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Will 2022 be the year in which antitrust reforms become law?

By Jeffrey May, J.D.

More than a dozen bills are currently pending in Congress that could impact the future of antitrust law. Bipartisan support for strengthening the laws to rein in the tech giants could push some of these measures over the finish line in 2022.

While calls for antitrust reform and tougher antitrust enforcement have been heard for years in Washington, D.C., these pleas grew ever louder in 2021. With the new Biden Administration picks to head the Department of Justice Antitrust Division and Federal Trade Commission settling in, policy changes are being made and new priorities are being identified at the federal antitrust agencies. The White House even issued an [executive order](#) on promoting competition. But on Capitol Hill, Democratic lawmakers, in some cases joined by their colleagues across the aisle, are moving to make more lasting, structural changes to antitrust law. With the Democrats—for the most part—leading the charge in control of both houses of Congress and the White House, 2022 may see passage of a legislative package that has a lasting impact on the future of antitrust law.

Concerns about the accumulation of monopoly power and allegations of anticompetitive conduct by the tech giants have fueled the movement. Many of the concerns are memorialized in a 2020 staff report of the House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law, titled [Investigation of Competition in Digital Markets](#). The report detailed the findings of a 16-month-long investigation and called for strengthening antitrust enforcement. A number of the legislative proposals are outgrowths of this study.

Both Democratic and Republican lawmakers have couched their calls for reform in terms of addressing the tech sector abuses. It is not necessarily a Democratic or Republican issue. Notably, the high-profile antitrust cases brought by the Antitrust Division against Google and the FTC against Facebook were filed during the Trump Administration. However, there remains opposition from some lawmakers who continue to argue that the current antitrust laws adequately address anticompetitive conduct and acquisitions by powerful companies. Republican lawmakers have expressed concern that the FTC in particular, under new Chair Lina Khan, is moving too quickly and in a partisan fashion to “advance the White House’s partisan progressive agenda.” In response, legislation has been introduced in an effort to avoid radical changes to antitrust law and agency procedure.

As with most legislation, there are proponents and opponents. Many bills have already been reported favorably by the House Judiciary Committee. The Senate has been slower to advance these measures, and it is likely where these proposals could be stymied.

The bills impacting antitrust run the gamut from encouraging enforcement through increased funding measures to making technical changes to the Clayton Act, Sherman Act, and FTC Act to address conduct by large tech platforms.

Antitrust Enforcement Generally

While much of the discussion in the popular press about the pending antitrust legislation has focused on bills restricting the practices of big tech companies, some of the measures are intended to strengthen antitrust enforcement generally. These measures could provide federal and state enforcers and private plaintiffs with new tools. However, even general antitrust legislation will likely have a more direct impact on the tech sector due to company size, market share, and acquisitions.

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Agency funding

The much-talked-about Build Back Better Act ([H.R. 5376](#)) is massive. Within the nearly \$2 trillion spending bill, there are even provisions for antitrust enforcement. The bill, as it passed the House of Representatives on November 19 by a vote of 220-213, includes an additional \$1 billion in funding for the federal antitrust agencies over the next decade. The measure would appropriate an additional \$500 million to the Justice Department and \$500 million to the FTC for antitrust enforcement to remain available until September 30, 2031. An earlier version had set aside \$900 million for the Antitrust Division and \$100 million for the FTC’s competition law mission.

There was speculation that the social spending bill would be wrapped up by Christmas, but it is unclear whether that is possible or if the antitrust funding would be included in any final deal. The measure still needs to be considered by the Senate. If there are changes, the House would either have to accede to a Senate amendment or the legislation would have to go to conference to resolve differences.

The Build Back Better Act is not the only bill that includes a provision to increase funding for federal antitrust enforcement. The bipartisan Merger Filing Fee Modernization Act would increase appropriations for the Antitrust Division and FTC in Fiscal Year (FY) 2022 in addition to raising premerger notification filing fees on the largest transactions. The Senate version of the bill ([S. 228](#)), introduced by Sens. Amy Klobuchar (D., Minn.), chair of the Senate antitrust subcommittee, and Chuck Grassley (R., Iowa), ranking member of the Senate Judiciary Committee, passed the Senate as part of the U.S. Innovation and Competition Act ([S. 1260](#)) in June. The premerger notification filing fee provision is in Title II, Sec. 6202, and the funding provision is in Sec. 6203.

