJ (E.D. Tex. Apr. 15, 2021).

⁶The fact that the *Surgical Care Affiliates* indictment charges a scheme that began several years before 2016 Guidance was issued likely also raises a separate set of due process considerations. See Indictment at ¶¶ 9, 17, *Surgical Care Affiliates*, No. 3-21-cr-00011-L.

Recent and Pending Antitrust Legislation in Congress

By Robert Hauberg (Section Chair), Shareholder at Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. in Jackson, MS and Washington, D.C.

With a new Administration now in office and a new Congress underway, a plethora of new antitrust bills have been introduced. A brief summary follows, although with hearings progressing on some, amendments may well modify terms of the legislative proposals and their prospects for passage as well.

To recap the last session of Congress, three major pieces of legislation were enacted. First, on October 1, 2020, new legislation signed by the President extended the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) (S.2258, enacted as Pub. L. No. 108-237), which provided carrots for companies to report antitrust violations and thereby gain leniency from prosecution and reduce civil liability to single (not treble) damages. Second, on December 23, 2020, the Criminal Antitrust Anti-Retaliation Act (Pub. L. No. 116-257) became law, barring employers from retaliating against those who report criminal antitrust violations. Third, on January 13, 2021, the Competitive Health Insurance Reform Act of 2020 (Pub. L. No. 116-321) became law, which limited the antitrust exemption that the McCarren-Ferguson Act provided for health-insurance companies, leaving health-insurance companies subject to the antitrust laws except for certain activities improving health insurance for consumers.

Events in 2020 also spurred some new antitrust proposals in the current 117th Congress. Foremost was the increasing focus on technology platforms like Google and Facebook and allegations by the Department of Justice and Federal Trade Commission, as well as scores of state attorneys general, of monopolization and exclusionary practices by “Big Tech.” House Democrats also published a 450-page report on 15 years of this alleged exclusionary conduct. Already

hearings are underway to assess possible remedies and new bills have been introduced from both sides of the aisle – Democrat and Republican.

Both political parties have concerns that companies like Amazon, Apple, Facebook, and Google do not have competitive rivals and can dominate their markets. Democratic legislators tend to focus on concentration in the industries, including effects on worker leverage and consumer access to alternatives with new products and services. Their Republican counterparts worry about fair treatment of conservative views and prefer enhanced enforcement over added regulation. Thus some bills seek to ease standards for stopping mergers and conduct, enhance civil penalties, and increase agency budgets (or even shift some FTC authority to DOJ).

The major bills thus differ in their details. The most comprehensive are proposals from Senator Amy Klobuchar (D-MN) and Senator John Hawley (R-MO).¹

First, on February 4, 2021, Senator Klobuchar (with 9 Democratic co-sponsors) introduced S. 225, the Competition and Antitrust Law Enforcement Act. The first hearing occurred on March 11, 2021, with others subsequently set.

Senator Klobuchar’s bill has the following features, which would affect all industries, not just tech platforms (as

Senator Klobuchar was quoted as to its scope in the Wall Street Journal: “cat food to caskets”):

- Lower the standard of proof that a merger is anticompetitive from “may be substantially to lessen competition” (Clayton Act, § 7) to “create an appreciable risk of materially lessening competition,” with “materially” being defined as “more than a de minimis amount.”
- Shift the burden of proof to the acquiror/acquiree to show the deal’s benefits outweigh the risks in enumerated circumstances, such as whether it may be:
- Leading to a significant increase in concentration in any relevant market
- Involving a buyer with over 50% market share or other significant market power competing or having reasonable probability of competing in the same relevant market
- Eliminating a disruptive or “Maverick” firm or “materially increasing the probability of coordinated interaction among competitors”
- Establish a presumption that (i) any acquisition exceeding \$5 billion or (ii) an acquisition exceeding \$50 million by a purchaser with a market cap, net revenues, or assets over \$100 billion, is anticompetitive.
- Bar large firms from acquiring smaller companies over \$50 million, whether actual or potential (nascent) competitors or not.
- Bar “dominant firms” (over 50% market share or significant market share) from exclusionary conduct raising appreciable risk of harming competition.

Perceived legal effects on agency and courts’ long-standing merger analysis that would result, or business concerns that start-ups will be discouraged, among other factors, will affect the prospects for passage. Lack of clarity as to what constitutes exclusionary conduct may also be a critical issue. Under Senate rules, unlike the House of Representatives, 60 votes not a simple majority – are required for passage.

Second, Senator Hawley’s bills, both introduced in April, contain the following provisions generally:

The Trust-Busting for the Twenty-First Century Act (introduced as S.1074 on April 12) targets all industries’

largest companies: “Big Tech, Big Banks, Big Telecom, and Big Pharma.” It would:

- Designate through the FTC companies as “dominant digital firms.”
- Presume for these firms, as an unlawful “unfair or deceptive trade practice,” any acquisition over \$1 million.
- Bar dominant digital firms from “self-preferencing” or favoring their own searches (unless fully disclosed).
- Bar all mergers and acquisitions by companies whose market cap exceeds \$100 billion if the effect “may be to lessen competition” (eliminating any standard of materiality, substantiality, or unreasonableness).
- Eliminate use of market definition, market shares, or concentration, and rely on a preponderance of evidence standard.
- Change the consumer welfare standard to “protection of economic competition.”
- Require disgorgement of profits by companies losing lawsuits unless for an “extraordinary good cause.”

