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How the Antitrust Landscape May Change in 2021: Compliance Risks in a Democratic Washington

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As Democrats prepare to rule the White House and the House (and possibly, though seemingly unlikely, the Senate) for the first time since 2011, the climate for antitrust legislation and enforcement is vastly different nine years later. Several factors have contributed to the altered landscape. First, days before the election, the Department of Justice sued Google, alleging abuse of monopoly power in search products. This suit represents the highest-profile DOJ monopolization suit since the Microsoft case in the mid-1990s. Second, the COVID-19 pandemic has led to even further growth of the largest technology platforms. This has led to a growing number of calls (within the antitrust community of enforcers, practitioners, and economists) that the antitrust laws have not kept pace with the rapid consolidation and growth of high market share companies. Third, Congress has entered the antitrust conversation in a major way through the House Committee on the Judiciary's Subcommittee on Antitrust and its majority report on its Investigation of Competition in Digital Markets (the "House Subcommittee Report"). Finally, while we are just digesting the 2020 election, foreign interference in the 2016 election and the issue of political fairness on the platforms has injected a populist interest in big technology. The result is an unprecedented spotlight on the nation's largest technology companies and on antitrust.

We have evaluated the House Judiciary's Antitrust Subcommittee recommendations, the Department of Justice's pre-election suit against Google, Minnesota Senator Amy Klobuchar's recent legislative proposals on antitrust, President-Elect Biden's past engagement on competition and technology issues, and recent public statements policymakers and observers to distill what might be on the horizon for antitrust.[1]

We should note that each of these could receive its own extended academic discussion. Given the sheer number of proposals and activity (and an intervening election season), we instead summarize what is on the table. In addition, while we will not opine on the merits of each proposal in this summary, we have put together a free compliance program for your antitrust/competition team that looks at the types of documents and conduct that is fueling these investigations and the types of documents that can complicate companies' efforts to expand.

***Probable* Areas of Greater Antitrust Emphasis**

1. **Focus on "Preferencing" by Dominant Firms**: The House Subcommittee Report and the recent EU suit against Amazon all cite the alleged use of data residing on the platform to

provide advantages to the dominant firm. Representative Cicilline, on November 12, 2020, noted that, of the House Subcommittee Report recommendations, targeting perceived self-preferencing has unique bipartisan support.[2] This reform could come from a variety of sources, from agency rulemaking to DOJ suits ala Microsoft/AT&T.

2. **Increased Scrutiny on Acquisitions by Dominant Firms**: The House Subcommittee Report found that, "[a]lthough the dominant platforms collectively engaged in several hundred mergers and acquisitions between 2000-2019, antitrust enforcers did not a block single one of these transactions."[3] Given the increase in market capitalization of the largest tech platforms during the COVID-19 pandemic and a Democratic-led administration, FTC, and DOJ, we can expect scrutiny of mergers and acquisitions to increase—especially in the tech sector. We can also expect greater scrutiny on the acquisition of nascent competitors, including in new markets where the acquiring firm may not yet have significant market share.

3. **Increase in Merger Fees to Fund Enforcement**. Bipartisan legislation, proposed by Senators Grassley and Klobuchar, would increase the merger filing fees to $2.5 million for any merger valued at over $5 billion. These fees would fund greater regulatory enforcement at the DOJ and the FTC.

4. **Closer Scrutiny of Pharma Mergers**: In a September 2019 letter to FTC Chairman Joseph Simons, Senator Klobuchar, joined by Senators Blumenthal, Booker, Hirono, Harris, Warren, Baldwin, Smith, and Sanders urged the FTC "to take appropriate action to protect consumers from acquisitions that may threaten competition in drug markets, raise drug prices, or reduce patient access to essential medications."

5. **Updated HSR Premerger Notification Requirements**. On September 21, 2020, the Premerger Notification Office of the FTC announced two new rules relating to premerger notice obligations and an intent to revisit several other HSR requirements and exemptions in the coming year. One new rule will expand HSR obligations for large investment funds by requiring reporting across all "associate" entities within the family of funds, and the second will attempt to clarify that investments below 10% are not reportable in most instances. Other rules that are up for potential revision include the exemption for REITs and other real property acquisitions, the calculation of transaction value for purposes of reporting thresholds, and treatment of LLCs and other non-corporate entities. The announcement portends expanded M&A reporting across the board in the future.