A House version ([H.R. 3843](#)) of the Merger Filing Fee Modernization Act, which was introduced by Reps. Joe Neguse (D., Colo.), David N. Cicilline (D., R.I.), Ken Buck (R., Colo.), and others, was reported favorably out of the House Judiciary Committee along with a package of five other antitrust

bills in June. In both versions, for FY 2022, the Antitrust Division would receive \$252 million, and the FTC would receive \$418 million under these bills.

State enforcement

Federal lawmakers on both sides of the aisle support providing state attorneys general with greater power to control their own antitrust suits. The proposed State Antitrust Enforcement Venue Act of 2021 ([H.R. 3460](#); [S. 1787](#)) would amend Title 28, Section 1407 of the U.S. Code to prevent judicial transfer of antitrust cases brought by state attorneys general, providing protection similar to that which is enjoyed by federal antitrust agencies. As a result, the state suits would not have to be consolidated with private actions.

Some lawmakers have expressed concerns about the bill's retroactive effect on cases already transferred. The law could impact the multi-state antitrust lawsuit brought against Google LLC in a federal district court in Texas. The case was subsequently [transferred](#) to a federal court in New York and consolidated with private antitrust lawsuits against the search and ad network giant in August.

"If Texas wants to be able to sue Google in Texas to support Texans, it ought to be able to do so," Sen. Mike Lee (R., Utah), ranking member of the Senate antitrust subcommittee, said in support of the bill, which he sponsored with Democratic support. The House version was reported favorably by the House Judiciary Committee in June, as part of a package of antitrust reform bills.

FTC authority, procedure

In the current Congress, there also is pending legislation aimed at assisting the FTC in its enforcement efforts. Some other measures are aimed at reining in the agency, even removing its antitrust authority altogether.

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Disgorgement, restitution awards. Among the bills to address enforcement issues at the FTC is the proposed Consumer Protection and Recovery Act ([H.R. 2668](#)). The legislation responds to one of the most significant antitrust and consumer protection developments of 2021—the U.S. Supreme Court's decision in [AMG Capital Management, LLC v. FTC](#).

In April 2021, the Supreme Court ruled that the FTC lacked the authority to use FTC Act, Section 13(b)'s "permanent injunction" authority to bypass the requirements of administrative processes in order to obtain restitution or disgorgement. In its decision, the Court noted that the agency had

used Section 13(b)'s "permanent injunction" authority in consumer protection and antitrust cases "to win equitable monetary relief directly in court with great frequency."

Even before the High Court ruled, legislation was being prepared to address the FTC's authority. The Consumer Protection and Recovery Act was introduced by Rep. Tony Cardenas (D., Cal.) on April 20 and was passed by the House of Representatives on July 20.

All four FTC commissioners (including current Commissioners Rebecca Kelly Slaughter, Noah Joshua Phillips, and Christine S. Wilson) at the time of the decision supported legislative clarification of the agency's Section 13(b) authority. Yet, Republican commissioners have expressed concern about giving the Commission too much authority. In a prepared [statement](#) to the House Energy and Commerce consumer protection subcommittee, the Republican Commissioner Wilson noted concerns about the absence of a statute of limitations in the legislation and voiced her support for including one in legislative revisions to Section 13(b). Wilson also commented on fears of "unbounded use of 13(b) to achieve disgorgement in antitrust cases." The commissioner suggested that guidance, such as the now-rescinded 2003 Policy Statement on Monetary Equitable Remedies in Competition Cases, would establish "guardrails" for Commission enforcement efforts under Section 13(b) in antitrust cases.

House Republicans had expressed similar concerns during floor debate on the bill. They suggested that Democrats had not been willing to work with them and that the bill fails to prioritize due process, particularly with respect to the authorization of monetary relief.

The Biden Administration supports the legislation. However, the 221-205 vote, largely along party lines, could signal troubles for Senate passage.

Whistleblower assistance. To assist the FTC in its enforcement efforts, Democrats on the House Energy and Commerce consumer protection subcommittee have also introduced legislation to encourage whistleblowers to disclose wrongdoing at their current and former employers who fall under the jurisdiction of the FTC. Subcommittee chair Jan Schakowsky (D., Ill.), joined by Congresswoman Lori Trahan (D., Mass.) introduced the FTC Whistleblower Act of 2021 ([H.R. 6093](#)) on November 30. Whistleblowers would be protected from retaliation and could potentially receive rewards for reporting violations of laws, rules, and regulations enforced by the agency. The subcommittee held a hearing on H.R. 6093, as well as a number of other bills targeting privacy abuses in the tech sector, on December 9.

