akerman

Blog Post

Klobuchar Antitrust Bill Could Have Significant Impact on Healthcare Industry

February 8, 2021

In early February, Senator Amy Klobuchar, new Chair of the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, introduced the "Competition and Antitrust Law Enforcement Reform Act of 2021"(S225). While the legislation is widely understood to be intended to address perceived shortcomings in the ability of federal authorities to regulate the largest and most dominant companies in the information technology industry (Big Tech) under the antitrust laws, the legislation is not limited to that industry, and if enacted, the legislation could have a significant impact on larger health systems and health insurers as well.

While the legislation – 56 pages in all – would change antitrust laws in many ways, and also includes the creation of an "Office of Competition Advocacy" and a "Division of Market Analysis," the provisions most likely to directly impact the healthcare industry include the following:

- *Lower legal standard applied by the courts when considering whether a large merger should be blocked for competitive reasons*. While current antitrust law requires regulators to prove that the impact of the proposed merger will "substantially lessen" competition, under the Klobuchar bill, when challenging a merger in which the acquiring party would subsequently have a

Related Work

Government Affairs and Public Policy
Healthcare
Healthcare Licensure and Compliance
Hospitals and Health Systems

Related Offices

Washington, D.C.

Health Law Rx

Akerman Perspectives on the Latest Developments in Healthcare Law

Visit this Akerman blog

market share in excess of 50%, regulators would be required only to show that the transaction creates "an appreciable risk of lessening competition." This lower standard is expected to potentially change the outcome in many contested merger cases.

- *No limitation to Big Tech.* While crafted in response to regulators' prior inability to derail several Big Tech transactions in the past, this change to merger law would not be limited to Big Tech transactions. Many hospital systems and health insurers enjoy large market shares in their local or regional markets and, because the Klobuchar legislation is *not* expressly limited to tech transactions, any acquisition by a large hospital system or health insurer potentially could be subjected to these more rigorous standards.
- *New annual filing requirements.* Addressing the claim that regulators have not done enough to follow up on the competitive effects of mergers after they have been approved or resolved through settlement/divestiture, the Klobuchar legislation provides that whenever the FTC or the DOJ challenge a merger transaction, the acquiring entity will subsequently be required to make annual filings to the regulators for a five year period to assist the regulators in seeking to assess whether the terms of the settlement of the merger challenge adequately protected competition in the affected market. Again, this change would not be Big Tech specific, and thus the Klobuchar bill would apply to any merger challenge brought in the healthcare industry as well. This new, long-term, reporting obligation could well have an impact on the healthcare industry merger wave that has been predicted for 2021-2022.
- *Lower standard to show exclusionary conduct.* Perhaps even more significantly for the healthcare industry, the Klobuchar bill would change antitrust law with respect to the legal standard for proving unlawful exclusionary

conduct. Under current law, to prevail, a regulator or a private party plaintiff must show not only that a competitor has been harmed by the defendant's allegedly exclusionary conduct, but that the conduct has also had an appreciable, harmful impact on competition overall in the affected market. Under the Klobuchar bill, any entity with "a 50% or more share of any market" or that "otherwise has significant market power" violates the antitrust laws by engaging in conduct that harms even a single competitor (without regard to overall impact on the market) unless it can prove that the conduct creates "distinct procompetitive benefits" or that other competitors have entered or expanded their presence in the market notwithstanding the exclusionary conduct. Once again, given that in many local and regional healthcare markets in the United States there is a "dominant" health system and/or a "dominant" health insurer (and sometimes both in the same market), this new standard would likely lead to significantly more healthcare antitrust litigation regarding the effect of many forms of contractual provisions between dominant providers and/or insurers across the country. For example, the use of most favored nations clauses, all products clauses, anti-tiering/anti-steering clauses, etc. could be deemed to demonstrate exclusionary conduct.

- *Introduction of Civil Fines*. Finally, in addition to making substantive changes to how the antitrust laws are interpreted (with respect to merger challenges and exclusionary conduct), the Klobuchar bill would also permit the FTC and the DOJ to obtain civil fines for certain antitrust offenses. The bill would permit regulators to obtain fines of up to 15% of an offending party's overall annual revenues or 30% of the party's revenues in the affected line of commerce. For those in the healthcare industry – particularly while they struggle to rebound from COVID-related financial challenges – penalties of this magnitude could place their very existence in jeopardy.

At present, the Klobuchar bill has a long way to go before potentially being enacted into law, and changes to the text of the bill are also likely to occur along the way. However, given the significant attention that has already been given to antitrust issues by the Biden administration – and Senator Klobuchar's significant issue in antitrust reform – the possibility that the Klobuchar legislation could be enacted, in some form or fashion, is real. Stay tuned.