Proposed But Less Likely **Areas of Antitrust Reform**[4]

1. **Increased Emphasis on Structural Separation of Dominant Firms**. Senator Klobuchar and the House Subcommittee Report both emphasize the possibility of breaking up large firms to increase competition. Indeed, the Subcommittee Report makes this recommendation in Section 1 under the heading "Restoring Competition in the Digital Economy."

2. **Increased Enforcement of Anti-Monopoly Provisions of Clayton Act:** Senator Klobuchar has proposed legislation that would amend the Clayton Antitrust Act to ban "exclusionary conduct" if it poses an "appreciable risk of harming competition," lowering the standard for enjoining deals. The bill would also create a presumption of illegality for a deal where one party has a market share of 50 percent or more or that has "significant market power," placing the burden on deal parties to prove their deal does not have an "appreciable risk of harming competition."

3. **Increased Civil Penalty Capability for Antitrust Enforcers:** Senator Klobuchar's legislation would allow the DOJ and FTC to pursue large civil penalties for any violations, including at most 15 percent of total U.S. revenue or 30 percent of the affected U.S. revenues.

4. **Requiring Interoperability by Dominant Firms:** This proposal would require tech platforms to enhance the ability for data interoperability and portability. Interoperability and closed ecosystems (so-called "walled gardens") have become hot topics, not only because of the prominent discussion in the House Subcommittee Report, but also because the lawsuit brought by Epic Games challenging the policies of the Apple App Store and the Google App Store revolve around this issue.

5. **Shifting Burden of Proof on Mergers by Dominant Firms:** Both the House Subcommittee Report and Senator Klobuchar (see above) have proposed some version of shifting the burden of proof to a dominant firm to rebut a presumption that an acquisition is anticompetitive. Additionally, both the House Subcommittee Report and Senator Klobuchar have recommended eliminating efficiencies as an affirmative defense. The House Subcommittee Report also proposes that *all* mergers and acquisitions be subject to the Hart-Scott-Rodino process, not only those reaching the current size threshold.[5]

6. **Prohibit Acquisitions That "May Lessen Competition or Tend to Increase Market Power":** The House Subcommittee Report suggests legislatively overturning precedent requiring a merger challenger to prove that the potential or nascent competitor would have been a successful entrant in the "but-for" world.[6]

7. **Increased Scrutiny on Two Sided Platforms.** The House Subcommittee Report advocates (1) overriding *Ohio v. American Express* by clarifying that cases involving two sided platforms do not require plaintiffs to establish harm to both sets of customers; and (2) overriding *United States v. Sabre Corp.*, clarifying that platforms that are "two-sided," or serve multiple sets of customers, can compete with firms that are "one-sided."[7]

8. **Clarification of Intent of Antitrust Laws:** The House Subcommittee Report explicitly advocates moving beyond "consumer welfare" as the ultimate goal of antitrust laws to consider the impact on "workers, entrepreneurs, independent businesses, open markets, a fair economy and democratic ideals."[8]

9. **Strengthening Section 2 Anti-Monopoly Provisions:** The House Subcommittee Report suggests studying the creation of a rebuttable presumption of dominance for sellers holding over 30% market share and buyers holding over 25%.[9] The Report also suggests barring the requirement of recoupment in predatory pricing and reinvigorating theories of "monopoly leveraging," tying, and unilateral steps refusal to deals by legislatively overriding defense-favorable precedents such as *Verizon v. Trinko*.[10] While the Obama-era DOJ did not bring any monopolization suits in eight years, larger firms are likely to be under a brighter spotlight in the next Democratic administration.

10. **Eliminate Market Definition Requirement**: Both the House Subcommittee Report and Senator Klobuchar propose eliminating the requirement from most antitrust claims unless market definition is specifically articulated in the statutory language.

With antitrust enforcement in favor, companies are advised to reinvigorate their compliance programs to help manage risk.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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[1] For this analysis, we assume the Senate remains under GOP control and there is no change to the filibuster rules.

[2] Congressman David Cicilline comments to American Bar Association Antitrust Fall Forum, November 12, 2020.

[3] House Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, 116th Cong., Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations, at 387 (hereinafter House Subcommittee Report), *available at* https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=3429.

[4] Should the Democrats win both seats in the Georgia runoff, that result would surely affect the odds of some of these reforms winning passage. However, even in a 50:50 Senate, we see any significant legislation still requiring 60 votes to pass, as the filibuster would likely survive any attempts at reform.

[5] House Subcommittee Report at 393.

[6] *Id.* at 394 (citing *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974).

[7] *Id.* at 399.

[8] *Id.* at 392.

[9] *Id.* at 396.

[10] *Id.* at 397-398.