

HOUSE JUDICIARY COMMITTEE PASSES SIX ANTITRUST BILLS TARGETING TECH PLATFORMS AND LARGE TRANSACTIONS, SETTING UP VOTE BEFORE HOUSE OF REPRESENTATIVES

Over the course of 19 hours on June 23rd and June 24th, the House Judiciary Committee ("Committee") revised and approved five bills aimed at reining in Big Tech's power over consumers. After a brief recess, the Committee reconvened on June 24th and approved a sixth bill. The six bills¹ will now move on to a full vote in the House of Representatives. If the voting trend continues from the Committee in the full House of Representatives, these bills will move on to the Senate, where the margin for passing these bills will be much narrower. It is unknown if the Senate, which is evenly split between 50 Democrats and 50 Republicans, will have the appetite to pass any of these bills, although the "Merger Filing Fee Modernization Act" and the "State Antitrust Enforcement Venue Act" have companion Senate bills, making it more likely that some iteration of these bills could become law. The Senate Judiciary Committee unanimously approved the "Merger Filing Fee Modernization Act" in May 2021 (see our previous alert on the topic [here](#)). These bills follow on from last year's high profile report published by the Committee, *Investigation into Competition in Digital Markets*, which called for a series of legislative overhauls intended to ensure federal antitrust laws effectively promote robust competition in technology markets.

¹ The six bills are:

- Merger Filing Fee Modernization Act of 2021
- State Antitrust Enforcement Venue Act of 2021
- Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021
- Platform Competition and Opportunity Act of 2021
- American Choice and Innovation Online Act
- Ending Platform Monopolies Act

The following are summaries of the various bills approved and voted out of Committee, which will next be considered by the full House of Representatives.

Merger Filing Fee Modernization Act

The bill that seems to have the most likelihood of success is the Merger Filing Fee Modernization Act,² which was voted out of Committee 29-12. Five Republican members approved the bill, including Rep. Ken Buck (R-CO), the ranking member on the Subcommittee on Antitrust. The bill mirrors the Senate version of the bill, creating six categories of filings. The proposed bill would overhaul the existing filing fee structure for pre-merger notifications made pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR Act"). Under the HSR Act and its implementing regulations, there currently are three filing fees: \$45,000, \$125,000, and \$280,000. While providing for smaller fees for lower valued deals, the proposed bill would create substantially higher filing fees for transactions over \$1 billion.

New Proposed Filing Fees	Size of Transaction
\$30,000	\$92 million or greater but is less than \$161.5 million
\$100,000	\$161.5 million or greater but is less than \$500 million
\$250,000	\$500 million or greater but is less than \$1 billion
\$400,000	\$1 billion or greater but is less than \$2 billion
\$800,000	\$2 billion or greater but is less than \$5 billion
\$2,250,000	\$5 billion or greater

Just as important as the significant filing fee increases, the bill also increases the DOJ Antitrust Division's budget from \$184.5 million to \$252 million and the FTC's budget from \$330.2 million to \$418 million for fiscal year 2022. The increased budgets match the Senate's version of the bill.

State Antitrust Enforcement Venue Act

The State Antitrust Enforcement Venue Act,³ voted out of Committee 34-7, would allow state attorneys general to remain in the venue of their choosing when bringing a federal antitrust claim. In a statement, Rep. Buck said, "States play a critical role in enforcing antitrust law and should have the same benefit federal antitrust enforcers have to select and remain in the venue where the case is filed."⁴ Rep. Zoe Lofgren (D-CA), from a District in which a number of the Big Tech

² H.R. 3843, 117th Cong. (2021).

³ H.R. 3460, 117th Cong. (2021).

⁴ *Press Release*, Rep. Buck Applauds House Judiciary Committee Passage of Bills Taking on Big Tech's Monopoly Power (June 24, 2021), available at <https://buck.house.gov/media-center/press-releases/rep-buck-applauds-house-judiciary-committee-passage-bills-taking-big>.

companies reside, stressed concerns that the bill would unnecessarily disrupt a system that has performed well for decades.

Augmenting Compatibility and Competition by Enabling Service Switching Act

The Augmenting Compatibility and Competition by Enabling Service Switching Act ("ACCESS Act")⁵ would require "covered platforms" to "reasonably secure any user data it acquires" and "take reasonable steps to avoid introducing security risks to data or the covered platform's information systems." The bill requires a "covered platform" to maintain third-party-accessible interfaces that maintain interoperability with competitors, which would allow users to switch their data to a third party. The bill was voted out of Committee by a vote of 25-19.

"Covered platform," as used in this bill, shares the same definition as the Platform Competition and Opportunity Act, American Choice and Innovation Online Act, and Ending Platform Monopolies Act. A "covered platform," which looks at the preceding 12 months from a complaint being filed or designation of a company as "covered platform" by the DOJ or FTC, is defined as 1a) having 50 million U.S.-based monthly active users; or 1b) 100,000 U.S.-based monthly active business users; 2) having a market capitalization of more than \$600 billion; and 3) being "a critical trading partner for sale or provision of any product or services offered on or directly related to the online platform." A "critical trading partner" has the ability to restrict or impede a) "the access of a business user to its users or customers"; or b) "the access of a business user to a tool or service that it needs to effectively serve its users or customers." Under these bills, "The Federal Trade Commission or Department of Justice may designate a covered platform for the purpose of implementing and enforcing this Act" so long as the criteria above are met and the agency publishes the designation in the Federal Register. The bill states that the designation will apply for 10 years from its issuance, regardless of changes in control or ownership.

