March 22, 2021

SENATOR KLOBUCHAR PROPOSES MAJOR ANTITRUST BILL

To Our Clients and Friends:

On February 4, 2021, Senator Amy Klobuchar (D-MN) introduced S. 225, the Competition and Antitrust Law Enforcement Act ("the Klobuchar Bill"), a comprehensive legislative effort to revamp current antitrust laws and strengthen enforcement. The bill has nine cosponsors, all Democrats, including three of the four members of the Senate Judiciary Committee, Subcommittee on Competition Policy, Antitrust, and Consumer Rights ("Senate Antitrust Subcommittee"). On March 11, 2021, as the Chair of the Senate Antitrust Subcommittee, Senator Klobuchar gaveled in the first of likely many hearings on antitrust policy in the 117th session of Congress.

The Klobuchar Bill includes sweeping changes to antitrust law, such as lowering the standard that the Federal Trade Commission and Department of Justice must meet to block a merger, switching the burden of proof in certain merger cases, revising the role of market definition in merger cases, overturning existing caselaw regarding predatory pricing and other types of unilateral conduct, and imposing new civil penalties for antitrust violations. It also provides for increased antitrust agency funding for both enforcement and studying outcomes in consummated mergers, and expanded whistleblower protections—proposals that in some instances already have cross-aisle support. The bill is currently pending before the Senate Judiciary Committee and does not yet have a House companion bill.

The Klobuchar Bill comes on the heels of more than a year of congressional hearings and investigations into the role of the antitrust laws in addressing perceived concentration across the tech sector and the broader economy. In October of 2020, the House Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law ("House Antitrust Subcommittee") concluded a 16-month investigation into technology companies. Last Congress, the Senate also held hearings featuring testimony from top tech executives on a range of antitrust, data, and privacy issues.

If enacted into law, the Klobuchar Bill would impact antitrust enforcement across all industries. As Senator Klobuchar recently put it, "It's not just tech, it's cat food to caskets."[1] The Klobuchar Bill takes aim at purported "higher levels of market concentration . . . driven by waves of corporate consolidation" in industries ranging from "pharmaceuticals, social media and digital technology, telecommunications, agriculture, online ticket sales, transportation, and more."[2]

In order to become law, the Klobuchar Bill will need to pick up at least 10 Republican votes in the Senate—assuming that the Senate filibuster rules remain in place—as well as contend with tech-targeted proposals in the House that differ in substance. As detailed in the Pathway to Passage section below, Senator Mike Lee (R-UT), the leading Republican on the Senate Antitrust Subcommittee, has signaled concerns about the Klobuchar Bill.[3] The challenge will be moving beyond a general aversion to the power wielded by big tech companies, and finding bipartisan consensus on specific antitrust policy changes.

Key Provisions of the Klobuchar Bill

Revised Standard for Mergers. The bill purports to change the legal standards that courts use to determine whether an acquisition is anticompetitive. The Clayton Act prohibits any acquisition or merger where the effect "may be substantially to lessen competition or to tend to create a monopoly." The bill revises the standard to "create an appreciable risk of materially lessening competition, or to tend to create a monopoly or a monopsony." The term "materially" is later defined as "more than a de minimis amount."

The change is intended to provide more flexibility for federal agencies to challenge certain mergers. It remains uncertain, however, how federal courts will interpret the changes. Federal agencies already win the majority of litigated challenges.[4] And it is unclear whether and to what extent courts will discard a well-developed body of caselaw based on a slight retooling of the legal standard.

Switch the Burden of Proof. The bill purports to shift the burden of proof to the merging parties to demonstrate that the benefits of the transaction outweigh the potential risks in certain circumstances. Under current law, the burden is on the government. These enumerated circumstances include instances where:

- The "acquisition would lead to a significant increase in market concentration";
- A firm with greater than 50% market share or otherwise possessing significant market power acquires a competitor or a company that has a "reasonable probability" of becoming a competitor in the relevant market;
- The acquisition eliminates a firm that "prevents, limits, or disrupts coordinated interaction among competitors in a relevant market," which is sometimes referred to as a "maverick" in antitrust parlance;
- The acquisition enables the "acquiring person to unilaterally and profitably exercise market power" or "materially increase[s] the probability of coordinated interaction among competitors";
- The transaction is valued at more than $5 billion;
- The acquiring party has assets, net revenue, or market capitalization above $100 billion and makes an acquisition of $50 million or more.