In opening remarks at the hearing titled, "Holding Big Tech Accountable: Legislation to Build a Safer Internet," Energy and Commerce Chairman Frank Pallone, Jr. (D., N.J.) [said](#) that the measure would protect whistleblowers, like former Facebook employee Frances Haugen. Haugen, a self-described advocate for public oversight of social media, made headlines in 2021 when she leaked information about Facebook's social media practices and later testified before Congress on the topic. While there have not been signs of Republican support for an FTC whistleblower program, the media coverage of Haugen and Facebook could lend support to the Democrats' efforts on H.R. 6093. A Senate version of the FTC Whistleblower Act has not yet been introduced.

H.R. 6093 follows the enactment of an antitrust whistleblower law in December 2020. President Donald J. Trump signed into law the Criminal Antitrust Anti-Retaliation Act ([Public Law 116-257](#); 134 Stat. 1147), which prohibits employers from retaliating against certain individuals who report criminal antitrust violations.

Commissioner voting. News reports about so-called “ghost” or “zombie” voting at the FTC have also triggered a legislative response. Under the practice, votes cast by commissioners may be counted up to 60 days after the commissioner’s departure from the agency. In this case, the departing commissioner was Democrat Rohit Chopra. Apparently, the practice permitted 20 votes cast by Chopra on his final day on the Commission—October 8—on pending motions before the FTC. With Chopra’s departure, the Commission returned to an evenly divided four members—two Democrats and two Republicans. The tie will likely soon be broken, thereby eliminating any need for ghost voting to move agenda items forward. The nomination of Alvaro Bedoya to a seat on the FTC moved out of the Senate Commerce Committee (despite a 14-14 vote) on December 1. However, Republican lawmakers introduced the FTC Integrity Act ([S. 3311](#)) to prohibit the practice.

Senators Jerry Moran (R., Kan.), John Thune (R., S.D.), Mike Lee (R., Utah), Roy Blunt (R., Mo.), Ted Cruz (R., Tex), Cynthia Lummis (R., Wyo.) and Ron Johnson (R., Wis.) introduced the legislation on December 2 that would stop votes cast by an FTC commissioner from being counted after the commissioner has left the post. Shortly after the legislation was introduced, the U.S. Chamber of Commerce threw its [support](#) behind the proposal.

On the House side, House Energy and Commerce Commission ranking member Cathy McMorris Rodgers (R., Wash.) and consumer protection and commerce subcommittee ranking member Gus Bilirakis (R., Fla.) wrote a [letter](#) to FTC Chair Lina Khan, expressing concern about “zombie” votes filed by former Commissioner Rohit Chopra before he left the agency. The lawmakers questioned the use of “unprecedented and questionable procedures to advance the White House’s partisan progressive agenda.” House legislation has not, however, been introduced.

Removal of FTC antitrust authority to Justice Department. There also continues to be an effort in Congress to go so far as to remove the FTC’s authority over civil antitrust matters. Under the proposed One Agency Act, the FTC would lose its antitrust enforcement authority and federal antitrust enforcement would be handled by one agency—the Department of Justice. Versions have been introduced in both the House ([H.R.2926](#)) and Senate ([S. 633](#)). The measures are backed by Republican lawmakers.

H.R. 2926 was introduced in April by Rep. Mike Johnson (R., La.). In [announcing](#) the bill, Johnson suggested that the consolidated federal antitrust enforcement within the Justice Department “will improve the federal government’s ability to police anticompetitive behavior by Big Tech and other major corporations.”

“For too long, unelected and unaccountable bureaucrats at the FTC have pursued overly partisan enforcement actions which are entirely disconnected from economic reality,” Senator Mike Lee (R.,

Utah) said in [announcing](#) the Senate measure in March. “It’s past time that antitrust enforcement be handled solely by a politically accountable entity.”

Lee introduced a similar measure in the last Congress, but it failed to advance. In the current Congress, the latest attempts are unlikely to move forward.

