WINSTON & STRAWN LLP

BLOG

Democratic-Led Congress and Biden Administration Gearing Up to Revamp Antitrust Law, Enforcement, and Merger Reviews/Challenges

FEBRUARY 8, 2021

Recently, antitrust law and regulations have made their way to the center stage of politics in the United States. In fact, according to a report issued by the American Antitrust Institute (AAI) in April 2020, nearly 60 antitrust-related bills have been introduced in Congress during the last few years, sending "a clear signal that voters are concerned about declining competition."[1] Progressive lawmakers in particular are embracing antitrust reform as a way to protect consumers and invigorate competition.

It has been clear for some time now that with the Biden administration at the helm and both houses of Congress controlled by Democrats, companies can expect a marked increase in legislative activity complemented by an uptick in antitrust enforcement and merger reviews/challenges. (*See our post about the antitrust changes to expect under the new administration here.*) The administration has already taken actions to gear up for the latter—since the former FTC chairman, Joseph J. Simmons, and several other FTC leaders stepped down, the FTC has announced *lower* jurisdictional thresholds for HSR filings and has announced (along with the Department of Justice) a temporary suspension of the option to request early termination of the Hart-Scott-Rodino Act's statutory waiting period. The resignations of key leadership have opened the door for President Biden to appoint a Democratic majority to the FTC. And with the procedural changes, antitrust regulators are pumping the brakes on the merger review process as well as effectively widening the net of transactions that must be reviewed.

Moreover, with the new Democratic majority in the Senate, and bipartisan concerns about the market power of several technology companies, it did not take long for Democratic Senator Amy Klobuchar—who, notably, had previously introduced three bills that each proposed comprehensive reforms of core areas of antitrust law, and who is set to lead the Senate Judiciary Committee's antitrust panel—to introduce a bill that proposes sweeping reforms of U.S. antitrust law. But this new bill, dubbed the "Competition and Antitrust Law Enforcement Reform Act of 2021," takes aim at the very framework of antitrust law and the current system in its entirety rather than targeting just the technology sector. Some of the key features of the proposed legislation include:

- Increasing the FTC's and DOJ's annual budgets by $300 million each.
- Creating an independent Office of the Competition Advocate within the FTC to conduct market analysis and inform enforcement initiative and activity.

- Continuing retrospective analysis of mergers, including imposing obligations on the merged parties to report on the outcome of the transactions.
- Raising the civil fines the FTC and DOJ can seek in federal court for antitrust violations under Sections 1 and 2 of the Sherman Act (capped at 15% of the company's total annual U.S. revenue or 30% of the company's U.S. revenue for the affected line of commerce).
- Eliminating the requirement of defining a relevant market in order to establish liability under the antitrust laws, unless a defined relevant market is required to establish a presumption or resolve a claim under a statutory provision that specifically references a "relevant market."
- Amending Section 7 of the Clayton Act to
    - prohibit mergers that "create an appreciable risk of materially lessening competition," with "materiality" defined as "more than *de minimis*" This replaces the current legal standard, which prohibits mergers that "substantially lessen competition" and
    - shift the burden to the merging parties to show that the transaction does not "create an appreciable risk of materially lessening competition" in (i) transactions that significantly increase market concentration, (ii) transactions involving firms with 50% or greater market share or a significant amount of market power, (iii) acquisitions of a disruptive competitor, (iv) transactions that would allow the buyer to exercise market power, and (v) transactions above a certain value or market-capitalization threshold.
- Creating a new prohibition under the Clayton Act against "exclusionary conduct" that materially disadvantages, forecloses, or limits potential competitors from competing if it presents an "appreciable risk of harming competition," and establishing a rebuttable presumption that exclusionary conduct by a company with 50% or greater market share presents such an appreciable risk.

While some of these sweeping proposals will inevitably face pushback from other legislators, there may be enough bipartisan support for reforming antitrust laws notwithstanding the Democratic majority in both houses (e.g., from the number of Republican legislators who have set their sights on tech firms that they believe have too much market power), to push through some significant changes. In any case, companies across industries—whether contemplating business combinations or not—should be aware of changes that may be coming and the significance of those changes for their businesses and conduct in the market. Winston & Strawn's Antitrust / Competition attorneys will continue to monitor developments and stand ready to assist in analyzing the impacts of antitrust laws and regulations on a case-by-case basis.

Visit Winston & Strawn's The First 100 Days series for our perspectives on Biden/Harris administration's regulatory, compliance, and enforcement agenda as it impacts U.S. and multinational companies across global markets.

---

[1] *The State of Antitrust Enforcement and Competition Policy in the U.S.*, Am. Antitrust Inst., at 35 (Apr. 14, 2020) [hereinafter "AAI Report"], https://www.antitrustinstitute.org/wp-content/uploads/2020/04/AAI_StateofAntitrust2019_FINAL2.pdf.

4 Min Read

Authors

Susannah Torpey

Nasir Hussain

Related Locations

Chicago | New York | San Francisco

Related Topics

Antitrust Intelligence | Disruptive Technology | M&A | Monopoly | Department of Justice (DOJ) | Federal Trade Commission (FTC) | Technology Antitrust

Related Capabilities

Antitrust/Competition | Technology Antitrust | Antitrust Transactions

Related Regions

North America

Related Professionals

Susannah Torpey

Nasir Hussain

This entry has been created for information and planning purposes. It is not intended to be, nor should it be substituted for, legal advice, which turns on specific facts.