Some of the above modifications appear to follow agency practices and recent cases. For example, the federal agencies' primary inquiry when reviewing a proposed transaction is whether the deal will result in higher prices, either through unilateral effects (*i.e.*, the loss of head to head competition) or coordinated effects.[5] Similarly, federal courts currently apply a presumption of illegality to any acquisition that increases market concentration in a well-defined relevant market in accordance with metrics used by the agencies.[6] Furthermore, federal agencies routinely raise concerns with acquisitions that may eliminate a disruptive competitor.[7]

By expanding the presumption of illegality to cover mega-mergers and a so-called "dominant" firm's acquisition of nascent competitors, however, the Klobuchar Bill might alter the analysis of certain types of mergers, including the following:

- **Nascent Competitor Acquisitions.** The bill addresses mergers where allegedly dominant firms acquire small competitors. The FTC and DOJ recently challenged several proposed acquisitions of nascent or potential competitors,[8] but those mergers were abandoned before the cases were litigated.

- **Start-Up Acquisitions.** The bill also covers instances where large firms propose to acquire smaller companies for more than $50 million, *even if those companies are not competitors and are unlikely to become competitors in the future*. Under the current legal framework, acquisitions of non-competitors rarely raise antitrust concerns. Not only would the bill usher in a new category of potential antitrust challenges, but it would also make presumptively illegal many acquisitions that today do not require pre-merger clearance *at all* (for 2021, parties need only report acquisitions above $92 million).

- **Other Mergers.** The presumption that any acquisition above $5 billion is anticompetitive, even if the merging parties are not competitors, might add another layer of risk, cost, and complexity to the merger review process.

Harmful Conduct By A Dominant Firm. The Klobuchar Bill proposes to amend the Clayton Act to prohibit "dominant firms" from engaging in exclusionary conduct that presents an "appreciable risk of harming competition" within the relevant market. "Dominant firms," according to the legislation, include those with "a market share of greater than 50 percent" or "otherwise ha[ve] significant market power," and "exclusionary conduct" is conduct that would "materially disadvantage" competitors or "limit the ability or incentive" of competitors to compete.

The bill also provides a laundry list of "limitations"—facts that "may constitute evidence of a violation," but that are not required to find that a specific course of conduct is exclusionary. According to Senator Klobuchar, the list aims to overturn the "flawed court decisions" that have weakened other antitrust laws.

If enacted into law as written, the bill might lead to uncertainty about what practices constitute unlawful exclusionary conduct. The bill's laundry list of "limitations" enumerate circumstances that are *not* required to prove that a course of conduct is exclusionary; the bill provides minimal guidance about what *is* required to prove that conduct is exclusionary. That uncertainty is especially problematic because many allegedly exclusionary practices have procompetitive rationales.

Pathway to Passage

The Senate. The Klobuchar Bill appears to face an uphill battle in the Senate. Assuming that the filibuster remains intact, the bill will not pass without the support of at least 10 Republicans, assuming all Senate Democrats support the legislation.

There appears to be skepticism from across the aisle on whether a complete reworking of the antitrust laws is appropriate. Senator Mike Lee voiced concern that this broad structural change is "misplaced," and that, in his view, "in the rush to address our collective concerns about tech, we risk undermining the soundness and impartiality of antitrust enforcement."[9] During the March 11th Senate hearing he reiterated his views, stating that "what we need now is not a sweeping transformation of our antitrust laws." Rather, Senator Lee emphasized the need for "agency leaders who have the resources and the will to enforce the laws we have."[10]

Not all Senate Democrats have voted in unison this Congress. At a time when the Senate is evenly divided between Democrats and Republicans, a single party defector can derail legislation, including the Klobuchar Bill. In addition, while three of the four Democratic members of the Senate Antitrust Subcommittee have cosponsored the Klobuchar Bill, Senator Ossoff (D-GA) is the sole Democratic member of the Subcommittee who has not yet cosponsored the bill. His support may also be helpful in moving the Klobuchar Bill through the Judiciary Committee.

House of Representatives. Democrats in the House appear to favor many of the proposals included in the Klobuchar Bill. Last year, in its Staff Report on competition in digital markets, the U.S. House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law recommended Congressional actions similar to the proposals in the Klobuchar Bill.

The Staff Report recommended revamping merger policy by:

- Shifting the burden of proof to the merging parties in cases involving concentrated markets or high market shares;[11]
- "Prohibit[ing] acquisitions of potential rivals and nascent competitors";
- "Codifying a presumption against acquisitions of startups by dominant firms, particularly those that serve as direct competitors, as well as those operating in adjacent or related markets";
- Creating a "presumption that vertical mergers are anticompetitive when either of the merging parties is a dominant firm operating in a concentrated market";
- Amending the Clayton Act to prohibit acquisitions that "may lessen competition or tend to increase market power."