Platform Competition and Opportunity Act

Sponsored by Rep. Hakeem Jeffries (D-NY), the Platform Competition and Opportunity Act⁶ would prohibit "certain acquisitions by dominant online platforms." Interestingly, "dominant online platform" is used in the description of this bill and the Ending Platform Monopolies Act, but it is not defined anywhere in either bill.

The bill would make it unlawful for a dominant online platform to acquire: 1) companies that compete with the "covered platform"; 2) nascent or potential competitors; 3) companies that may "enhance or increase . . . market position"; or 4) companies that may "enhance or increase the . . . ability to maintain [the covered platform's] market position." During negotiations, an amendment was passed that would exempt transactions under \$50 million. The bill was voted out of Committee 24-17.

American Choice and Innovation Online Act

The American Choice and Innovation Online Act⁷ was voted out of Committee 24-20. The bill, sponsored by Rep. David Cicilline (D-RI), the chairman of the Subcommittee on Antitrust, would make it unlawful "for a person operating a covered platform, in or affecting commerce, to engage in any conduct in

⁵ H.R. 3849, 117th Cong. (2021).

⁶ H.R. 3826, 117th Cong. (2021).

⁷ H.R. 3816, 117th Cong. (2021).

connection with the operation of the covered platform that—(1) advantages the covered platform operator's own products, services, or lines of business over those of another business user; (2) excludes or disadvantages the products, services, or lines of business of another business user relative to the covered platform operator's own products, services, or lines of business; or (3) discriminates among similarly situated business users." The bill is clearly aimed at some online tech companies' self-preferencing their own products.

Ending Platform Monopolies Act

The sixth and final bill, the Ending Platform Monopolies Act,⁸ would "eliminat[e] the conflicts of interest that arise from dominant online platforms' concurrent ownership or control of an online platform and certain other businesses." The most punitive of the six bills, this bill prohibits "covered platforms" from using their leverage to disadvantage a competitor's use of a platform, as has been alleged in online marketplaces. Remarkably, "disadvantage" is not defined in the bill. Further, it prohibits "covered platforms" from requiring that a business user purchase or utilize a product or service as a condition for access, preferred status, or placement of the business user's products or services on the "covered platform." Lastly, the bill prohibits conflicts of interest, which arise when a "covered platform" owns or controls a line of business other than its own and creates an incentive for the "covered platform" to either advantage its own products or disadvantage a competing business (or business that constitutes nascent or potential competition). "Control" is defined as holding or having rights to 25% or more of any of the following: stock ownership, rights to profits, rights to assets in the event of dissolution, rights to appoint directors, rights to appoint trustees, or "otherwise exercise[] substantial control over the person." This bill was narrowly voted out of Committee 21-20.

Key Takeaways

While voting was somewhat along party lines, there were significant defections on both sides of the aisle. Most notably, a number of Democrat Representatives from California, where a number of Big Tech companies are located, voted against several bills. Conversely, some Republicans voted for the bills.

Others argue that the whole process is moving too quickly. After the bills were passed, Reps. Lofgren (D), Darrell Issa (R), Eric Swalwell (D), Tom McClintock (R), and Lou Correa (D), all from California, released this statement: "The marathon markup . . . featured several bills that would radically change America's leading tech companies and made crystal clear that the bill text as debated is not close to ready for Floor consideration. The package of legislation poses harm to American consumers and the U.S. economy and left Members on both sides of the aisle with basic questions that have yet to be answered. What companies are covered in the scope of the bills? If only four, why? Why are foreign firms not covered? Were the definitions of 'covered platforms' arbitrary or not? How would the bills impact useful products that consumers rely on? How do the bills protect the data of American consumers? How do the bills protect consumers from arbitrary tech company abuses, as well as safeguard the nation's security and economic interests?"⁹

The coming days and weeks will be telling as to which bills, if any, will ultimately pass both chambers of Congress. However, two things are very clear from the

⁸ H.R. 3825, 117th Cong. (2021).

⁹ *Press Release*, Lofgren, Issa, Swalwell, McClintock, Correa Issue Bipartisan Statement Following Judiciary Committee Markup of Tech Antitrust Bills (June 24, 2021), available at <https://swalwell.house.gov/media-center/press-releases/lofgren-issa-swallowell-mcclintock-correa-issue-bipartisan-statement>.

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marathon sessions over the past week: 1) there is bipartisan support to modify existing antitrust laws in some way, whether small or large; and 2) antitrust is garnering national attention, the likes of which haven't been seen since Representative John Sherman was taking on the steel and oil industries in the late 1800s.

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