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ALERT

Antitrust Practice

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Significant Changes to the Antitrust Laws May Be Coming

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The recent change in Administrations and control of Congress may well usher in a new era of more energetic antitrust enforcement as well as substantive changes to the federal antitrust laws. Such changes would likely affect all industries and businesses – both dominant firms, and those that compete with them or are affected by dominant firms' exclusionary conduct. Thus, the political alignment of both the executive and legislative branches, coupled with bipartisan consensus on the anticompetitive threats from "Big Tech", may be the harbingers of a perfect storm for a new era of aggressive antitrust enforcement.

According to recent published reports, the Biden administration has considered the appointment of an "Antitrust Czar" who may potentially sit in the White House and coordinate among relevant antitrust enforcement agencies.[1] Even without such an appointment, however, the announcement of the heads of the leading federal antitrust enforcement authorities – the U.S. Department of Justice (DOJ) Assistant Attorney General for the Antitrust Division, and the Chair of the Federal Trade Commission (FTC) – will strongly signal to the market the direction of antitrust enforcement in the next four years.

These pending executive branch appointments coincide with a notable legislative development. Specifically, on February 4, 2021, Senator Amy Klobuchar (D-MN), the newly installed Chair of the Senate Judiciary's Subcommittee on Antitrust, Competition Policy and Consumer Rights, introduced the Competition and Antitrust Law Enforcement Reform Act of 2021. *See* Competition and Antitrust Law Enforcement Reform Act of 2021, S.228, 117th Congress (2021). This draft legislation would, among other things, make sweeping changes to Section 7 of the Clayton Act, increase funding to the Antitrust Division and FTC, and create protections for would-be whistleblowers reporting to agencies about illegal conduct. The ranking member of the House Antitrust Subcommittee, Congressman Ken Buck (R-CO), has expressed support for certain of these reforms, suggesting that bipartisan support may increase the chances of the bill's passage.

The draft legislation is motivated, in part, by concerns regarding increased consolidation in a wide variety of industries, the acquisition of emerging disruptive firms, court decisions alleged to have made it more difficult for government agencies to carry their burden of proof under the Clayton Act, the insufficiency of civil monetary penalties available to private plaintiffs under the Sherman Act, and the inadequacy of federal enforcement agency budgets.

Accordingly, among other things the Klobuchar legislation would:

- Amend the Clayton Act to extend the prohibition that presently applies to mergers tending to create monopoly power among sellers, to also more explicitly prohibit mergers creating monopsony power among buyers.
- Change the incipiency standard of the Clayton Act, which, as currently formulated prohibits acquisitions the "effect of [which] ***may be substantially to lessen competition***," to instead require a significantly lower showing that the merger would merely "create an ***appreciable risk of materially lessening***" competition.
- Establish what amount to *per se* anticompetitive rules for certain mergers, by requiring courts to conclude, in cases brought by federal enforcement authorities or state Attorneys General – unless a defendant is able to prove the contrary – that "an appreciable risk" would arise automatically when, among other things: (1) acquisition would lead to a significant increase in market concentration; (2) either (a) the acquirer has a 50 percent market share (or significant market power) and would acquire competing entities or assets as a result of the merger, or (b) the acquirer would acquire an entity or assets with 50 percent market share (or significant market power), and the acquirer competes with such entities or assets; (3) the combined entity "prevents, limits, or disrupts coordinated interaction among competitors in a relevant market or has a reasonable probability of doing so"; (4) the acquisition would either (a) enable the acquirer to unilaterally exercise market power, or

materially increase its ability to do so, or (b) materially increase the probability of coordinated action among competitors; or (5) result in either (a) the acquirer's holding of more than $5 billion of voting stock or assets of the acquired entity, or (b) the acquirer obtaining more than $100 billion in market capital where the acquirer has greater than $50 million of voting stock or assets in the acquired entity. Such *per se* rules in effect shift the burden of proof to antitrust defendants to disprove the anticompetitive potential of their mergers.

- Require firms subject to a DOJ or FTC settlement agreement to provide post-settlement data to enable the agencies to evaluate a merger's post-merger effects on competition, including (1) the pricing, availability and quality of products in the relevant market; (2) the source, magnitude, and extent of cost savings (as anticipated prior to the merger), and the degree to which they were passed on to consumers; and (3) "the effectiveness of any divestitures or any conditions placed on the acquisition in fully restoring competition."
- Enable the DOJ and FTC to obtain civil monetary penalties in addition to private civil remedies already available under the Sherman Act.
- Give the DOJ and FTC additional resources.
- Provide antiretaliation protections to those who provide information to authorities regarding anticompetitive conduct, as well as financial incentives for would-be whistleblowers.
- Permit the award of prejudgment interest (in addition to treble damages and attorney's fees) in civil actions where a company is found to have violated the antitrust laws.

In sum, Senator Klobuchar's ambitious legislative reform proposal coincides with the change in administrations, as well as historic enforcement actions brought against so-called "Big Tech" companies in the waning days of the last administration. Conditions are therefore ripe for both increased enforcement and bold legislative changes.

As the contours of this new era of energetic enforcement and vigilant congressional oversight become more clear, Saul Ewing Arnstein & Lehr lawyers are tracking the developments closely. If your clients would like to comment on the proposed legislation, or have been adversely impacted by exclusionary conduct of a dominant firm, please contact the authors.

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1. Diane Bartz & Nandita Bose, "Exclusive: Biden administration considers creating White House antitrust czar – sources," Reuters (Jan. 19, 2021), available at https://www.reuters.com/article/us-usa-biden-antitrust-exclusive/exclusive-biden-administration-considers-creating-white-house-antitrust-czar-sources-idUSKBN29O2PT (last visited Feb. 19, 2021).

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