

Locke Lord QuickStudy: What's Ahead for Antitrust Law and Enforcement – Rewriting the Sherman and Clayton Acts

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Many foreshadowed that Democratic control of both the House and the Senate would lead to substantive reform of the U.S. antitrust laws. On February 4, 2021, Senator Klobuchar delivered on that prediction by introducing Senate Bill 225 entitled the “Competition and Antitrust Law Enforcement Reform Act” or “CALERA”.¹ Pitched as “sweeping new legislation” intended to “overhaul and modernize the antitrust laws,” the bill is aimed at fixing what Senator Klobuchar describes as “a massive competition problem.”² Indeed, if passed, CALERA would bring dramatic changes to the antitrust law scheme which has not changed much at all since the Sherman Act and the Clayton Act were passed well over 100 years ago.

Mergers & Acquisitions

CALERA proposes ground-shifting changes to the laws surrounding mergers and acquisitions. Among other things, the bill would:

- Expressly prohibit monopsony power (domination of the demand for goods or services by a single buyer), alongside monopoly power (domination of the supply of goods or services by a single seller);
- Lower the threshold for whether a merger or acquisition is prohibited under Section 7 of the Clayton Act from prohibiting mergers that “substantially lessen” competition to prohibiting mergers that “create an appreciable risk of materially lessening competition”;
- Create a presumption of illegality for many kinds of transactions, including:
 - Transactions leading to more than 50% market share;
 - Acquisitions leading to a “significant increase in market share”; and
 - Acquisitions of market disrupting competitors; and
- Shift the burden to companies to affirmatively prove that their merger or acquisition would not harm competition, where the above presumption of illegality applies.

These changes would place a much wider swath of mergers and acquisitions under antitrust scrutiny, and make it easier for the government to successfully challenge mergers and acquisitions in court.

Exclusionary Conduct

CALERA also targets exclusionary conduct by dominant firms, amending Section 2 of the Clayton Act to prohibit dominant firms from engaging in any conduct that would “materially disadvantage” a competitor. This relatively vague language and standard would leave significant room for regulatory interpretation and action.

Support for FTC Enforcement

To ensure regulators are in a position to enforce the substantive changes in the bill, CALERA also increases the FTC’s budget for antitrust enforcement and establishes a new, independent FTC division specifically to conduct market studies and study the effects of past mergers.

Penalties

CALERA would remove the \$100 million cap on civil fines, and use the violator’s revenues to calculate civil fines going forward.

CALERA, whose original list of co-sponsors has grown from four Democratic senators to nine, has been referred to the Antitrust Subcommittee of the Senate Judiciary Committee. The Subcommittee held a hearing on March 11th entitled “Competition Policy for the Twenty-First Century: The Case for Antitrust Reform,”³ and is holding another hearing today entitled “Antitrust Applied: Examining Competition in App Stores.”⁴ The Subcommittee plans additional hearings focused on specific sectors such as technology and healthcare. No companion bill has been introduced in the House to date.

While there appears to be bipartisan appetite for some measure of antitrust reform in both the House and the Senate, there is also significant skepticism across the aisle as to the appropriate approach. Senator Klobuchar has recognized that her proposal is ambitious, and indicated a desire to find common ground where possible and move parts of the bill forward separately from others as necessary.

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1. The full text of the bill is available at <https://www.congress.gov/117/bills/s225/BILLS-117s225is.pdf>.
2. <https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement>.
3. <https://www.judiciary.senate.gov/meetings/competition-policy-for-the-twenty-first-century-the-case-for-antitrust-reform>
4. <https://www.judiciary.senate.gov/meetings/antitrust-applied-examining-competition-in-app-stores>

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