LATHAM&WATKINS

Client Alert Commentary

Latham & Watkins Antitrust & Competition Practice February 18, 2021 | Number 2859

US Senate Bill Would Reshape Antitrust Enforcement and Litigation

The bill would increase and shift the burden for many merger reviews, introduce new categories of prohibited conduct, and undo important common law defenses to single-firm conduct.

On February 4, 2021, Senator Amy Klobuchar, the incoming chair of the US Senate Judiciary Committee's Antitrust Subcommittee, presented a sweeping antitrust reform bill, named the Competition and Antitrust Law Enforcement Reform Act of 2021 (CALERA).

This *Client Alert* provides an overview of CALERA and its likely impact if it were to pass as currently presented. Latham & Watkins will provide updates on the bill as it is considered in the Senate in the coming months.

Notably, CALERA would impact:

- **M&A** by subjecting volumes of deals to increased scrutiny, including via a revised standard for permissible mergers, a broader definition of market power, and explicit inclusion of "monopsony" effects. At the same time, the bill would shift the burden of proving certain mergers are permissible from the government to the merging companies.

- **Business activity** by expanding existing antitrust laws to forbid "exclusionary conduct that presents an appreciable risk of harming competition." The bill would also explicitly remove many well-established common law defenses to claims of anticompetitive single-firm conduct, including defenses applicable to refusal to deal and predatory pricing claims.

- **Antitrust litigation** by eliminating the requirement that plaintiffs (in most cases) define a relevant market to establish antitrust liability, increasing plaintiffs' flexibility in bringing a claim. The bill would also make it easier for plaintiffs to earn pre-judgment interest on already trebled antirust damages.

- **Enforcement** by greatly increasing resources for the Federal Trade Commission (FTC) and the Department of Justice (DOJ). The bill would also increase the enforcement agencies' access to civil monetary penalties.

- **Oversight** by increasing occasions for agencies to scrutinize companies' behavior. The bill would create new risks and burdens for merging companies by requiring any company that agrees to undertake a merger remedy with the FTC or the DOJ to make annual submissions for a period of five years of information that would allow the agencies to analyze the merger's competitive impact. The bill would also increase incentives for whistleblowing, including with monetary awards.

Overview

CALERA follows a report released last year by the staff of the House Judiciary Committee Democrats, led by Representative David Cicilline, that examined the tech industry at the intersection of existing antitrust laws and economic activity. The bill represents an attempt at significant antitrust reform, and is extremely ambitious as currently presented. CALERA aims to strengthen and expand aspects of the antitrust laws and to provide the enforcement agencies with additional funding to keep pace with the growing economy. Practically, the bill's effects would include (1) increasing the risks, compliance costs, and burdens to merging companies and defendants; (2) adding further obstacles for mergers that are perceived to involve large or "dominant" companies and acquisitions of nascent or disruptive companies; and (3) expanding enforcement activity and private actions by incentivizing reporting, removing costly obstacles for private action plaintiffs, and increasing resources to the federal enforcement agencies. CALERA also introduces several legal terms of art that would cause uncertainty while their parameters were tested and defined through case law. At the same time, CALERA would upset decades of common law, including by undoing important defenses to alleged anticompetitive single-firm conduct.

On February 16, 2021, Senator Mike Lee issued a statement following his appointment as the Republican ranking member on the Senate Judiciary Committee's Antitrust Subcommittee. Commenting on CALERA, Senator Lee expressed enthusiasm for antitrust reform, particularly as it relates to the technology industry. Though Senator Lee's statement suggested that he would support certain aspects of the bill, such as increased oversight and resources for the enforcement agencies, he characterized other aspects as an attempt to "radically alter our antitrust enforcement regime." Senator Lee stated that any attempt to "replace or undermine the consumer welfare standard" would be a "non-starter" for bipartisan support, and characterized CALERA as "Senator Klobuchar's opening contribution to this bipartisan discussion."

