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Contents

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Is Congress the Answer?
Evaluating Antitrust Legislation and the Impact on Technology Industries

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Antitrust enforcement has not been much of a "hot button" issue in modern, mainstream American politics. Although the occasional high-profile matter, such as the government's case against Microsoft in the 1990s[3], may attract attention, antitrust enforcement is not usually among the key areas of focus by elected officials or political candidates, as opposed to taxes or social issues. Nor has antitrust enforcement changed materially when new presidential administrations or Congressional majorities have come into power, even when those administrations or majorities are from a different political party, notwithstanding statements from political candidates, like those from then-candidate Barack Obama in 2008 promising more vigorous enforcement.[4]

Recently, however, antitrust has become a prominent political issue, particularly when it comes to the technology industry or "Big Tech."[5] There has been a growing concern among academics and politicians that U.S. antitrust enforcement is not adequately addressing competition issues and needs major changes, with some–including the recently named acting Chairperson of the Federal Trade Commission–viewing antitrust enforcement as a potential means of solving broader economic issues and even social issues, such as racial inequality.[6] Although there are a variety of views on the scope and magnitude of changes needed, one perspective that appears to be shared generally by many across ideologies is that antitrust enforcement has not appropriately reigned in leading technology companies, notwithstanding the fact that the Department of Justice, Antitrust Division (DOJ), Federal Trade Commission (FTC), and State Attorneys General have all brought historic monopolization cases against certain technology companies (e.g., Google).[7]

These views are also reflected in proposed federal legislation that, if passed, would dramatically change U.S. federal antitrust enforcement and have a profound effect on leading U.S. industries, and on technology companies in particular. This article will examine the legislation, its likelihood of passage, impact on technology companies, and whether it would have unintended consequences for the U.S. economy.

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3 *United States v. Microsoft Corp.*, 253 F. 3d 34 (D.C. Cir. 2001).

4 David Giacalone, *Obama Promises Strong Antitrust Enforcement* (Sept. 27, 2007), *available at* https://blogs.harvard.edu/ethicalesq/2007/09/27/obama-promises-strong-antitrust-enforcement/.

5 Daisuke Wakabayashi, *The Antitrust Case Against Big Tech, Shaped by Tech Industry Exiles*, N.Y. TIMES (Dec. 20, 2020); Jon Swartz, *Big Tech has an antitrust target on its back, and it is only going to get bigger*, MARKETWATCH (Jan. 2, 2021), *available at* https://www.marketwatch.com/story/big-techs-antitrust-woes-will-continue-to-grow-but-will-it-actually-matter-11607628425.

6 *See e.g.*, Comm'r Rebecca Kelly Slaughter, Antitrust at a Precipice, Remarks Before the GCR Interactive: Women in Antitrust (Nov. 17, 2020), *available at* https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf.

7 Josh Kosman, *Google's high handed tactics with US regulators are backfiring*, N.Y. POST (Oct. 25, 2020); Tony Romm, *Justice Department sues Google, alleging multiple violations federal antitrust law*, WASHINGTON POST (Oct. 20, 2020).

I. Modern U.S. Antitrust Enforcement Philosophy and Enforcement Reflects Relative Stability

U.S. antitrust enforcement activity throughout presidential administrations can be characterized as relatively predictable and stable. Enforcement activity has focused largely on economic analysis and the consumer welfare standard, evolving not through sweeping changes, but through common law.

U.S. antitrust jurisprudence has a long history that began with the adoption of the Sherman Act[8] over 120 years ago and has evolved over time largely through the common law (and a few other statutes, such as the Clayton Act of 1914[9]), as courts and the antitrust enforcement agencies grappled with how to assess competitive issues in the U.S. economy. The development of antitrust doctrine by courts is significant, particularly since antitrust decisions by a court or enforcement decisions by an agency can be existential for a company or even an industry.[10]

Since the late 1970s and until recently, there has been general consensus regarding U.S. antitrust enforcement within mainstream political ideologies, with disagreements on policy between administrations of different political parties largely being played "between the 40-yard lines."[11] This consensus has been based at its core on the consumer welfare standard, a common law framework where business conduct and mergers are assessed to determine whether they would harm consumers in a relevant market, and the purpose of the antitrust laws is "the protection of competition, not competitors."[12]

To determine whether consumer welfare is enhanced, courts and the agencies generally look to whether the conduct or merger in question would enhance economic efficiency (i.e., the effect on prices for consumers and other related factors, such as innovation). In other words, if consumers are or would be harmed by reduced output, decreased product quality, or higher prices that result from the firm or firms' market power, then the conduct or merger violates the antitrust laws.[13] The chief tools used to assess these issues are based on modern microeconomics, with econometric modeling driving, or at least significantly influencing, enforcement decisions by agencies and decisions by courts.

This is not to say that the general acceptance and use of the consumer welfare standard means there is agreement on all enforcement decisions, such as whether to challenge a particular merger, as the consumer welfare standard is not a rigid formula that provides bright lines for

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8 15 U.S.C. §§ 1-38.

