

CLIENT ALERT

# Federal Legislation Proposed to Expand Antitrust Enforcement

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## AUTHORS

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The Democratic Party's "Better Deal" platform, announced in late July as a blueprint for promoting U.S. economic growth, calls for amending U.S. antitrust laws to protect consumers from the purported adverse effects of growing market concentration and other conduct by U.S. corporations. President Trump likewise has called for more aggressive antitrust enforcement, at least in the context of certain large proposed media deals and the continued growth of Amazon, and a variety of other political and economic commentators recently have advocated for expanded antitrust enforcement powers.

Democratic members of the U.S. Senate recently responded with two proposed bills that seek to enhance U.S. antitrust authorities' power to challenge both merger and non-merger conduct. The proposed laws would substantially increase pre-merger notification filing fees on the largest proposed deals, shift the burden to merger parties to demonstrate that challenged transactions are on balance pro-competitive, and establish an antitrust super-regulator to investigate and recommend enforcement action against alleged anticompetitive business conduct.

While these legislative proposals are unlikely to become law in current form, they indicate a growing public sentiment in favor of stricter merger review and non-merger antitrust enforcement, which could lead to more agency investigations and merger challenges on the margin and continued consideration of legislative expansion of antitrust enforcement authority.

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### Legislative Proposals

- Sen. Amy Klobuchar of Minnesota (joined by Sens. Gillibrand, Blumenthal, and Markey, among others) has proposed two bills to amend U.S. antitrust laws.
- The Merger Enforcement Improvement Act, S. 1811, would:
  - Modify the current merger filing fee structure in the Hart-Scott-Rodino Act (HSR) to (i) create six “size of transaction” tiers, (ii) lower the HSR filing fees applicable to smaller transactions (*e.g.*, the filing fee applicable to a transaction valued between \$80.8 million and \$161.5 million would drop from \$45,000 to \$30,000), and (iii) substantially increase the HSR filing fees applicable to the largest transactions (*e.g.*, transactions above \$5 billion would require a \$2,250,000 filing fee).
  - Require parties whose mergers are approved subject to conditions to supply to the FTC/DOJ, each year for the first five years after a transaction closes, information on the “effectiveness” of the merger—*e.g.*, data on pricing and cost savings to consumers.
  - Direct the FTC to investigate the competitive impact of institutional investor ownership of stakes in multiple competitors in moderately or highly concentrated industries and, if adverse competitive impact is detected, consider remedial options.
- The Consolidation Prevention and Competition Promotion Act, S. 1812, would:
  - Amend the Clayton Act to implement new legal standards to govern the federal agencies’ and courts’ assessment of the largest mergers (*i.e.*, mergers with a transaction value in excess of \$5 billion and/or that involve at least one party with assets in excess of \$10 billion), including by:
    - Changing the current Clayton Act Section 7 prohibition on mergers whose effect “may be *substantially to lessen* competition” to those whose effect “may be *materially to lessen* competition.” The bill clarifies that a transaction that “may cause more than a *de minimis* amount of harm to competition” would meet this new standard.
    - Further modifying Section 7 to expressly cover mergers that lead to concentration in buyer markets, by expanding prohibited transactions to those that “tend to create a monopoly or *monopsony*.”

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- Imposing on the merging parties in any agency challenge the burden of proving by a preponderance of the evidence that the acquisition will not materially lessen competition or create a monopoly or monopsony.
- Create a new Office of the Competition Advocate within the FTC that would make recommendations to the antitrust agencies on competition enforcement and publish periodic reports on market concentration (and its impact) and the success of merger remedies.

### What To Expect

- Taken together, the proposed Senate bills would make it easier for the antitrust agencies to challenge the largest mergers by lowering the legal standard for showing harm to competition and imposing on merger parties the burden of proving a deal will not adversely impact competition.
- Both bills would significantly increase parties' costs of antitrust regulatory compliance by increasing HSR filing fees applicable to many mergers, making agency enforcement actions more likely, and imposing burdensome post-closing annual reporting requirements.
- The formation of the Office of Competition Advocate to identify more potential targets of merger and non-merger enforcement likewise could lead to increased antitrust risk and associated transaction costs for parties considering a range of business activities.
- The proposed direction to the FTC to investigate institutional investors' ownership of stock in multiple competitors in the same industry, whether or not ultimately adopted, signals continued governmental interest in the potential competitive effects of such overlapping institutional investment.
- Both bills have been referred to the Senate Judiciary Committee, and there currently is no scheduled date for debate or other consideration of the bills.
- Despite President Trump's public statements on antitrust enforcement, there is little sign of bipartisan congressional support for such substantial modification of current U.S. antitrust laws, making it unlikely that either Senate bill will be passed in current form.
- Nonetheless, the mounting public sentiment in favor of more aggressive antitrust enforcement likely will lead to continued legislative efforts to expand antitrust enforcement and may influence the agencies' approach to investigating and challenging mergers and other alleged anticompetitive business practices.

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If you have any questions regarding this client alert, please contact the following attorneys or the attorney with whom you regularly work.

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