Remedies

The One Agency Act is also part of the larger proposed “Tougher Enforcement Against Monopolists Act” or the “TEAM Act.” Lee’s TEAM Act ([S. 2039](#)) is an 81-page package of antitrust reform proposals. It is Lee’s response to antitrust legislation focused on government regulation. In addition to ending antitrust enforcement by the FTC, it calls for increased funding for the Department of Justice (\$600 million) for FY 2022, includes a version of the bipartisan Merger Filing Fee Modernization Act, and provides for greater antitrust remedies for both private plaintiffs and the government.

Downstream consumers often foreclosed from seeking damages in antitrust suits by the *Illinois Brick* indirect purchaser doctrine would be permitted to seek relief under a proposed amendment to Section 4 of the Clayton Act. The Clayton Act also would specifically address damages for resellers who pass on overcharges to subsequent purchasers.

Furthermore, the Justice Department would be empowered to recover treble damages on behalf of consumers for Sherman Act, Section 1 violations. In addition, the Justice Department could seek civil fines for knowing violations of the antitrust laws. The fine could be “15 percent of the total of the gross income of the person from the line of business at issue during each year during which the person engaged in the violation.” The fines would be in addition to damages recovered against the defendant.

One last provision of the TEAM Act worth noting is its proposed codification of the consumer welfare standard. This appears to be a nonstarter with the current Administration. President Joe Biden’s picks to run the Antitrust Division and to serve as commissioners at the FTC seemingly refused to pledge support for the traditional standard during questioning from Republican lawmakers at their confirmation hearings.

Under the TEAM Act, the Clayton Act would be amended to specify: “In examining the competitive effects of conduct or a transaction challenged under any of the antitrust laws, a court shall consider exclusively the effects of the challenged conduct or transaction on consumer welfare, including price, output, quality, innovation, and consumer choice.”

Merger Enforcement

Premerger filing fees. The Merger Filing Fee Modernization Act would increase Hart-Scott-Rodino or HSR Act premerger notification fees on particularly large deals and authorize increased appropriations for the two federal antitrust agencies. It also would lower the burden on small and medium-sized businesses. Moreover, the filing fees would be linked to increases in the Producer Price Index going forward. The update to the filing fees for mergers would be the first in two decades.

Sen. Grassley, who co-sponsored the Senate bill with Klobuchar, [said](#) that the measure is intended to “ensure fees reflect the size of each deal, and raise enough revenue to increase agency enforcement resources without making taxpayers foot the bill.”

The measure has moved forward in both houses. As noted above, it passed the Senate on June 8, as part of U.S. Innovation and Competition Act ([S. 1260](#)). The House version ([H.R. 3843](#)), which also has bipartisan support, was reported favorably out of the House Judiciary Committee in June. The bipartisan support for these measures and the progress of these bills in the House and Senate is a good indication that the Merger Filing Fee Modernization Act will become law.

Merger restrictions. Sen. Klobuchar reintroduced in November 2021 a bill to prohibit certain mega-mergers. The proposed Consolidation Prevention and Competition Promotion Act of 2021 ([S. 3267](#)) would, among other things, change the standard under Sec. 7 of the Clayton Act for reviewing mergers. Section 7 would be revised to forbid mergers that “create an appreciable risk of materially lessening competition” rather than mergers that “substantially lessen competition,” where “materially” is defined as “more than a de minimus amount.” The Clayton Act would also be amended to prohibit mergers that create a monopoly. The measure was introduced in the last Congress, and it did not gain traction. It does not have bipartisan support. Further, there is no similar bill pending in the House.

The proposed Platform Competition and Opportunity Act ([H.R. 3826](#); [S. 3197](#)), discussed below, would address consolidation within the tech sector.

Competition in the Tech Sector

The 2020 House antitrust subcommittee majority staff report raised a number of concerns about competition in digital markets that has resulted in the legislative proposals pending currently. In fact, in his opening statement at the House Judiciary Committee’s markup hearing in June on bipartisan antitrust bills taking aim at online platforms Facebook, Google, Amazon, and Apple, Cicilline praised the extensive work done by both the full committee and subcommittee in its investigation of Big Tech. The antitrust bills reported favorably by the committee—in addition to the Merger Filing Fee Modernization Act of 2021 ([H.R. 3843](#)) and the State Antitrust Enforcement Venue Act of 2021 ([H.R. 3460](#)) discussed earlier—are the Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021 or the ACCESS Act of 2021 ([H.R. 3849](#)); the American Choice and Innovation Online Act ([H.R. 3816](#)); the Platform Competition and Opportunity Act of 2021 ([H.R. 3826](#)); and the Ending Platform Monopolies Act ([H.R. 3825](#)).