CALERA would increase scrutiny for mergers and acquisitions

Lower threshold for prohibited mergers

One of CALERA's most notable provisions would replace the current standard for prohibited mergers from those that are demonstrated to "**substantially lessen competition**" to those that "**create an appreciable risk of materially lessening competition**." CALERA defines "materially" to mean "more than de minimis," but the other terms, including "appreciable risk," are not defined. The reduced standard would almost certainly mean increased scrutiny for deals, longer and more rigorous review procedures to obtain clearance, and a higher relative rate of blocked deals.

Shifted burden of proof

Under current law, the US government bears the burden to prove that a proposed merger would "substantially lessen competition." For many transactions, CALERA would shift the burden to merging parties to prove by a preponderance of the evidence that the transaction met the new "appreciable risk" standard. The types of transactions that would be subject to the shifted burden of proof include:

- Mergers that would "lead to a significant increase in market concentration in any relevant market"

- Mergers in which either party has a market share of 50% or more or “otherwise has significant market power,” and the merger involves actual or potential competitors
- Mergers that involve competitors, one of which is a “maverick” or “disrupting” firm
- Mergers that would allow for the exercise of anticompetitive effects, such as the exercise of market power or coordination among competitors in a relevant market
- Mergers that are valued at US$5 billion or more, or those in which the acquirer has “assets, net annual sales, or a market capitalization” of more than US$100 billion and makes an acquisition of US$50 million or more

This shift in burden would have practical effects on merging companies, which would bear both the cost of making the new showing and the risk that close calls would be decided in favor of the party without the burden (the government). What remains unclear and would likely be the source of significant uncertainty is whether the government or the merging parties would bear the burden of proving that a merger met the conditions for the shifted burden of proof (e.g., whether one of the merging parties had “significant market power” or was a “maverick” or whether the merger would “allow for the exercise of anticompetitive effects”).

Redefined “market power”

The bill introduces a definition of “market power” that is broader than the prevailing common law definition and could expose more companies and transactions to antitrust scrutiny. Specifically, CALERA would define market power as “the ability of a person, or a group of persons acting in concert, to profitably impose terms or conditions on counterparties, including terms regarding price, quantity, product or service quality, or other terms affecting the value of consideration exchanged in the transaction, that are more favorable to the person or group of persons imposing them than what the person or group of persons could obtain in a competitive market.”

CALERA would increase antitrust enforcement and private actions

Widen scope of anticompetitive conduct

In addition to broadening the definition of market power and lowering the standard for prohibited mergers, CALERA would add a new prohibition on “**exclusionary conduct that presents an appreciable risk of harming competition**.” “**Exclusionary conduct**” is defined by CALERA as conduct that “**materially disadvantages one or more actual or potential competitors**,” or “**tends to foreclose or limit the ability or incentive of one or more actual or potential competitors to compete**.” This prohibition would lead to an increase in claims, and novel allegations of anticompetitive conduct, as litigants would likely try to take advantage of these broad and undefined terms and shape the precedent.

CALERA would implement a rebuttal presumption that “exclusionary conduct” creates an appreciable risk of harming competition when a merging company has a market share of 50% or more or “otherwise has significant market power in the relevant market.” The presumption can be rebutted by a preponderance of the evidence showing any of the following:

- Distinct pro-competitive benefits in the relevant market that eliminate the risk of harming competition

- New entrants or an expanded presence in the market that eliminates the risk of harming competition

- No appreciable risk of harm to competition

Fewer common law defenses for single-firm conduct

CALERA would explicitly undo certain requirements for proving certain “monopolization” and “attempted monopolization” antitrust violations. For instance, the bill would not require a plaintiff alleging an anticompetitive refusal to deal to show that the defendant “altered or terminated a prior course of dealing,” as currently required under common law precedent. Such violations would also no longer require a showing that, among other things (1) a defendant’s conduct “makes no economic sense,” (2) the risk of harm to competition has been quantified, or (3) a defendant’s prices are set “below any measure of the costs to the defendant.” The drafters’ intent to alter this common law defense to a predatory pricing claim is emphasized in the bill’s findings, which note the “flawed assumption” that “above-cost pricing cannot harm competition.”