9 15 U.S.C. §§ 12-27.

10 *See* Catherine Shu, *RentPath drops acquisition deal with CoStar after FTC antitrust lawsuit*, TECHCRUNCH (Dec. 30, 2020), *available at* https://techcrunch.com/2020/12/29/rentpath-drops-acquisition-deal-with-costar-after-ftc-antitrust-lawsuit/; *See also* Thomas J. Horton, *Unraveling the Chicago/Harvard Antitrust Double Helix: Applying Evolutionary Theory to Guard Competitors and Revive Antitrust Jury Trials*, 41 U. Balt. L. Rev. 615,630-1 (2012) (discussing the negative impacts of the decision in Brown Shoe Co., Inc. v. United States, 370 U.S. 294 (1962)).

11 Comm'r Thomas B. Leary, The Bipartisan Legacy (June 21, 2005), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/bipartisan-legacy/050803bipartisanlegacy.pdf.

12 *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 320 (1962).

13 Herbert Hovenkamp, *Implementing Antitrust's Welfare Goals*, 81 FORDHAM L. REV. 2471, 2476 (2013) ("[C]ourts almost invariably apply a consumer welfare test."); Jonathan M. Jacobson, *Another Take on the Relevant Welfare Standard for Antitrust*, ANTITRUST SOURCE, at 2 (Aug. 2015) (The "consumer welfare standard is the standard understood to be employed in practice by the federal enforcement agencies").

enforcement decisions. Rather, antitrust investigations are highly fact-specific and involve complex econometrics, with lawyers and economists frequently disagreeing on a particular type of business conduct or transaction's competitive effects.[14] And thus while most antitrust enforcers and judges would probably agree that the consumer welfare standard is the appropriate standard to assess competitive issues, there are differences in opinion as to how to apply the standard, such as how to determine whether a merger would harm innovation sufficient to substantially lessen competition under the Clayton Act.[15]

These differences may reflect, at least to some degree, broader philosophical or political views, with progressives' being more inclined to bring enforcement actions or challenges to mergers while conservatives' being less inclined to do so. There are a number of enforcement actions by the FTC that are split along partisan lines–the appointment process for the five Commissioners, with the Chairperson and two Commissioners appointed by the political party that holds the presidency and two Commissioners from the other political party. For instance, in 2019, the FTC entered into a settlement to resolve concerns regarding Staples acquisition of wholesaler Essendant Corporation.[16] The settlement in that vertical transaction was supported by the three Republican FTC Commissioners, with the two Democrat Commissioners dissenting, arguing that the majority's analysis was part of "a decades-long, bipartisan pattern of faulty analysis, improper assumptions, unreliable predictions, underweighting evidence of anticompetitive effect, and overweighting evidence of efficiencies."[17] In addition, the DOJ under Obama administration's withdrew its report on Section 2 of the Sherman Act that had been issued previously under the Bush Administration.[18]

With that said, that data does not indicate that there have been wild swings in enforcement from one administration to the next. The percentages of Second Requests issued in merger investigations, for example, has been in the low single digits for decades.[19] Merger challenges have varied somewhat, but such variation may reflect investigations that have carried over from one administration to the next.[20] Furthermore, some of the more controversial merger challenges, such as the FTC's successful challenge to the Whole Foods/Wild Oats merger in 2007 and the DOJ's

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14 Diane Bartz, *AT&T economist argues Time Warner merger is good for consumers*, A.P. (Apr. 12, 2018)("Carlton said Shapiro underestimated how many people were dropping pay TV altogether and overestimated how many people would leave their pay TV provider if they lost access to Turner's channels.").

15 *See e.g.*, Richard J. Gilbert & Hillary Greene, *Merging Innovation into Antitrust Agency Enforcement of the Clayton Act*, 83 GEO. WASH. L. REV. 1919, 1921 (2015).

16 Press Release by FTC, FTC Imposes Conditions on Staples' Acquisition of Office Supply Wholesaler Essendant Inc. (Jan. 28, 2019), *available at* https://www.ftc.gov/news-events/press-releases/2019/01/ftc-imposes-conditions-staples-acquisition-office-supply.

17 Statement of Chairman Joseph J. Simons and Commissioners Noah Joshua Phillips and Christine S. Wilson Concerning the Proposed Acquisition of Essendant, Inc. by Staples, Inc., FTC File No. 181-0180 (June 30, 2020) (statement from the majority describing the position of the dissent), *available at* https://www.ftc.gov/system/files/documents/public_statements/1448328/181_0180_staples_essendant_majority_statement_1-28-19.pdf.

18 Press Release by DOJ, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), *available at* https://www.justice.gov/opa/pr/justice-department-withdraws-report-antitrust-monopoly-law.

19 Cornerstone Research, *Trends in Merger Investigations and Enforcement at the U.S. Antitrust Agencies: FY 2010–FY 2019*, at 4, *available at* https://www.cornerstone.com/Publications/Reports/Trends-in-Merger-Investigations-and-Enforcemen-(6).