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The House bills addressing competition in the tech sector moved quickly from introduction to House committee approval—in just two weeks—despite industry opposition, including a [statement](#)

from Amazon Vice President of Public Policy Brian Huseman, speaking out against what the company perceives as the potential negative effects of the proposed bills. The company—a target of the measures—unsuccessfully urged Cicilline “to slow down, postpone the markup, and thoroughly vet the language in the bills for unintended negative consequences.”

The package has some Republican support. Antitrust Subcommittee Ranking Member Buck is among the supporters, while Judiciary Committee Ranking Member Jim Jordan (R., Ohio) is among the Republicans who oppose the bills. There are Senate versions of some of these measures making their way through that chamber.

Interoperability and data portability requirements. The proposed Augmenting Compatibility and Competition by Enabling Service Switching or ACCESS Act is intended to promote competition online by lowering barriers to entry and switching costs for businesses and consumers through interoperability and data portability requirements. The platforms would have to make user data portable, and services would have to be interoperable with competing services. Under the measure, an FTC committee would determine what constitutes a covered platform that would need to comply. This has been noted as a particular concern by critics. Factors would include number of active platform users and net annual sales.

The bill was introduced by Rep. Mary Gay Scanlon (D., Pa.) and has 23 co-sponsors, including Republican Rep. Burgess Owens (R., Utah). Scanlon [says](#) that the legislation would provide new entrants with “a fair shot in the digital economy while giving users the freedom to choose by ensuring that they can easily move their data to competing services.”

A Senate version has not been introduced in the current Congress. However, in the last Congress, Sens. Mark R. Warner (D., Va.), Josh Hawley (R., Mo.) and Richard Blumenthal (D., Conn.) introduced a Senate version that did not move forward. Warner and Blumenthal [applauded](#) the House Judiciary Committee approval of the ACCESS Act in June.

Online platform self-preferencing. To address a purported practice by Amazon, known as “self-preferencing,” a bipartisan group of lawmakers in the House support the American Choice and Innovation Online Act ([H.R. 3816](#)) and a bipartisan group of Senators support the American Innovation and Choice Online Act ([S. 2992](#)). The House bill was sponsored by Cicilline and was favorably reported along with the other tech competition bills in June. The measure would take aim at Amazon listing its own private-label products at the top of its search results to the detriment of other suppliers.

Sen. Klobuchar, who introduced the Senate companion bill along with Republican Sens. Grassley and John Kennedy (R., La.), has said that the bill will establish a fairer playing field for small and medium businesses in four main areas of perceived market failure: (1) dominant platforms squelching interoperability with other business’ products or services; (2) dominant platforms tying purchases of dominant platform goods and services to preferred placement on the platform; (3) misuse of counterparty data in competition; (4) biasing search results to favor the dominant firm. The bill specifies seven forms of unlawful conduct. The measure also defines a covered platform based on market capitalization and lists possible defenses for these covered platforms. There is a six-year statute of limitations.

The U.S. Chamber of Commerce has [voiced](#) its strong objection to the American Innovation and Choice Online Act on the ground that it would “apply one set of rules to some companies and a different set for everyone else – the very definition of government picking winners and losers.”

Industry consolidation. The proposed Platform Competition and Opportunity Act ([H.R. 3826](#); [S. 3197](#)) would prohibit acquisitions of competitive threats by dominant platforms, as well as acquisitions that expand or entrench the market power of online platforms.

As introduced and reported favorably by the House Judiciary Committee in June, the bill would make it unlawful for a covered platform operator to acquire any other entity engaged in commerce unless the operator can show by clear and convincing evidence that the acquisition is a transaction that is described in section 7A(c) of the Clayton Act or does not: “(A) compete with the covered platform or with the covered platform operator for the sale or provision of any product or service; (B) constitute nascent or potential competition to the covered platform or the covered platform operator for the sale or provision of any product or service; (C) enhance or increase the covered platform’s or the covered platform operator’s market position with respect to the sale or provision of any product or service offered on or directly related to the covered platform; or (D) enhance or increase the covered platform’s or covered platform operator’s ability to maintain its market position with respect to the sale or provision of any product or service offered on or directly related to the covered platform.” Attempts to amend the bill during the markup failed.

