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Insights

BIG TECH UNDER FIRE: NEW ANTITRUST BILL TARGETS "EXTREMELY LARGE" COMPANIES

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SUMMARY

On February 4, 2021, Senator Amy Klobuchar (D-MN) and four other senators introduced S. 225, the Competition and Antitrust Law Enforcement Act of 2021 (the "Bill").[1] The Bill amends the Clayton Act in three key areas: (1) modifying the standards to determine whether an acquisition is anticompetitive; (2) targeting "exclusionary conduct" with new lower proof requirements; and (3) enhancing the powers of the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") to enforce the antitrust laws. While the Bill highlights the increased scrutiny placed on Big Tech companies, the Bill would impact all companies considering mergers and acquisitions and other conduct within the market.

1. Modifying the Standards for Analyzing Mergers and Acquisitions

The Bill would revise the Clayton Act's Section 7 standards for analyzing mergers by substituting a "to create an appreciable risk of materially lessening competition" standard for the current "substantially to lessen competition" standard. This would meaningfully lower the bar for challenges to a merger or acquisition.

Further, acquisitions by "extremely large" companies[1] acquiring $50 million or more of the securities or assets of any company would be presumed to be anticompetitive. The large acquiring company would bear the burden of rebutting the presumption of anticompetitive harm by demonstrating that the acquisition will not materially harm competition.[2] While the Bill's target may be Big Tech, the effect of modifying the current standard would have ancillary effects on other companies (particularly large ones) looking at potential mergers and acquisitions.

2. Modifying the Standards for Exclusionary Conduct

The Bill also adds a specific provision regarding exclusionary conduct. Under the Bill, "exclusionary conduct" means conduct that "(i) materially disadvantages 1 or more actual or potential competitors; or (ii) tends to foreclose or limit the ability or incentive of 1 or more actual or potential competitors to compete."[3] This changes the standard for a violation from a "harm to competition" to a "materially disadvantages competitor" standard. This, in turn, changes an important antitrust principle that the antitrust laws are designed to protect competition, not individual competitors. That would be no longer true if the Bill becomes law. Further, it is unclear under this standard how the courts will distinguish legitimate competitive conduct from "exclusionary conduct," as the essence of competition is to take business away from a competitor, *i.e.*, to "disadvantage" a rival.

Activity that fits within the new exclusionary conduct definition is presumed anticompetitive if undertaken by a company (or more than one company collectively) with a market share in excess of 50% (or otherwise deemed to have market power). The presumption is rebuttable. If an activity is not presumptively exclusionary under the Bill, a totality of the circumstances standard is applied. The Bill also includes a list of activities that are not necessary for a court to find that exclusionary conduct has occurred, including: (1) unilateral conduct by the defendant that changes a prior course of dealing between the defendant and a party subject to the exclusionary conduct; (2) differential treatment by the defendant towards subjects of the exclusionary conduct; (3) conduct by the defendant which makes no economic sense, aside from harming competition; or (4) conduct by the defendant that presents a risk of harm to only one side of a two-sided market.[4] All these considerations are intended to make it easier for an antitrust plaintiff to prove liability.

3. Enhance the Enforcement Powers of the DOJ and FTC

The Bill increases the government's enforcement powers in two key ways: (1) through the creation of the Office of the Competition Advocate,[5] and (2) through new civil penalties for antitrust violations.[6] The Competition Advocate would collect data regarding concentration levels across various industries and recommend administrative actions to all federal agencies intended to foster procompetitive effects.

The Bill authorizes the government to seek civil penalties for antitrust violations. The Bill authorizes the DOJ and FTC to seek either:

1. 15 percent of the violator's total U.S. revenue in the prior calendar year, or

2. 30 percent of the revenues of the targeted company for the entire period of the unlawful conduct.

Under the Bill, prejudgment interest on treble damages would become a mandatory part of an award. The revisions affect all antitrust suits, thus sweetening the pot for potential plaintiffs and further incentivizing private antitrust suits.

In total, the Bill places further risk on antitrust defendants—whether in an action brought by the government or a private plaintiff. The Bill makes it easier to prove an antitrust violation and increases the monetary exposure for such violations. The Bill would also make it more difficult for large companies, especially Big Tech companies, to acquire companies of any kind.

Bryan Cave Leighton Paisner's experienced antitrust attorneys can help clients navigate complex antitrust issues and these possible changes in the law. We represent clients across diverse industries during all stages of antitrust compliance, investigations, and litigation. For more information, please contact a member of the Antitrust and Competition team.

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1. Companies with total assets, net annual sales, or a market capitalization greater than $100 billion. This is likely only a few hundred companies globally.

2. S. 225 Sec. 9 (c).

3. *Id.* at Sec. 9 (a)(1)(A).

4. *Id.* at Sec. 9 (e).

5. *See id.* at Sec. 8.

6. *See id.* at Sec. 11 & Sec. 17.

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