20 *See, e.g., FTC v. Whole Foods Market, Inc.*, 548 F. Supp. 3d 1028 (D.C. Cir. 2008) (example of case that carried over from one administration from the next).

unsuccessful challenge to the AT&T/Time Warner merger in 2019 took place during Republican administrations that are less likely to challenge mergers overall.[21]

II. A New/Retro Antitrust Philosophy Emerges and Targets Big Tech

In recent years, there has been a growing movement that advocates making significant changes to U.S. antitrust enforcement. Most notably, a progressive "Neo-Brandeisian" approach to antitrust reform has emerged. At its core, the Neo-Brandeisian approach is centered on concerns about "Bigness" or the concentration of power as opposed to enhancing consumer welfare.[22] Specifically, Neo-Brandesians allege that as a result of the adoption of the Chicago School's consumer welfare standard by courts and the antitrust enforcement agencies, a handful of firms have come to dominate most markets in the United States. This dominance has not just been economic, but political, as large corporations have accrued overwhelming political power that has squeezed out small businesses and ordinary consumers from the political process. The result of this concentration of economic and political power has caused deep, wide-ranging harms, such as suppressed wages and a weakening of democracy.[23]

The technology industry is the primary example that Neo-Brandeisians point to as exemplifying the harms that concentrated economic and political power have caused. Columbia Law School professor Tim Wu claims that we are in a new Gilded Age, with "Big Tech" companies' being the equivalent of Standard Oil.[24] According to Wu, "There's been a profound change in the tech economy, and I think one that's very dangerous for the United States' economy… right now, what we're seeing is a lack of innovation. A lack of starts. That's why I think it's important to have a shake-up of the industry every so often."[25]

How has modern antitrust policy allegedly caused all of these harms, and how should antitrust reforms proceed to remedy them? According Neo-Brandeisians, there is a wide range of policy errors and prescriptions, but three themes stand out. First, the consumer welfare standard misses critical issues by focusing too narrowly on economic efficiency (mainly price and output), which means that courts and enforcers have failed take into consideration the harmful effects that conduct such as predatory pricing and vertical integration have caused, including helping to entrench monopolists in their markets. Thus, the standard should be abandoned in favor of a new standard, such as containing corporate power.[26] Second, modern antitrust enforcement contains too few "bright lines," particularly with respect to market concentration and mergers, which should be outlawed under certain specific circumstances.[27] Third, and more broadly, according to Neo-Brandeisians, modern antitrust enforcement relies too much on economic analysis, specifically

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21 *Id*.; *United States v. AT&T Inc.*, et al., 916 F. Supp. 3d 1029 (D.C. Cir. 2019).

22 Tim Wu, "The Curse of Bigness: Antitrust in the New Gilded Age." (2018).

23 Wu, *supra* note 24, Introduction, ("we face what Louis Brandeis called the 'Curse of Bigness,' which, as he warned, represents a profound threat to democracy itself) ("a concentrated industry can tacitly collude to prevent wage growth").

24 *See generally* Tim Wu, "The Curse of Bigness: Antitrust in the New Gilded Age." (2018); See also, Chris Isidore & Jon Sarlin, *Big Tech is way too big*, CNN BUSINESS (Dec. 17, 2018), *available at* https://www.cnn.com/2018/12/17/tech/big-tech-too-big-tim-wu/index.html, (Wu described as not seeing much difference between Standard Oil and Big Tech).

25 Chris Isidore & Jon Sarlin, *Big Tech is way too big*, CNN BUSINESS (Dec. 17, 2018) *available at* https://www.cnn.com/2018/12/17/tech/big-tech-too-big-tim-wu/index.html.

26 Wu, *supra* note 24, Conclusion: A Neo-Brandeisian Agenda.

27 Open Markets Institute, "Restoring Antimonopoly Through Bright-Line Rules," (Apr. 26, 2019) *available at* https://www.openmarketsinstitute.org/publications/restoring-antimonopoly-bright-line-rules

industrial organization (IO) economics, which has caused judges and agency lawyers to become detached from the real-world economic and societal implications of antitrust policy and enforcement decisions in the modern U.S. economy.[28]

In contrast to the Chicago School, which sought to remedy what it viewed as misguided antitrust policy at the time through judicial decisions and to some extent the antitrust enforcement agencies[29], the Neo-Brandeisians have targeted mostly the political branches of government as the chief means to reform the antitrust laws—along with efforts to sway courts through the submission of amicus briefs—with a focus on the technology industry. The House Judiciary Committee (HJC), advised by Lina Khan among others, conducted a wide-ranging investigation of competition in digital markets in 2019-2020, culminating in a 450 page report that included several findings regarding the dominance of Big Tech and legislative recommendations for changing the antitrust laws.[30] Some of these recommendations are similar to several pieces of antitrust legislation proposed and introduced in the Congress that would dramatically change U.S. antitrust enforcement.