And it recommended reforming monopolization law by statutorily addressing predatory pricing, essential facilities, refusals to deal, tying, and two sided platforms.[12]

Representative David Cicilline (D-RI), Chair of the House Antitrust Subcommittee, has publicly stated that he will propose legislation codifying many of the Staff Report's recommendations.[13] In addition to the elements that it shares in common with the Klobuchar Bill, Rep. Cicilline is expected to propose changes that might target the tech sector, such as legislation that might address firms that own and participate in online marketplaces[14]—a change that Senator Elizabeth Warren (D-MA) has proposed in the Senate as well.[15] . On March 21, 2021, Rep. Cicilline stated that he was prepared to craft a series of narrowly tailored tech-specific bills that could be introduced as early as May.[16]

Representative Ken Buck (R-CO), the top Republican on the House Antitrust Subcommittee, has also promoted antitrust reform, including "proposals to shift the burden of proof for companies pursuing mergers and acquisitions," "reinforcing presumptions that certain behaviors are likely to reduce competition, lowering evidentiary burdens in litigated cases, and emphasizing that anticompetitive effects are not limited to price effects and include innovation competition, quality, output, and consumer choice."[17]

Like his Republican counterpart in the Senate, however, Rep. Buck has expressed concern that "sweeping changes could lead to overregulation and carry unintended consequences for the entire economy. We prefer a targeted approach, the scalpel of antitrust, rather than the chainsaw of regulation."[18]

It appears that the central debate in both the House and Senate will be whether to pass sweeping antitrust reform, or carve out targeted proposals aimed at specific industries or tech firms.

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[1] Brent Kendall and Ryan Tracy, Congress Eyes Antitrust Changes to Counter Big Tech, Consolidation, WSJ (March 11, 2021) (available at https://www.wsj.com/articles/congress-eyes-antitrust-changes-to-counter-big-tech-consolidation-11615458603)

[2] https://www.klobuchar.senate.gov/public/index.cfm/2019/9/klobuchar-presses-heads-of-doj-antitrust-division-and-ftc-on-critical-issues-of-competition-in-the-u-s-economy

[3] https://www.lee.senate.gov/public/index.cfm/press-releases?ID=C99C6DA7-D8EE-42FB-B51E-A26B2A2F2A8A

[4] Since 2000, the Agencies have won more than 70% of litigated cases.

[5] *See* Horizontal Merger Guidelines §1 ("A merger can enhance market power by simply eliminating competition between the merging parties" or by "increasing the risk of coordinated, accommodating, or interdependent behavior among rivals"); *id.* at §§ 6 & 7 (explaining how the agencies evaluate unilateral and coordinated effects); *see United States v. Aetna*, 240 F. Supp. 3d 1, 43-47 (D.D.C. 2017) (evaluating evidence of unilateral and coordinated effects); *United States v. H&R Block*, 833 F. Supp. 2d 36, 77-89 (D.D.C. 2011) (same).

[6] *See United States v. Baker Hughes, Inc.*, 908 F.2d 981, 991 (D.C. Cir. 1990) ("By showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area, the government establishes a presumption that the transaction will substantially lessen competition.").

[7] *See* Horizontal Merger Guidelines §2.1.5 ("If one of the merging firms has a strong incumbency position and the other merging firm threatens to disrupt market conditions with a new technology or business model, their merger can involve the loss of actual or potential competition.").

[8] For example, in *In re Illumina Inc. / Pacific Biosciences of California*, the FTC challenged Illumina Inc.'s "$1.2 billion acquisition of Pacific Biosciences of California, alleging in an administrative complaint that Illumina is seeking to unlawfully maintain its monopoly in the U.S. market for next-generation DNA sequencing systems by extinguishing PacBio as a nascent competitive threat." *See* https://www.ftc.gov/enforcement/cases-proceedings/1910035/matter-illumina-incpacific-biosciences-california-inc. The parties abandoned the transaction. Similarly, DOJ sued Visa to block its acquisition of Plaid, asserting in its complaint that "the transaction would have enabled Visa to eliminate this competitive threat to its online debit business before Plaid had a chance to succeed, thereby enhancing or maintaining its monopoly." The parties terminated the deal. *See* https://www.justice.gov/opa/pr/visa-and-plaid-abandon-merger-after-antitrust-division-s-suit-block

[9] https://www.foxnews.com/opinion/sen-mike-lee-facebook-google-others-have-big-problems-but-antitrust-law-is-not-the-answer

[10] Senate Hearing on Antitrust Law and Consumer Rights at 20:20, available at https://www.c-span.org/video/?509765-1/senate-hearing-antitrust-law-consumer-rights

[11] Staff Report at 393, available at https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf

[12] Staff Report at 395-99.

[13] https://www.bloomberg.com/news/articles/2021-02-22/congress-must-seize-moment-to-reform-antitrust-cicilline-says

[14] https://www.politico.com/news/2020/10/06/house-democrats-antitust-overhaul-big-tech-426840

[15] https://www.nytimes.com/2019/03/08/us/politics/elizabeth-warren-amazon.html

[16] https://www.axios.com/tech-antitrust-facebook-google-amazon-apple-275f122d-b3f5-49cb-b223-f77c95a49252.html

[17] Rep. Buck Report at 5, available at https://www.politico.com/f/?id=00000174-fa7f-db77-abfe-fe7f5d740000

[18] Rep. Buck Report at 6.

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