Senators Klobuchar and Tom Cotton (R., Ark.) introduced the Senate version in November. “This bipartisan legislation will put an end to those anticompetitive acquisitions by making it more difficult for dominant digital platforms to eliminate their competitors and enhance the platform’s market power,” [said](#) Klobuchar in announcing the bill.

As with other bills, there have been concerns raised about this measure. For example, TechNet, a bipartisan network of innovation economy CEOs and senior executives, responded to the proposal with a [statement](#) by its President and CEO Linda Moore that “by making it harder for startups to be acquired by U.S. companies, our economy will be weakened and our foreign adversaries strengthened amid an increasingly competitive global race for leadership.”

Leveraging control over multiple business lines. The Ending Platform Monopolies Act ([H.R. 3825](#)), which was also part of the package of bills favorably reported by the House Judiciary Committee, is intended to eliminate the ability of dominant platforms to leverage their control across multiple business lines to self-preference and disadvantage competitors in ways that undermine free and fair competition. The measure foresees structural separations.

The bill is sponsored by Rep. Pramila Jayapal (D., Wash.) and cosponsored by Rep. Lance Gooden (R., Tex). There currently is no Senate version.

According to a [statement](#) from Jayapal, the bill would make it unlawful for a dominant online platform—such as Google, Apple, Amazon, and Facebook—to simultaneously own another line of business when that dual ownership creates a conflict of interest. Companies in violation could have

to divest lines of business where their gatekeeper power allows them to favor their own services or disadvantage rivals.

As an example, Google operates the most popular Internet search engine as well as streaming service YouTube, the videos of which are ranked by Google's engine. In his statement for the markup of the bill, House Judiciary Chairman Jerry Nadler (D., N.Y.) said: "By operating as both the platform and as a competitor on the platform, these firms often possess an irreconcilable conflict of interest enabling them to harm competition by preferencing their own products and harming rivals."

Exclusionary conduct. Early in 2021, Sen. Klobuchar introduced a proposal to make sweeping changes to the antitrust laws. The move preceded the antitrust bills put forward in the House.

The proposed Competition and Antitrust Law Enforcement Reform Act (S. 225) would create a new section in the Clayton act to prohibit "exclusionary conduct" (conduct that materially disadvantages competitors or limits their opportunity to compete) that presents an "appreciable risk of harming competition," according to Klobuchar. Klobuchar said there was a need for the legislation due to "flawed court decisions [that] have weakened the effectiveness of Section 2 of the Sherman Antitrust Act to prevent anticompetitive conduct by dominant companies." In addition, it proposes restrictions on mergers and acquisitions also found in Klobuchar's Consolidation Prevention and Competition Promotion Act of 2021 (S. 3267). The measure would, among other things, change the standard under Sec. 7 of the Clayton Act for reviewing mergers.

While the bill is not specifically directed at the tech sector, it would likely have a disproportionate impact there. The Information Technology and Innovation Foundation (ITIF) expressed some concern with the measure.

In a [statement](#) from Aurelien Portuese, ITIF's director of antitrust and innovation policy, ITIF noted that the bill would prohibit almost any acquisitions by large tech companies. "To imply that market concentration necessarily leads to anticompetitive practices overlooks both decades of antitrust jurisprudence and comprehensive economic scholarly analysis." The bill risks hampering innovation by overlooking the needs of start-ups to access capital, the think tank opined.

The Competition and Antitrust Law Enforcement Reform Act does not have support from Republican lawmakers, and currently there is not a House version.

Support for app developers. Bipartisan legislation also has been introduced in the House and Senate focused on the app economy. The bills' sponsors contend that the proposed Open App Markets Act is intended to level the playing field between app developers and Google and Apple and their app stores. It takes aim at tying and exclusivity agreements. In addition, app developers would have new rights against Google and Apple.

Under the proposal, an app store with more than 50 million users in the United States would be prohibited from requiring app developers to use an in-app payment system owned or controlled by the covered company or any of its business partners as a condition of being distributed through an app store or being accessible on a mobile operating system. It also would bar these companies from

requiring as a condition for distribution through its app store pricing terms or conditions of sale that are more favorable than those on another app store. It would bar a covered company from taking punitive action or imposing less favorable terms and conditions against an app developer for using or offering different pricing terms or conditions of sale through another in-app payment system or in another app store.