III. Proposed Antitrust Reforms

As of late February 2021, over a dozen pieces of antitrust legislation have been proposed or introduced in the House and Senate, and additional legislation has been recommended in reports or by individual elected officials such as Sen. Elizabeth Warren (D-Mass). There are many more that have been proposed or introduced in various states, including in California, New York, and Michigan.

At the federal level, it is difficult to ascertain the likelihood that legislation or recommendations will become law, but there does appear to be at least some political momentum toward passing antitrust reform. Most notably, as a result of the Georgia run-off elections on January 5th, Democrats now control the Senate, making the passage of antitrust reform in the legislature more likely regardless of the new Presidential administration's antitrust enforcement strategy. Senators Jon Ossoff and Raphael Warnock, both Democrats, were elected in January after prolonged and tight races, resulting in the Senate becoming evenly divided between Democrats and Republicans. Senator Ossoff's campaign website indicated that he would "support strong antitrust enforcement" if elected,[31] and Senator Warnock will presumably vote along party lines when it comes to antitrust legislation. This will allow the Senate Democrats to push through items on their legislative agenda, potentially including antitrust reform legislation. Senator Amy Klobuchar remarked that "with a new administration, new leadership at the antitrust agencies, and Democratic majorities in the Senate and the House, we're well positioned to make competition policy a priority for the first time in decades."[32]

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28 Khan, Lina, The End of Antitrust History Revisited. 133 Harvard Law Review 1655, 1668-9 (2020), *available at* https://ssrn.com/abstract=3552132, (citing Lina M. Khan, The Ideological Roots of America's Market Power Problem, 127 YALE L.J.F. 960, 968–70 (2018)) (reviewing Tim Wu, "The Curse of Bigness: Antitrust in the New Gilded Age." (2018)).

29 *See, e.g.*, Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 926 (1978).

30 House Judiciary Committee Report, *Investigation of Competition in Digital Markets* at 404-405 (October 6, 2020), *available at* https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

31 POLICY, *available at* https://electjon.com/policy/.

32 Dean DeChiaro, *Klobuchar, incoming antitrust chair, eager to take on Big Tech*, ROLL CALL (Jan. 28, 2021) *available at* https://www.rollcall.com/2021/01/28/klobuchar-incoming-antitrust-chair-eager-to-take-on-big-tech/.

The Biden administration will have the ability to wield even more power when it comes to influencing the passage of antitrust legislation through Vice President Kamala Harris, because the Senate is split 50-50. The Vice President will serve as the tie-breaker on votes, including the votes on proposed antitrust legislation if the need arises. While the Biden administration's approach to antitrust has yet to be seen, Harris' past dealings with antitrust enforcement as the California Attorney General is well documented. She acted as a "tough" antitrust enforcer at times, as seen in her dealings with e-Bay and Tesoro, although she "lacks an aggressive antitrust record against the tech giants."[33] She could be in the unique position of being able to implement the administration's antitrust agenda by voting on tied antitrust legislation in the Senate.

It is possible, and perhaps likely, that the Vice President will not be needed as a tie breaker, as there is some Republican support for increasing antitrust enforcement that may be persuasive to Republican Senators. Outgoing Assistant Attorney General for the Antitrust Division of the DOJ Makan Delrahim used his final remarks to clarify his support for "sensible antitrust reforms," including one contained in pending legislation detailed below.[34] Republican Congressman Ken Buck last year indicated that while he found Democrat recommendations to be too sweeping, there were areas of agreement between himself and the Democrats on the House antitrust subcommittee.[35] There is a consensus across the aisle that reform is needed, and the sticking point is the extent of the reform.

Senator Klobuchar may also help propel the legislation forward. As detailed below, authors of the proposed changes to U.S. federal antitrust laws include most notably former presidential candidate, Senator Klobuchar (D-MN), and Representative Cicilline. Before the election, Senator Klobuchar was the Ranking Member of the Senate Judiciary Committee's Antitrust Subcommittee in the 116th Congress, and Representative Cicilline is the Chairman of the House Judiciary Committee's Antitrust Subcommittee. Now that the Democrats have taken control of the Senate, Senator Klobuchar is now the Chairman of the Senate Judiciary Committee, Antitrust Subcommittee and will likely push to advance antitrust legislation.

Antitrust reform will also be influenced by what happens at the federal antitrust enforcement agencies. The Biden administration has just recently come into power, and several key appointments have yet to be made to the FTC and DOJ, although Biden did recently name current FTC Commissioner Rebecca Kelly Slaughter to be acting Chairperson[36]. There is abundant speculation about who President Biden may appoint to the FTC—one news interest website ran a headline this month titled "Big Tech Nemesis Lina Khan is gaining traction for top

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[33] Mike Swift, Claude Marx and Max Fillion, *VP pick Harris has long regulatory history with Big Tech on privacy,* FTCWATCH, *available at* https://www.mlexwatch.com/articles/9021/print?section=ftcwatch.