Senator’s Hawley’s other bill, the Bust Up Big Tech Act (introduced as S.1204 on April 19) targets Big Tech companies trying to “dominate multiple industries simultaneously.” Its provisions include:

- Bar Big Tech from selling, advertising, or promoting their own products and services on their own platforms.
- Bar providing online hosting services or back-end online services to other companies, including affiliates.
- Require FTC annual audits of these companies.
- Empower state attorneys general to bring civil enforcement actions.
- Authorize up to \$1 million in damages to any injured party.

Third, not to be outdone by the expansive bills in the Senate, proponents of change in the House of Representatives have taken a different tactic: a series of bills on individual competition issues led by Representative David Cicilline (D-RI), whose Antitrust Subcommittee of the House Judiciary Committee issued the October 2020 report. Ten or more bills targeting Big Tech may be introduced. A separate bill

may revise the Section 230 liability protection for tech platforms over users' posted consent. Representative Cicilline kicked off hearings on these issues March 18, 2021. On June 9, 2021, discussion drafts of 5 bills were circulated, addressing these issues, and being sponsored by different representatives. Generally, they would do the following:

- Limit Amazon, Apple, Facebook, and Google from acquiring large actual or potential (nascent) competitors or controlling businesses with unreasonable conflicts of interest.
- Shift to the platforms the burden of proof in merger cases.
- Increase their filing costs to clear the transactions with the agencies.
- Lessen barriers for users to opt out of the platforms with their data intact.
- Limit Amazon's and Apple's operations of their marketplace from discriminating and giving their products and services advantages over their competitors.
- Increase the budgets of antitrust enforcement agencies.
- Require services on these platforms to be interoperable with other companies.

The five bills were formally introduced in the House on June 11, 2021, each co-sponsored by a Democrat and a Republican (Representative Ken Buck (R-CO) as ranking Antitrust Subcommittee member, has been collaborating with Representative Cicilline).²

The proposed legislation covers the following:

- American Choice and Innovation Online Act (H.R. 3816), which bars discrimination by dominant tech platforms, such as self-preferencing for their own products and services.
- Ending Platform Monopolies Act (H.R. 3825), which bars leveraging by platforms across multiple business lines, thus self-preferencing and discriminating against other providers.
- Platform Competition and Opportunity Act of 2021 (H.R. 3826), which bars acquisitions by dominant tech platforms of actual or nascent competitors or deals expanding or entrenching the platforms' market power.

- Merger Filing Fee Modernization Act of 2021 (H.R. 3843), which after two decades raises the Hart-Scott-Rodino premerger notification filing fees to obtain FTC or DOJ clearance. The new range would be \$30,000 to \$2,250,000. Funding for the FTC and Antitrust Division would also be increased. Relatedly, on June 8, 2021, the Senate passed part of Senator Klobuchar's bill S.228 to the same end, as an amendment to the U.S. Innovation and Competition Act (S.1260).
- Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021 (ACCESS Act) (H.R. 3849), which lowers entry barriers and switching costs by requiring interoperability and data portability.

In conclusion, some significant overlap of approaches between Senate and House bills appears. Common elements among these varying proposals include:

- Targeting large or "dominant" firm conduct and acquisitions as anticompetitive.
- Lessening the standard of proof for challengers of transactions, e.g., defining relevant markets.
- Increasing the burden of proof on defendants to show their conduct is beneficial.
- Changing standards for defining what constitutes anticompetitive conduct.

Therefore, stay tuned for continuing developments.³

Endnotes:

¹See, e.g., Gibson Dunn, "Senator Klobuchar Proposes Major Antitrust Bill" (March 22, 2021); White & Case, "Senator Josh Hawley Joins Growing Number in Congress Proposing Sweeping Antitrust Reform Legislation" (April 19, 2021).

²See, e.g., Congressman David Cicilline, "House Lawmakers Release Anti-Monopoly Agenda for 'A Stronger Economy: Opportunity, Innovation, Choice'" (June 11, 2021); Vox, "What you need to know about the House's opening bid to rein in Big Tech" (June 11, 2021); The Washington Post, "Bipartisan proposals in House would mean major changes for the way tech giants operate" (June 11, 2021); Wolters Kluwer Antitrust Law Daily "House lawmakers moving forward with package of antitrust legislation aimed at Big Tech" (June 11, 2021); Leah Nysten, Politico, "House Dems unveil bills to rein in Silicon Valley giants – opening rift among Republicans" (June 11, 2021).

³See The Wall Street Journal, "Google, Facebook Pressure Falls Short as Antitrust Measures Advance in House Committee" (June 24, 2021).