

Antitrust and a New Administration: Important Developments

February 4, 2021

Many have anticipated that the Biden Administration and Democratic-controlled Congress would push for changes in antitrust enforcement policy, particularly with respect to mergers. There were two developments on this front today.

First, the Federal Trade Commission and Department of Justice announced that they will be “temporarily” suspending the practice of granting early termination (“ET”) of the 30-day waiting period under the Hart-Scott-Rodino Act (HSR). According to the FTC and DOJ, this change is due both to the “unprecedented volume” of HSR filings for the start of the fiscal year (which began October 1, 2020) and also to the transition to a new administration. The FTC and DOJ indicated that this temporary suspension would be brief, although the agencies provided no timeline for the resumption of ET for merger reviews for transactions that pose no meaningful antitrust concerns.

It is tempting to interpret this development as a signal of more aggressive merger enforcement, although that is not mentioned expressly in the announcement. Prior Presidential transitions have occurred without suspending ET. And, with respect to the volume of filings, the FTC website shows that it received a high of 424 HSR notifications in November 2020, with other months this fiscal year averaging around 200 filings. The November surge is already past the initial 30-day waiting period, and the following months appear largely in line with historical trends. The two Republican Commissioners (Phillips and Wilson) criticized the ET moratorium on the ground that its “introduces inefficiency into market operation, harming consumers and other stakeholders involved in the transactions that would have consistently received ET at any point during the last 45 years.”

Also today, Senator Amy Klobuchar (D – Minn.), Chair of the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights, introduced far-reaching legislation that would (1) impose tougher antitrust standards for mergers and exclusionary conduct, (2) adopt presumptions against large or dominant firms, and (3) increase the budgets and the remedial powers of the FTC and the DOJ’s Antitrust Division. Senator Klobuchar has long advocated for more vigorous antitrust enforcement, including being a vocal critic of the perceived power of so-called “Big Tech.” We would expect an extended process in moving this legislation forward as Senator Klobuchar has already announced her intention to hold a series of legislative hearings on monopoly power. While some Senate Republicans have indicated openness to legislative changes on antitrust, we would expect some significant opposition to these legislative proposals from the business community.

More broadly, we are briefing our clients on the future of antitrust enforcement in the Biden administration. Please do not hesitate to contact us if you would like to arrange a discussion.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your usual Davis Polk contact.

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