[34]Makan Delrahim, Asst. Att'y Gen., "A Whole New World": An Antitrust Entreaty for a Digital Age, Remarks Before Virtually Hosted Event at Duke University (Jan. 19, 2021), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-final-address, ("Congress should pass legislation to introduce bright line rules and alter the burdens of proof in civil merger cases in order to effectively combat certain excessive market concentration").

[35] Christiano Lima, *GOP Lawmaker: Democrats' tech proposals will include 'non-starters for conservatives'*, POLITICO, (Oct. 5, 2020), *available at* https://www.politico.com/news/2020/10/05/gop-democrats-tech-antitrust-proposals-426528.

[36] Press Release by FTC, FTC Commissioner Rebecca Kelly Slaughter Designated Acting Chair of the Agency (Jan. 21, 2021) *available at* https://www.ftc.gov/news-events/press-releases/2021/01/ftc-commissioner-rebecca-kelly-slaughter-designated-acting-chair

Biden antitrust role"—but no other appointments have been made.[37] U.S. News reported that the President is even "considering creating a White House position focused on competition policy and issues relating to antitrust."[38] Until appointments are made and agendas are set, however, any discussion about the Biden administration's approach to antitrust enforcement remains speculative, as the President has not been specific about his agenda nor how he plans to specifically address Big Tech.[39] The President could put antitrust on the legislative backburner and prioritize other issues, such as immigration and infrastructure. He could choose to redirect antitrust efforts towards FTC rulemaking and away from legislative action, altering the manner in which his preferred antitrust enforcement agenda becomes implemented. There are many possibilities.

Covering everything from mergers to conduct to FTC funding and divisions is a newly drafted omnibus antitrust bill that has a large potential impact on the technology industry. The Competition and Antitrust Law Enforcement Reform Act was introduced on February 4, 2021 by Senator Klobuchar.[40] It was cosponsored by Senators Blumenthal, Booker, Markey, and Schatz.[41] The Competition and Antitrust Law Enforcement Reform Act is an omnibus bill that combines proposals from other legislation that have been previously introduced by Democrats—including Senator Klobuchar—but includes additional provisions.[42]

A. Mergers

Senator Klobuchar, who has called for a complete overhaul of the antitrust laws[43] and even remarked that breaking up big tech would be "one way to deal with a competition issue,"[44] authored and introduced the Competition and Law Enforcement Reform Act of 2021[45].

Senator Klobuchar's statement in her news release regarding the bill echoes many of the sentiments of the Neo-Brandeisians described above:

> *"Competition and effective antitrust enforcement are critical to protecting workers and consumers, spurring innovation, and promoting economic equity. While the United States once had some of the most effective antitrust laws in the world, our economy today faces a massive*

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37 Jason Del Rey, *Big Tech nemesis Lina Khan is gaining traction for top Biden antitrust role*, VOX (Jan. 22, 2021 *available at* https://www.vox.com/recode/2021/1/22/22244186/lina-khan-ftc-commissioner-antitrust-rohit-chopra-biden-administration).

38 Diane Bartz and Nandita Bose, *Exclusive: Biden Administration Considers Creating White House Antitrust Czar- Sources*, U.S. NEWS AND & WORLD REPORT (Jan. 19, 2021) *available at* https://www.usnews.com/news/top-news/articles/2021-01-19/exclusive-biden-administration-eyes-creating-white-house-antitrust-czar-sources.

39 Cat Zakrzewski, *Biden inherits bipartisan momentum to crack down on large tech companies' power,* THE WASHINGTON POST (Jan. 18, 2021).

40 Press Release by Sen. Amy Klobuchar, Senator Klobuchar Sweeping Bill to Promote Competition and Improve Antitrust Enforcement (Feb. 4, 2021), *available at* https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement.

41 *Id.*

42 *See, e.g.*, Consolidation Prevention and Competition Promotion Act, S. 307, 116th Cong. (2019); Merger Filing Fee Modernization Act, S. 1937, 116th Cong. (2019); Merger Enforcement Improvement Act, S. 306, 116th Cong. (2019).

43 Chris Mills Rodrigo, *Antitrust, content moderation to dominate tech policy in 2021*, THE HILL (Dec. 7, 2020), *available at https://thehill.com/policy/technology/528861-antitrust-content-moderation-to-dominate-tech-policy-in-2021.*

44 Kelcee Griffis, *Klobuchar Says Big Tech Breakups Should Still Be An Option,* LAW360 (Jan. 27, 2021), *available at* https://www.law360.com/articles/1349411/klobuchar-says-big-tech-breakups-should-still-be-an-option.

45 Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. (2021), *available at* https://www.klobuchar.senate.gov/public/_cache/files/e/1/e171ac94-edaf-42bc-95ba-85c985a89200/375AF2AEA4F2AF97FB96DBC6A2A839F9.sil21191.pdf.

