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Sen. Klobuchar Introduces Bill to Significantly Alter Federal Antitrust Law

On February 4, 2021, Sen. Amy Klobuchar (D-MN) introduced the Competition and Antitrust Law Enforcement Reform Act (the "CALERA"), which is co-sponsored by Sens. Blumenthal (D-CT), Booker (D-NJ), Markey (D-MA) and Schatz (D-HI). If enacted, the CALERA would significantly alter existing federal antitrust law by, among other things, establishing new legal standards for anticompetitive mergers and expanding liability for exclusionary conduct.

The 56-page bill has eight pages of findings and purposes. In recent history, findings and purposes have "frequently" been part of enacted law and have "appear[ed] in a majority of significant bills."[1] However, "courts infrequently cite enacted findings and purposes when interpreting statutes."[2] To be sure, enacted findings and purposes may indeed guide the federal antitrust agencies in enforcing the law. [3]

Among the bill's findings:

- "in the United States economy today, the presence and exercise of market power is substantial and growing" and "makes it more difficult for people in the United States to start their own businesses, depresses wages, and increases economic inequality, with particularly damaging effects on historically-disadvantaged communities." The bill also states that "market power and undue market concentration contribute to the consolidation of political power, undermining the health of democracy in the United States."
- The bill posits that the "vitality" of Section 7 of the Clayton Act has been "limited" by judicial decisions and enforcement policies, including by "focusing inordinately on the effect of an acquisition on price in the short term,

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[1] Jarrod Shobe, Enacted Legislative Findings and Purposes, 86 U. Chi. L.R. 669, 671 (2019) ("Courts appear to lack a coherent theory of how enacted findings and purposes should be used in statutory interpretation.").

[2] *Id.* at 674.

[3] *Id.* at 686 ("Another obvious audience for findings and purposes is federal agencies. Sometimes Congress speaks directly to agencies in findings and purposes, either to approve or disapprove of an agency's actions or to provide direction to the agency going forward.").

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to the exclusion of other potential anticompetitive effects" and "underestimating the dangers that horizontal, vertical, and conglomerate mergers will lower quality, reduce choice, impede innovation, exclude competitors, increase entry barriers, or create buyer power, including monopsony power."

- And the bill asserts that in some cases "courts have declined to rigorously examine the facts in favor of relying on inaccurate economic assumptions that are inconsistent with contemporary economic learning, such as presuming that market power is not durable and can be expected to self-correct, that monopolies can drive as much or more innovation than a competitive market, that above-cost pricing cannot harm competition, and other flawed assumptions"

If enacted, the CALERA would markedly change merger law and the law governing exclusionary conduct, while increasing financial consequences for companies found to have violated antitrust laws.

- **New legal standards for anticompetitive mergers.** Current law prohibits acquisitions the effect of which "may be substantially to lessen competition, or to tend to create a monopoly." Generally, the federal enforcement agencies look to the Horizontal Merger Guidelines to make this determination, which involve determinations of changes in market concentration as a result of a proposed transaction.

  The CALERA would prohibit acquisitions which "create an appreciable risk of materially lessening" competition, including those which would tend to create a monopsony, or a firm with buyer power. The threshold for materiality is "more than a de minimis amount."

  - Government enforcers could meet the standard in several ways: (1) by showing that "the acquisition would lead to a significant increase in market concentration in any relevant market;" (2) by showing that the acquirer has or would obtain "market share of greater than 50 percent or otherwise has significant market power, as a seller or buyer, in any relevant market" and would have "control over entities or assets that compete or have a reasonable probability of competing;" (3) by showing that the acquisition involves a firm that "prevents, limits, or disrupts coordinated interaction among competitors in a relevant market or has a reasonable probability of doing so;" (4) by showing that the acquisition "would likely enable the acquiring person to unilaterally and profitably exercise market power or materially increase its ability to do so" or "would materially increase the probability of coordinated interaction among competitors." Many of these concepts are derived from the Horizontal Merger Guidelines.

  - Among the more significant changes to existing law, the CALERA would, with certain exemptions for such things as acquiring realty or securities solely for the purpose of investment, also prohibit acquisitions which would result in the acquirer holding "an aggregate total amount of the voting securities and assets of the acquired person in excess of $5,000,000,000" or where the acquirer or the entity "being acquired has assets, net annual sales, or a market capitalization greater than $100,000,000,000" and the acquisition would result in the acquirer owning "an aggregate total amount of the voting securities and assets of the acquired person in excess of $50,000,000."

  - The parties could proceed with acquisitions if they "establish, by a preponderance of the evidence, that the effect of the acquisition will not be to create an appreciable risk of materially lessening competition or tend to create a monopoly or a monopsony."

   - The bill would require parties who enter into merger-related consent decrees to provide information relating to pricing, efficiencies and "the effect of any divestitures or conditions placed on the acquisition in fully restoring competition" to the relevant agency annually for five years.

- **Expansion of liability for exclusionary conduct.** Current law prohibits certain specific types of exclusionary conduct in certain circumstances – such as below-cost pricing – by a monopolist. The CALERA would, among other things, reduce the market share threshold and potentially expand the range of conduct subject to liability. It would also establish civil penalties for exclusionary conduct violations.

  Specifically, the CALERA would prohibit an entity from engaging in "exclusionary conduct that presents an appreciable risk of harming competition." Exclusionary conduct is defined as conduct that "materially disadvantages 1 or more actual or potential competitors" or "tends to foreclose or limit the ability or incentive of 1 or more actual or potential competitors to compete" and is presumed to present an appreciable risk of harming competition if it is undertaken by an entity with a market share of greater than 50 percent or "otherwise has significant market power." For a defendant that "operates a multi-sided platform business," the bill would "not require finding" that the challenged "conduct . . . presents an appreciable risk of harming competition on more than 1 side of" such a platform.

  A defendant could avoid liability by establishing that the conduct has "distinct procompetitive benefits" which "eliminate the risk of harming competition," that another entity has entered or expanded in the market "with the effect of eliminating the risk of harming competition," or "the exclusionary conduct does not present an appreciable risk of harming competition."

- **Civil penalties for violations of the Sherman Act.** The Act would establish civil penalties for antitrust violations "of not more than the greater of—(A) 15 percent of the total United States revenues of the person for the previous calendar year; or (B) 30 percent of the United States revenues of the person in any part of the trade or commerce related to or targeted by the unlawful conduct under this section during the period of the unlawful conduct."

- **Prejudgment interest.** The Act would provide for prejudgment interest on treble damages.

- While the Act in several places relies on the concept of an antitrust market, it also allows for harm to competition to be proved by sufficient "direct evidence."

Among other things, the Act also calls for a study of the economic impacts of institutional investors' holdings of competitors in "moderately concentrated or concentrated markets" and a study of merger remedies agreed to by the DOJ and FTC; it would create an Office of Competition Advocate at the FTC with subpoena power to gather information regarding competition and a requirement to publish data on market concentration and merger enforcement; it would also have the power to conduct investigations of consummated acquisitions and recommend remedies for any anticompetitive effects. The bill also contains provisions protecting whistleblowers and incentivizing whistleblowers to provide information to the government.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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