

An Antitrust Law Update Looms in President Biden's First Term

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BY JENNIFER FISHELL

There is growing bipartisan frustration with “Big Tech” giants such as Amazon, Apple and Facebook leveraging their market power into control over consumers and even the internet itself. President Joe Biden’s first term will certainly see changes in the executive branch’s antitrust enforcement priorities on that front. But that’s not all. For the first time in years, a consensus around modernizing competition regulation sets the stage for a sea change in antitrust law itself.

Historically, Democrats—now in power after Biden’s inauguration and Georgia’s Senate runoff elections—have advocated for strengthening antitrust laws. But there are signs that Republicans will also support significant reforms.

Late last year, the Democrat-controlled House Subcommittee on Antitrust, Commercial and Administrative Law published a nearly **450-page report** based on an investigation of competition in digital markets. That report sets forth an ambitious agenda for change, including the “[p]resumptive prohibition against future mergers and acquisitions by the dominant platforms,” requirements for nondiscrimination and interoperability, and other restrictions on platforms’ abuse of market dominance. The report also proposes eliminating barriers to private enforcement, as well as strengthening and clarifying Section 7 of the Clayton Act and Section 2 of the Sherman Act, which relate to anti-competitive mergers and abuses of monopoly power.



Facebook CEO Mark Zuckerberg testifies before the House Financial Services Committee on Capitol Hill on Oct. 23, 2019. Photo: Diego M. Radzinski/ALM

It is far from clear whether the Republicans—in the Senate, especially—will be interested in all of those changes. But some Republican representatives **responded** to the House report by stating their commitment to working “in a bipartisan fashion to help enact the legislative solutions where [they] can agree.” And their response indicates they agree on quite a bit, including that Congress “can make a meaningful difference” by enacting legislation to “reinforc[e] presumptions that certain behaviors are likely to reduce competition, lower[] evidentiary burdens in litigated cases, and emphasiz[e] that anticompetitive effects are not limited to price effects and include innovation competition, quality, output, and consumer choice.” They also agree on other reforms such as “shift[ing] the burden of proof for companies pursuing mergers and acquisitions.”

Until recently, the pressures of COVID-19, economic relief, and Senate confirmation and impeachment proceedings have suggested that antitrust reform might not be a priority in the first 100 days of the Biden administration. But that appears to be changing, especially as to Big Tech.

For the Republicans, the push for antitrust reform gained newfound momentum when their base expressed **outrage** over the way Big Tech titans exercised their market power by banning users who violated their terms of service in the wake of the violence at the Capitol on Jan. 6. Indeed, more than a dozen new **House Republicans** recently wrote Biden, expressing hope that they could work together to “enforce our antitrust laws against emboldened technology monopolies.”

Biden’s focus also appears to have turned to antitrust: Just in the last week, he has been **considering** “creating a White House position focused on competition policy and issues relating to antitrust.” Biden’s interest in antitrust is not fleeting. He has put forward a **proposal** focusing on competition in the labor markets, hoping to “[e]liminate non-compete clauses and no-poaching agreements that hinder the ability of employees to seek higher wages, better benefits, and working conditions by changing employers.” And he has surrounded himself with **advisers** with strong views

on antitrust enforcement. Even **Merrick Garland**, Biden’s pick to lead the Department of Justice, taught antitrust law at Harvard and has published on the topic.

Just on Tuesday, moreover, the **New York Times** reported that Sen. Amy Klobuchar plans to introduce a sweeping antitrust bill “with a particular eye on tech” in the “coming weeks.” Such a bill would be right in Klobuchar’s wheelhouse, as the incoming Democratic chairwoman of the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights. Over the years, she has introduced a number of antitrust bills, including bills to make it easier to **challenge mergers** and to **deter other anti-competitive abuses**. She has previously **indicated** interest in pursuing “an investigation of the online platform giants.” And she recently **announced** she is writing a book that will “call for reform in how the United States treats monopolies and competition.”

To the extent the Republicans are hesitant about the sweeping reforms Democrats appear to be on the cusp of proposing, they might not be in any position to stop them. Senate leaders Mitch McConnell and Chuck Schumer have now **tentatively reached** a **power-sharing deal** that would allow bills to advance to the Senate floor even if they are tied during committee votes. It is also conceivable (if **unlikely**)

that the Senate could nix the Republicans’ remaining tool to stall votes—the **filibuster**.

Even with the filibuster in place, Republicans might be leery of filibustering a bill to reform the antitrust laws, particularly if the bill targets industries or companies that are unpopular with their base. Democrats may also be able to pull together the 10 Republican votes needed to overcome a filibuster, invoke cloture, and ultimately take a bill to a vote.

Whatever the specifics of future legislation, it is undeniable that some antitrust reform is woefully overdue. The Sherman and Clayton acts are more than a century old. And Congress’s most recent piece of major antitrust legislation—the Hart-Scott-Rodino Antitrust Improvements Act—was passed in 1976. To put that in context, 1976 was the year Steve Jobs and Steve Wozniak founded Apple. The economy and markets that exist today were unimaginable then.

Biden’s first term presents a unique opportunity to run an update on the antitrust laws. Whether that update will turn into a total rewrite, however, remains to be seen.

Jennifer Fischell is an attorney at MoloLamken with a practice focusing on complex civil litigation and appeals. Before joining the firm, Fischell clerked on the U.S. Court of Appeals for the Sixth Circuit and the U.S. District Court for the Southern District of New York.