The bill would prohibit covered companies from restricting app developers from communicating with users about pricing offers, products, services, or other legitimate business communications and from using non-public business information derived from a third-party app to compete with that app.

The Department of Justice, the FTC, state attorneys general, and app developers would have authority to bring a suit under the measure. The FTC would have authority to bring a suit for a violation of the measure as an unfair method of competition under Section 5 of the FTC Act. The FTC also could seek civil penalties.

Senators Marsha Blackburn (R., Tenn.), Richard Blumenthal (D., Conn.), and Amy Klobuchar (D., Minn.) introduced the Senate version ([S. 2710](#)) on August 11. The House version ([H.R. 5017](#)) was introduced by Rep. Hank Johnson (D., Ga.) and Rep. Buck two days later. In addition to bipartisan support, the measure has the backing of some consumer groups and developer groups.

In 2021, a high-profile battle between an app developer and an app store played out in *Epic Games, Inc. v. Apple Inc.*, showcasing some of the conduct of app stores that raised concerns among lawmakers. Although antitrust claims raised by Fortnite developer Epic Games over Apple's restrictions on distribution of apps and payment processors failed, Epic succeeded on its claim that Apple's anti-steering requirements violated California's Unfair Competition Law. The federal district court in California issued a [permanent injunction](#) restraining Apple from among other things prohibiting developers from directing customers to purchasing mechanisms. As the year was coming to a close, the U.S. Court of Appeals in San Francisco [granted](#) Apple's request to partially stay the injunction pending appeal. The Ninth Circuit's take on the claims is another development to watch for in 2022.

Other Targeted Legislation

While many of the antitrust bills introduced so far in 2021 are aimed at the tech sector, there are a few proposals that impact other sectors, including professional baseball and the oil and gas industry.

Baseball antitrust exemption. Led by Sen. Lee and Rep. Jeff Duncan (R., S.C.), Republican lawmakers introduced legislation in April to remove the antitrust exemption that has been in place for Major League Baseball to subject professional baseball to existing law. It would repeal Sec. 27 of the Clayton Act. The move followed MLB's decision to move the All-Star Game out of Atlanta in response to a Georgia voting law. While some Democrats have expressed concerns about the remaining antitrust exemption for MLB in the past, it is unlikely the current Competition in Professional Baseball Act ([H.R. 2511](#); [S. 1111](#)) would win their support considering the timing and background on the proposal.

Antitrust suits against OPEC. Lastly, bipartisan legislation authorizing the Justice Department to pursue antitrust enforcement actions against members of the Organization of Petroleum Exporting Countries, or OPEC, was resurrected in the current Congress. The bill has surfaced repeatedly in some form or another for decades. The proposed No Oil Producing and Exporting Cartels (NOPEC) Act of 2021 ([H.R. 2393](#)) cleared the House Judiciary Committee in April after being introduced by Rep. Steve Chabot (R., Ohio).

A Senate version ([S. 977](#)) was introduced by Sen. Grassley in March, but it has not moved forward. Grassley has since pressed the administration to take a closer look at the bipartisan legislation with letters to [Attorney General Merrick Garland](#) and [President Biden](#). In the letter to Biden, which followed Biden's letter to the FTC raising concerns about "mounting evidence of anticonsumer behavior by oil and gas companies," Grassley noted that when the president was a senator he supported similar legislation.

The measure adds a new section to the Sherman Antitrust Act to explicitly make it illegal for any foreign state to act collectively with others to limit production, fix prices, or otherwise restrain trade with respect to oil, natural gas, or other petroleum products. The provision could be enforced only by the Justice Department. The bill also creates an exemption under the Foreign Sovereign Immunities Act and clarifies the "act of state" doctrine to facilitate the enforcement actions.

Conclusion

Perhaps the stars have finally aligned for proponents of antitrust reform legislation. Lawmakers who support many of the pending proposals take the position that the current antitrust laws will not do the job. They point to judicial interpretations that have made it too difficult for enforcers and private plaintiffs to pursue antitrust claims and challenge anticompetitive transactions. Yet, there are still opponents who contend that current antitrust laws are adequate and that greater enforcement efforts would address most concerns, including concerns about competition in the tech sector. Time will tell. None of the bills focused on antitrust in the tech sector have come to the House or Senate floor for a vote in 2021.

