Executive Summary: Congress is considering proposed legislation would substantially rewrite U.S. antitrust law. If approved, the “Competition and Antitrust Law Enforcement Act of 2021” would increase the compliance burden on many mergers to show they would not create a risk of reducing competition. The bill also
would create a new federal office to enforce such regulation, as well as increasing civil penalties in antitrust litigation.

Wasting no time as the incoming chair of the Senate antitrust subcommittee, on February 4, Sen. Amy Klobuchar introduced a comprehensive and sweeping bill targeting the tech industry that would make wholesale changes to antitrust jurisprudence. The bill, entitled the “Competition and Antitrust Law Enforcement Act of 2021” most certainly aligns with the political agenda of Democrats and several Republicans, as evidenced by the House Antitrust Subcommittee hearings chaired in July and August by Rep. Dennis Cicilline. (Indeed, many of the suggestions in the House Subcommittee’s 450-page report are included in the bill.) Whether the bill aligns with the purpose of competition and antitrust law, however, is debatable. And, if an objective is to reduce or minimize antitrust litigation, the bill fails.

The bill would abandon decades of precedent that has added definition to the otherwise amorphous standards set by the antitrust laws. Read literally, those laws would preclude all sorts of beneficial, commercial conduct. The Supreme Court, however, has held that antitrust laws should only be applied to protect consumers, not to protect competitors from firms that can offer consumers lower prices or better products. The Court has also repeatedly confirmed that merely exercising market power is not, by itself, anticompetitive. Instead, the antitrust laws only prohibit activities or combinations that would harm competition and result in higher prices, reduced quality or reduced output.

The recitals in Klobuchar’s bill, on the other hand, insist that “nascent or potential rivals—even those that are unprofitable or inefficient—can be an important source of competitive discipline.” (Emphasis added). And, although the bill does not mention Amazon, Apple, Google, and Facebook by name, it asserts that the mere “presence and exercise of market power . . . increases economic inequality.”

The bill targets these firms, as well as recent court decisions, through a number of measures—significantly increasing funding for federal antitrust enforcement, imposing greater civil penalties, redefining the standards necessary to show an antitrust violation, and shifting the burden to businesses to show that certain types of mergers or conduct are procompetitive.

**Redefining the Merger Standards**

The bill would rewrite Section 7 of the Clayton Act (which governs business combinations) to prohibit any mergers that “create an appreciable risk of materially lessening competition,” rather just those that “substantially lessen competition.” The bill would also define “materially” as “more than a de minimis amount.”

Just what these standards would mean in practice is unclear. However, they would seem to prevent courts from weighing a merger’s pro-competitive benefits against its anticompetitive effects in order to determine whether it is prohibited. Here is one of several instances in which the bill fails to reduce litigation or clarify the existing law; one can reasonably anticipate years and volumes of definitional litigation.

The bill would also amend the Clayton Act to expressly prohibit mergers that create
a monopsony—commonly defined as monopoly power on the part of a buyer, rather than a seller or supplier.

**Burden-Shifting in Certain Mergers**

The bill would also shift the burden to businesses in certain categories of mergers to prove their mergers do not create an appreciable risk of materially lessening competition. The categories include:

1. Mergers that “significantly increase market concentration”

2. Acquisitions of “competitors” or “nascent competitors” by a “dominant firm” (defined as a firm that either has 50% or greater market share or possess “significant market power”)

3. So-called “mega-mergers” in which the transaction is valued at more than $5 billion or the buyer is worth at least $100 billion.

This represents a sweeping change, and a reversal of the usual presumption that business can engage in any arrangement unless it is expressly prohibited. In the press release accompanying the bill Klobuchar acknowledges that in many cases it is difficult for the government to show that mergers that fall within these categories actually pose a significant risk to competition. Thus, it would require companies to prove the opposite.

**Prohibiting “Exclusionary Conduct”**

The bill would greatly expand the restrictions under Section 2 of the Sherman Act, which prohibits the acquiring or maintaining monopoly through anticompetitive means.

Klobuchar’s proposal would add a new provision prohibiting “exclusionary conduct” by “dominant firms” (again defined as those with a 50% or greater market share or which possess “significant market power”).

Yet, while at first glance this would seem to mirror the definition of monopoly power—which is traditionally defined as the power to exclude competitors or control prices—the bill’s definitions make clear that it would go further, defining “exclusionary conduct” as any conduct that “materially disadvantages competitors or limits their opportunity to compete.”

**Federal Enforcement**

The bill would create within the FTC a new “Office of the Competition Advocate” and, as well as a “Division of Market Analysis” to fulfill that mission. The bill would also come close to double funding for the FTC and the Antitrust Division of the DOJ to enable them to bring challenge a greater number of mergers and pursue enforcement litigation. Again, rather than expecting reduced litigation, the bill clearly encourages more, imposing even greater costs of compliance and defense on corporations, with the effect of discouraging innovation and passing on increased
costs to the ultimate consumer.

**Other Enforcement Measures**

The bill would also include a number of other measures designed to increase leverage in both public and private lawsuits seeking to enforce antitrust claims.

The act would increase civil monetary penalties under the Sherman Act and Clayton Act. Under the Act, penalties would be the greater of 15 percent of a company’s U.S. revenues from the prior year or 30 percent of the company’s U.S. revenue in the part of trade or commerce related to or targeted by the alleged illegal conduct for the duration that the conduct occurred.

The bill would also encourage claims by purported whistleblowers, entitling them to recover up to 30 percent of criminal fines collected in enforcement actions. Further, in addition to the existing, standard treble damages and attorney’s fees remedy, the Act proposes to make available prejudgment interest that accrues on three times the amount of damages sustained, rather than on actual damages, as is the current law.

**Conclusions**

It is not clear whether Klobuchar’s bill has enough votes to pass the Act, however, her proposals are likely to draw support from at least a few Republicans, who have voiced criticism of large tech firms such as Facebook and Google. And, as a marker for where the Senator and her colleagues want to go with antitrust policy, these ideas will creep into many formal, i.e., litigation, and informal discussions about the proper interpretation and use of antitrust law.

What is clear is that these are not mere “updates” to the antitrust laws, but instead a proposal to fundamentally rewrite the antitrust laws and the purposes for which they have traditionally been applied. The result, at minimum, will be years of litigation to grapple with defining a series of prohibitions whose limits are far from self-explanatory.

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