



Recent FTC Chair Appointment and Legislative Developments Signal Increased Antitrust Enforcement in the U.S.

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The appointment of Lina Khan as Chairperson of the Federal Trade Commission is the latest in a series of developments – including investigations, legislative proposals for overhauls large and small, and reinvigorated enforcement by regulatory bodies – that highlight renewed interest in antitrust policy among federal and state legislators and leaders of both political parties. Together, these represent a level of bipartisan focus on antitrust law unseen in decades in the United States.

FTC Chair Appointment

On June 15, 2021 the U.S. Senate, by a vote of 69-28, confirmed progressive-favorite Lina Khan to the Federal Trade Commission (**FTC**), reflecting serious bipartisan interest in tackling high profile antitrust issues. Shortly after her Senate confirmation, Khan was appointed as the Chairperson of the FTC, putting the agency's leadership under the 32-year old big tech critic. Khan first gained attention following the publication of her 2017 academic paper, "**Amazon's Antitrust Paradox**," which argued for the need for new and broader antitrust reforms in order to combat anticompetitive conduct from big tech platforms such as Amazon. Since then, Khan has been viewed as a leader of the "hipster antitrust" movement and one of big tech's staunchest opponents. Her elevation to Chairperson sets the agency on a new, more progressive approach and breaks a 2-2 tie between Democratic and Republican Commissioners.

This 3-2 majority will give Khan the opportunity to pursue innovative enforcements and rulemakings derived from the FTC’s enabling statute, which she referred to as “hidden gems” during her confirmation hearings. Specifically Khan has argued that the FTC should create rules to give substance to the “unfair methods of competition” language in the FTC statute. Khan’s position as Chair thus significantly increases the likelihood of more progressive and innovative actions by the agency in the foreseeable future. Meanwhile, although the Department of Justice (**DOJ**) Antitrust Division still awaits a nominee to permanently fill the role at the head of the division, the DOJ continues to pursue a number of antitrust enforcement actions, including the high-profile case against Google and a recent merger suit against Aon and Willis Towers Watson.

Proposed Legislative Reforms

In addition to the Khan appointment, there are several legislative proposals which have gained traction at both the federal and state level, which promise additional antitrust reform in the future.

Merger Filing Fee Modernization Act

The furthest along of the various legislative proposals in Congress is the Merger Filing Fee Modernization Act of 2021, which passed the U.S. Senate on June 6, 2021 and has now gone to the House of Representatives for approval. The proposed legislation amends the premerger notification provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (**HSR Act**), 15 U.S.C. § 18a, and would update the filing fees under the HSR Act for the first time since 2001.

The new bill lowers the filing fees for small deals, while raising the filing fees for “mega deals,” with a maximum filing fee of USD 2.25 million for mergers over USD 5 billion – an eightfold increase of the previous maximum filing fee of USD 280,000. The proposed filing fees are as follows:

Current Filing Fee Thresholds

Size of Transaction	Filing Fee
Greater than USD 92 million but less than USD 184 million	USD 45,000
USD 184 million or greater but less than USD 919.9 million	USD 125,000
USD 919.9 million or greater	USD 280,000

Proposed Filing Fee Thresholds

Size of Transaction	Filing Fee
Greater than USD 92 million but less than USD 161.5 million	USD 30,000
USD 161.5 million or greater but less than USD 500 million	USD 100,000
USD 500 million or greater but less than USD 1 billion	USD 250,000
USD 1 billion or greater but less than USD 2 billion	USD 400,000
USD 2 billion or greater but less than USD 5 billion	USD 800,000
USD 5 billion or greater	USD 2,250,000

The new legislation also requires that the HSR filing fee amounts be adjusted annually for inflation based on increases to the consumer price index. In addition, Section 3 of the bill proposes major increases in budget appropriations to the federal competition agencies: USD 252 million to the DOJ Antitrust Division and USD 418 million to the FTC.

Other Federal Legislation

Since the start of the Biden administration, lawmakers on both sides of the aisle have introduced a host of bills aimed at broader antitrust reform. These include a bill introduced in February by Senator Amy Klobuchar (D-

Minn.) with numerous sweeping changes to antitrust law; a slate of five bills introduced in June by a bipartisan group of lawmakers in the U.S. House of Representatives designed to curb the power of large technology platforms; and a bill introduced in June by Senators Mike Lee (R-Utah) and Chuck Grassley (R-Iowa) aimed at achieving broader antitrust reform beyond big tech. While many of these bills may never be signed into law, the sheer volume and level of bipartisan support indicates that at least some antitrust reform is likely to come.

New York Legislation

On June 7, 2021, the New York Senate passed New York Senate Bill, S933A, known as the “Twenty-First Century Anti-Trust Act,” sending the bill to the State Assembly for review. If adopted, the bill’s provisions would represent a dramatic development in antitrust enforcement in New York and in the U.S. more broadly, making New York the first state to require pre-merger notification for all mergers over a certain threshold and the first U.S. jurisdiction to implement the antitrust concept of “abuse of dominance.”

Mirroring the pre-notification provisions of the federal HSR Act, the NY bill would require that anyone seeking to acquire a company file a premerger notification with the New York Attorney General, if either the acquiring or acquired person has assets or annual net sales in New York in excess of USD 9.2 million. This threshold of USD 9.2 million is determined based on a percentage of the HSR thresholds. The bill also provides for a 60-day notice period for closing, a waiting period twice as long as the 30 days required under federal law. However, unlike the HSR Act, which allows for an extension of the waiting period through issuance of a “second request” by the investigating authority, the New York legislation makes no provision for an additional waiting period to bar closing during the pendency of an ongoing merger investigation.

The legislation was still pending when New York’s scheduled legislative session came to a close on Friday, June 11, and faces some hurdles before becoming law – notably, passage by the State Assembly and signature by the governor. However, its sponsor promises to continue to pursue its passage next year. If passed, the proposed bill could pave the way for other states to enact their own antitrust reforms.

Summary

Interest in antitrust is at the highest point in decades in the United States. Federal and state investigations, legislative proposals by members of both parties, and more progressive leadership in the antitrust agencies signal that lasting changes to law and policy are likely to come in the near future. While the full scope of any reforms is difficult to predict at this stage, over the next six months options will narrow. A&O will continue to monitor the situation and provide updates on meaningful developments.

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