Based on the current Democratic control of Congress and the White House, Republican-led efforts to rein in the FTC or take away its antitrust authority are not expected to move forward. Instead, it's quite possible that the package of antitrust bills reportedly favorable by the House Judiciary Committee in June, among other reform proposals primarily directed at tech sector competition, would pass that chamber. The closer call is whether the bills could pass the Senate. Despite support for these measures from some Republican senators, recent difficulties played out in the news headlines regarding moving legislation through the Senate could serve as a red flag.

Antitrust Legislation Status Chart

No.	Title	Date	Sponsor	Status	Related bills
HR 5376	Build Back Better Act	11/19/2021	Rep. John A. Yarmuth (D., Ky.)	Passed House	
HR 2668	Consumer Protection and Recovery Act	7/20/2021	Rep. Tony Cardenas (D., Cal.)	Passed House	
S 228	Merger Filing Fee Modernization Act (Passed as part of U.S. Innovation and Competition Act— S 1260)	6/8/2021	Sen. Amy Klobuchar (D., Minn.)	Passed Senate	HR 3843
HR 3816	American Choice and Innovation Online Act	6/24/2021	Rep. David Cicilline (D., R.I.)	House Committee Approval	S 2992
HR 3849	Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act	6/24/2021	Rep. Mary Scanlon (D., Pa.)	House Committee Approval	
HR 3825	Ending Platform Monopolies Act	6/24/2021	Rep. Pramila Jayapal (D. Wash.)	House Committee Approval	
HR 3843	Merger Filing Fee Modernization Act	6/11/2021	Rep. Joe Neguse (D., Colo.)	House Committee Approval	S 228
HR 2393	No Oil Producing and Exporting Cartels Act of 2021 (NOPEC)	4/20/2021	Rep. Chabot (R., Ohio)	House Committee Approval	S 977
HR 3826	Platform Competition and Opportunity Act of 2021	6/24/2021	Rep. Hakeem Jeffries (D. N.Y.)	House Committee Approval	S 3197
HR 3460	State Antitrust Enforcement Venue Act of 2021	6/24/2021	Rep. Ken Buck (R., Colo.)	House Committee Approval	S 1787
S 1787	State Antitrust Enforcement Venue Act of 2021	9/23/2021	Sen. Mike Lee (R., Utah)	Senate Committee approval	HR 3460
HR 2511	Competition in Professional Baseball Act	4/14/2021	Rep. Jeff Duncan (R., S.C.)	Introduced in House	S 1111
HR 6093	FTC Whistleblower Act of 2021	11/30/2021	Rep. Janice Schakowsky (D., Ill.)	Introduced in House	
HR 2926	One Agency Act	4/30/2021	Rep. Mike Johnson (R, La.)	Introduced in House	S 633
HR 5017	Open App Markets Act		Rep. Hank Johnson (D., Ga.)	Introduced in House	S 2710
S 2992	American Innovation and Choice Online Act	10/18/2021	Sen. Amy Klobuchar (D., Minn.)	Introduced in Senate	HR 3816
S 225	Competition and Antitrust Law Enforcement Reform Act	2/4/2021	Sen. Amy Klobuchar (D., Minn.)	Introduced in Senate	
S 1111	Competition in Professional Baseball Act	4/14/2021	Sen. Mike Lee (R., Utah)	Introduced in Senate	HR 2511
S 3267	Consolidation Prevention and Competition Promotion Act of 2021	11/18/2021	Sen. Amy Klobuchar (D., Minn.)	Introduced in Senate	
S 3311	FTC Integrity Act	12/2/2021	Sen. Jerry Moran (R-Kan.)	Introduced in Senate	
S 977	No Oil Producing and Exporting Cartels Act of 2021 (NOPEC)	3/25/2021	Sen. Grassley (R., Iowa)	Introduced in Senate	HR 2393
S 633	One Agency Act	3/9/2021	Sen. Mike Lee (R., Utah)	Introduced in Senate	HR 2926
S 2710	Open App Markets Act	8/11/2021	Sen. Marsha Blackburn (R., Tenn.)	Introduced in Senate	HR 5017
S 3197	Platform Competition and Opportunity Act of 2021	11/4/2021	Sen. Amy Klobuchar (D., Minn.)	Introduced in Senate	
S 2039	Tougher Enforcement Against Monopolists Act (TEAM Act)	6/14/2021	Sen. Mike Lee (R., Utah)	Introduced in Senate	

■ Democrat ■ Republican ■ Bipartisan