> *competition problem. We can no longer sweep this issue under the rug and hope our existing laws are adequate, The Competition and Antitrust Law Enforcement Reform Act is the first step to overhauling and modernizing our laws so we can effectively promote competition and protect American consumers."*[46]

For one, the bill would revise the merger review standard from "substantially" to "materially" reduce competition. "It amends the Clayton Act to forbid mergers that 'create an appreciable risk of materially lessening competition' rather than mergers that 'substantially lessen competition,' where materially is defined as 'more than a de minimis amount.'"[47] In other words, a plaintiff will now have to show only that an acquisition may cause just a de minimis amount of harm to competition. Although this provision exists within the established merger review framework (i.e., it focuses on harm to competition and does not represent an abandonment of the consumer welfare standard), it would completely upend decades of Clayton Act enforcement.[48] By lowering the standard, the government will have discretion to challenge many more horizontal mergers.

Furthermore, consistent with Neo-Brandeisians' calls for more "bright lines" in antitrust enforcement, the bill would bar so-called "mega-mergers" where (a) the acquiring person has assets, revenue, or market capitalization greater than $100 billion, and (b) the target is valued at least $50 million, unless it is established, by a preponderance of evidence, that the effect will not be to tend to materially lessen competition or tend to create a monopoly or monopsony.[49] In other words any transaction where the target is worth north of $50 million by Google, Apple, and others such as McKesson would be presumptively illegal.

The potential consequences of these provisions are difficult to overstate. The bill would impact any entity seeking a deal as the antitrust enforcement agencies would practically have discretion to challenge any transaction involving horizontal competitors, and large transactions (particularly so-called "mega mergers") may effectively be illegal. Further, in the past, it has been the government's burden to prove the anticompetitive effects of mergers. Under the bill, the burden of proof will be placed upon those "mega merger" parties to demonstrate that the benefits of the merger outweigh the anticompetitive harms, and that their actions are not illegal as presumed; this is an entirely different and far more daunting challenge than crafting a defense strategy when the government has the burden of proof. Under this bill, companies would have to prove that their mergers do not create an appreciable risk of materially lessening their competition and do not tend to create a monopoly or monopsony if they are engaging of megamergers and also

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[46] Press Release by Sen. Amy Klobuchar, Senator Klobuchar Sweeping Bill to Promote Competition and Improve Antitrust Enforcement (Feb. 4, 2021), *available at* https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement.

[47] Press Release by Sen. Amy Klobuchar, Senator Klobuchar Sweeping Bill to Promote Competition and Improve Antitrust Enforcement (Feb. 4, 2021), *available at* https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement., (quoting Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. (2021), *available at* https://www.klobuchar.senate.gov/public/_cache/files/e/1/e171ac94-edaf-42bc-95ba-85c985a89200/375AF2AEA4F2AF97FB96DBC6A2A839F9.sil21191.pdf).

[48] *See, e.g.*, *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1175 (N.D. Cal. 2004) (where government plaintiffs failed to meet burden of proving that the effect of the acquisition "may be substantially to diminish competition").

[49] Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. (2021), *available at* https://www.klobuchar.senate.gov/public/_cache/files/e/1/e171ac94-edaf-42bc-95ba-85c985a89200/375AF2AEA4F2AF97FB96DBC6A2A839F9.sil21191.pdf).

if the merger will significantly increase market concentration or the acquisition is by a dominant firm with 50% of the market share or another significant market power.[50] These changes would alter the business landscape meaningfully and drastically, as large companies would be discouraged from most merger activity when that activity would now be presumptively illegal. The companies now must bear the cost of showing why their mergers are more beneficial than anticompetitive at great risk that challenges will be decided in the government's favor under the newer, lower threshold for prohibited mergers. Furthermore, small technology innovators' common business model of being acquired by a larger company after some proven success would be disrupted, which would affect investor behavior and potentially change the dynamics of one of the largest sectors of the U.S. economy.

The bill contains several other less noteworthy, yet significant changes. They include adding "monopsony" to "monopoly" in Section 7 of the Clayton Act,[51] requiring merging parties with FTC / DOJ consent decrees to submit post-settlement data for 5 years,[52] and creating a "Competition Advocate" in the FTC that will report to the FTC Chairperson regarding the state of competition and antitrust enforcement.[53]

In an October 2020 Report stemming from an antitrust investigation into Big Tech, the House Judiciary Committee also made recommendations for merger enforcement, which may work themselves into antitrust-related bills and proposals in the future. Globally, the HJC recommended a change in enforcement policy, whereby there is clarity that "false positives" (or erroneous enforcement) are not more costly than "false negatives" (erroneous non-enforcement), and that, when relating to conduct or mergers involving dominant firms, "false negatives" are costlier.[54] Thus, according to this policy, the DOJ and FTC would have an incentive to challenge as many transactions as possible to ensure there would be no anticompetitive effects before approving them. The HJC also recommended codifying bright-line rules for merger enforcement, including structural presumptions.[55] Under a structural presumption, mergers resulting in a single firm controlling an outsized market share, or resulting in a significant increase in concentration, would be presumptively prohibited under Section 7 of the Clayton Act. This structural presumption would place the burden of proof upon the merging parties to show that the merger would not reduce competition. In addition to structural presumptions, the HJC recommended that there also be line of business restrictions, whereby the markets in which a dominant firm can engage are limited.[56] With respect to past transactions, the HJC recommended that Congress consider requiring the responsible agencies to conduct and make publicly available merger retrospectives on significant transactions consummated over the last three decades.[57]

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50 *Id.*

51 *Id*.