Meaningful and expensive obstacles for antitrust plaintiffs

The bill would explicitly prohibit courts from requiring plaintiffs to define a relevant antitrust market when the plaintiff can show “direct evidence” of the required level of harm. CALERA would also eliminate the requirement that plaintiffs (in most cases) define a relevant market to establish antitrust liability, but would *not* prohibit courts from considering market definition evidence in the absence of direct evidence. Market definition is a complicated, expert-intensive, and expensive step for antitrust plaintiffs, and a common basis for defense victories. Removing this requirement would reduce the barriers to plaintiffs in bringing cases (e.g., less expenditure on economic experts, fewer hurdles in bringing cases against defendants who lack significant market share). The result would likely be more complaints filed and more actions surviving early motions to dismiss and proceeding to costly discovery.

More resources for antitrust enforcement agencies

CALERA would significantly increase funding for the FTC and the DOJ, allocating US$300 million in additional funding to each agency. This funding would support a new Office of the Competition Advocate within the FTC, which would have subpoena power over any company that has ever made a merger filing. The Competition Advocate would be empowered to require reporting to allow it to “assess[ ] competition and its impact on the United States, local geographic areas, and different demographic and socioeconomic groups.”

The Competition Advocate would also oversee a new Division of Market Research, which would study evolving market conditions and effects of past mergers — much like the “sector inquiries” carried out by the European Commission — which would most certainly lead to increased investigations and other enforcement activity.

Incentivized whistleblowing

The bill would incentivize reporting of potential antitrust violations by extending anti-retaliation protections to civil whistleblowers, and by providing for a significant monetary award (up to 30% of the collected criminal fines) for whistleblowers who satisfy certain requirements. The potential for a significant personal benefit would not only motivate potential whistleblowers, but could counteract the potential negative impacts of coming forward.

CALERA would add compliance and oversight risks and burdens

New reporting requirements for merging companies

CALERA would require any company that agrees to undertake a remedy with the FTC or the DOJ in order to obtain antitrust clearance of a merger to make annual submissions for a period of five years of certain data and information that would allow the agencies to analyze the effect of the merger and remedy. This requirement could strain resources and lead to investigations or lawsuits. It would also create a disincentive to offer merger remedies to expedite merger clearance processes, which could increase the number of mergers that parties litigate in order to close and increase overall deal timing and closing risk.

Increased monetary risk

The bill would increase an antitrust defendant's potential monetary risk in two ways. First, it would allow the FTC and the DOJ to seek civil monetary penalties for violations of the antitrust laws. in addition to all existing remedies. Civil penalties would be "not more than the greater of (1) 15 percent of the total United States revenues of the person for the previous calendar year; or (2) 30 percent of the United States revenues of the person in any line of commerce affected or targeted by the unlawful conduct during the period of the unlawful conduct." Second, CALERA would provide for pre-judgment interest on a successful antitrust plaintiff's trebled damages award, starting on the date of the complaint.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Elizabeth H. Yandell
elizabeth.yandell@lw.com
+1.415.646.7822
San Francisco

Michael G. Egge
michael.egge@lw.com
+1.202.637.2285
Washington, D.C.

Kelly Fayne
kelly.fayne@lw.com
+1.415.646.7897
San Francisco

Belinda S. Lee
belinda.lee@lw.com
+1.415.395.8851
San Francisco

Amanda P. Reeves
amanda.reeves@lw.com
+1.202.637.2183
Washington, D.C.

Marilyn Nabil Guirguis
marilyn.guirguis@lw.com
+1.212.906.4748
New York

Shuyu (Clarissa) Lu
clarissa.lu@lw.com
+1.415.395.8180
San Francisco

You Might Also Be Interested In

A Look Ahead at the Biden Administration's Regulatory and Enforcement Priorities (Webcast)

Annual HSR Threshold Adjustments Announced for 2021

Antitrust Enforcement in Health Care: A Risky and Evolving Landscape

The Limits of Rivalry: The Role of Rivalry Between Companies in an Antitrust Context