52 *Id.*

53 *Id.*

54 *See* House Judiciary Committee Report, *Investigation of Competition in Digital Markets* at 399 (October 6, 2020), available at https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

55 *See Id.* at 393.

56 *Id*. at 378.

57 *Id.* at 403.

B. Conduct & Private Litigation

In addition to addressing mergers, Senator Klobuchar's Bill aims to deter anticompetitive conduct. The Competition and Antitrust Law Enforcement Reform Act amends the Clayton Act to prohibit "exclusionary conduct" that presents an "appreciable risk of harming competition" and imposes limitations on the courts' ability to imply antitrust immunity for regulated conduct.[58] According to the bill, exclusionary conduct is any conduct that "(i) materially disadvantages one or more actual or potential competitors; or (ii) tends to foreclose or limit the opportunity of one or more actual or potential competitors to compete."[59] Notably, the bill shifts the burden of proof so that powerful companies that have a market share of greater than 50% or that otherwise have substantial market power would have to prove that their exclusionary conduct in the markets they dominate does not present an "appreciable risk of harming competition."[60] However, the Act would allow an entity seeking the deal to overcome this presumption by establishing distinct procompetitive benefits by a preponderance of the evidence.[61]

Significantly, the bill eliminates the existing "Market Definition" requirements in the common law, and instead instructs courts that the antitrust laws do not require definition of a relevant market, unless the statutory language explicitly requires it to resolve the case.[62] Consequently, "mega mergers" would be presumptively disfavored under this law, and merger litigation would look different due to the change in market definition requirements. Additionally, the FTC/DOJ and private plaintiffs would have an easier time challenging conduct or transactions. This bill is in line with the October 2020 HJC report, which was also in favor of eliminating the market definition burden.[63]

The bill would also authorize the DOJ/FTC to seek civil penalties–in addition to existing remedies–for violations of Section 2 of the Sherman Act of up to 15% of the total U.S. revenues (or 30% in affected markets).[64] This bill would affect companies with a large presence in any relevant market, particularly if they are found to engage in "exclusionary conduct" as defined by the Anticompetitive Exclusionary Conduct Prevention Act. The HJC report also recommended civil penalties be triggered as relief for violations of "unfair methods of competition" rules.[65]

Generally, the conduct provisions of the bill appear to seek to close the "gap" between Sections 1 and 2 of the Sherman Act that insulates anticompetitive single-firm, exclusionary-conduct from condemnation.[66] Most notably, the provisions do this by appearing to overrule the

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58 Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. (2021), *available at* https://www.klobuchar.senate.gov/public/_cache/files/e/1/e171ac94-edaf-42bc-95ba-85c985a89200/375AF2AEA4F2AF97FB96DBC6A2A839F9.sil21191.pdf.

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.*

63 *See* House Judiciary Committee Report at 399.

64 Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. (2021), *available at* https://www.klobuchar.senate.gov/public/_cache/files/e/1/e171ac94-edaf-42bc-95ba-85c985a89200/375AF2AEA4F2AF97FB96DBC6A2A839F9.sil21191.pdf.

65 *See* House Judiciary Committee Report at 21.

66 *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 456 (1993); *see also* Jonathan B. Baker et al, *Joint Response to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets*, Howard

seminal antitrust case *United States v. Alcoa*, where the Second Circuit in an opinion authored by Judge Learned Hand provided benchmarks of market power (which exceeded the 50% threshold in the bill) and required that plaintiffs define the relevant market. [67] Another case that potentially would not be good law as a result of this bill is *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, where, as explained by the Joint Response, the Court was "[V]ery cautious" in recognizing exceptions to a firm's unilateral right to refuse to deal with rivals, and terming the holding in *Aspen Skiing* as a "limited exception" that is "at or near the outer boundary" of Section 2 enforcement."[68] And these are just a few examples of Supreme Court cases; there are countless lower court decisions that would be largely invalidated.

This bill would also raise a number of questions as to how it fits in the antitrust statutory and regulatory framework. Section 18 reads: "The rights and remedies provided under this Act are in addition to, not in lieu of, any other rights and remedies provided by Federal law." This appears to simply add a new section to the Clayton Act that would impact the cases as described above, but it is unclear exactly how these provisions would be enforced or litigated. For instance, would plaintiffs bring actions under Sections 1 or 2 of Sherman Act in addition to the new Section 26A of the Clayton Act? Would the government or plaintiffs re-litigate Section 1 or Section 2 cases they recently lost? What happens to the government's litigation strategy for cases it is currently considering bringing if the bill begins to get meaningful political traction?

Nearly all industries would be affected by these provisions, not just Big Tech. Pharmaceutical companies' exclusive/semi-exclusive arrangements with formularies would arguably be presumptively—but rebuttably—illegal, as would retailers' exclusive/semi-exclusive vendor contracts, both of which have the capacity to result in lower prices for consumers in a competitive market. Healthcare providers' contracts with independent physician groups are often exclusive as well and likely would be presumptive violations under the provisions. More broadly, in addition to creating significant financial exposure for companies via government enforcement–again, companies would face civil penalties of up to 15% of U.S. revenues–the conduct provisions of the Bill would also create a sea-change in private antitrust litigation and create opportunities for multiple recoveries for the same action. Companies would bear the burden of proof to defend against private antitrust lawsuits brought by plaintiffs. Furthermore, plaintiffs would no longer have to define relevant markets for most actions, which would make their cases substantially easier to bring and result in an explosion of private litigation, potentially overwhelming the courts.

The HJC report also recommended several measures to relax the requirements for private litigants to bring suits for antitrust causes of action. For example, the report called to eliminate court-created standards for "antitrust injury" and "antitrust standing," standards which it said undermine Congress's granting of enforcement authority to "any person . . . injured . . . by reason of anything forbidden in the antitrust laws."[69] In addition, the HJC recommended that the procedural obstacles to litigation be reduced–in practice, this would mean eliminating forced arbitration clauses and some limits on class action formation. Moreover, the report called for

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University School of Law Legal Studies Research Paper Series (Jul. 2 2020) *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3632532#.

67 *U.S. v. Alcoa*, 148 F.2d 416, 436 (2d Cir. 1945).

68 Joint response to the House Judiciary, at note 29 (citing *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, LLP 540 U.S. 398, 407-408 (2004)).

69 House Judiciary Committee Report, at 404.

lowering the pleading requirements initially imposed on the plaintiff upon filing their complaint.[70] Taken together, should these proposals come to pass, private antitrust litigation would be much easier to bring and sustain than it is now. More cases would be brought and less would settle, ultimately resulting in significant costs for defendants. Some of these litigation costs could become so prohibitive that they discourage merger activity in their own right.

C. Revamping the FTC and DOJ

The bill, if passed, would not only reform existing antitrust enforcement laws and practices—it would better equip the enforcement agencies. Both the FTC and DOJ would each enjoy budget increases of approximately $300 million annually. Senator Klobuchar remarked that "You cannot take on trillion-dollar companies, the biggest companies the world has ever seen, with just Band-aids and duct tape."[71] The bill also contains a provision to establish an entirely new division within the FTC, the Division of Market Analysis, which would report directly to and be appointed by the Competition Advocate.[72] The division would "conduct investigations of markets or industry sectors to analyze the competitive conditions and dynamics affecting [them] including the effects that market concentration, mergers and acquisitions […] have on competition, consumers, workers, and innovation."[73] The creation of a new division within the FTC that is empowered to investigate and report on competition within specific industries could have enormous impacts on Big Tech.

IV. Conclusion: Will any of These Reforms Be Implemented? Perhaps.

There is no question that the proposed antitrust legislation discussed above would alter drastically the landscape of mergers and acquisitions in the tech industry. The big question that remains is whether—and, if so, when—these reforms will pass and become implemented. It is true that the call for legislative reform of antitrust enforcement has momentum, even among some Republicans, which will help the newly Democrat controlled Senate push the legislation through. However, the Biden administration is brand new. Not only has the administration yet to clarify its agenda for antitrust enforcement; it has yet to clarify whether antitrust enforcement will be a priority at all. Given the COVID-19 pandemic crisis, impeachment proceedings, potential trials, and other social and economic issues too numerous to list, it is unclear when antitrust reform efforts will garner vigorous backing from the White House.

Additional complications may present themselves in the form of new legislation, as well. Rep. Cicilline is reportedly drafting his own antitrust legislation, and although details are scarce, "he has suggested that he is considering legislation barring big tech companies […] from both operating huge online platforms and selling their own products on those platforms in competition

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70 *See Id.* at 405.

71 Ryan Tracy, *Klobuchar Introduces Antitrust Bill Raising Bar for Antitrust Deals*, THE WALL STREET JOURNAL (Feb. 4, 2021).

72 Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. (2021), *available at* https://www.klobuchar.senate.gov/public/_cache/files/e/1/e171ac94-edaf-42bc-95ba-85c985a89200/375AF2AEA4F2AF97FB96DBC6A2A839F9.sil21191.pdf.

73 *Id.*

with other users."[74] No such provision is included in antitrust legislation currently introduced. Perhaps Democrat and Republican lawmakers will duke out their differences in Committee, or perhaps both houses will be voting on differing antitrust bills. Either way, Congress seems to be setting the tone for a period of active antitrust reform.

[74] Ryan Tracy, *Klobuchar Introduces Antitrust Bill Raising Bar for Antitrust Deals*, THE WALL STREET JOURNAL (Feb. 4, 2021).