

How a New Era in Antitrust Enforcement May Impact Government Contractors

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With a new presidential administration promising vigorous antitrust enforcement, and a new Democratic majority in Congress seeking to make drastic changes to U.S. antitrust laws, the technology and healthcare industries have found themselves the main targets of increased antitrust scrutiny. Though companies engaging in government contracting, particularly in the aerospace and defense industries, already have had to deal with a range of antitrust issues – for example, the Department of Justice, Antitrust Division (the “DOJ”) launched the Procurement Collusion Strike Force (“PCSF”) in 2019 (discussed in more detail [here](#)), which focused on “deterring, detecting, investigating and prosecuting antitrust crimes ... in government procurement, grant and program funding” – they may find themselves subject to increased antitrust enforcement in 2021. In fact, on February 23, 2021 PCSF Director Daniel Glad [confirmed](#) he is “focus[ed] on three things in 2021: expanding our platform with PCSF building out our data analytics program; and bringing investigations to the recommendation/disposition stage.”

U.S. Antitrust Enforcement: Is a Sea Change Coming or has it Already Arrived?

Antitrust enforcement is not typically a “hot button” issue in modern American politics, nor is it at the top of agendas for new administrations’ enforcement priorities. In fact, historically antitrust enforcement has not changed materially when new presidential administrations or Congressional majorities have come into power, even when those administrations or majorities are from a different political party. Recently, however, antitrust has become a prominent issue, as there has been a growing concern among academics, practitioners, and elected officials that U.S. antitrust enforcement is not adequately addressing competition issues and needs major changes.

While it only has been a month since the 117th Congress and the Biden administration have come into power, and many key antitrust positions at the DOJ and Federal Trade Commission (“FTC”) have yet to be filled, the government [already has suspended Early Termination \(“ET”\) for all mergers and acquisitions reportable under the Hart-Scott-Rodino Act](#), over the objections of two FTC Commissioners – meaning that all such deals now must undergo the full 30 calendar waiting period. In Congress, Senator Amy Klobuchar (D-MN), the Chair of the Antitrust Subcommittee of the Judiciary Committee, [introduced the Competition and Antitrust law Enforcement Reform Act](#) on February 4, 2021, that seeks to overhaul U.S. antitrust enforcement, by among other things, placing significant restrictions on businesses that have more than 50% market share in their relevant

markets.

Key Issues for Government Contractors in a New Age of Antitrust Enforcement

Given concerns by some regarding increased concentration in certain aerospace and defense industries – after all, in January 2021, the Pentagon raised concerns about “drastic consolidation” in the defense sector in its [annual Industrial Capabilities report](#) to Congress – companies may find their transactions and personnel practices under even more scrutiny by the DOJ and FTC.

With respect to transactions, companies’ proposed mergers or acquisitions of competitors have received close looks by the government in recent years, especially in concentrated industries, with the Department of Defense (“DOD”) playing a crucial role in determining the scope and result of review by the FTC or DOJ. Teaming agreements, which the DOD and antitrust enforcement agencies recognize can be pro-competitive, may be even more closely examined by government, and it is possible that the current guidance from the government regarding its antitrust evaluation of such agreements could be changed.

Because government contractors often operate in industries where there is a limited supply of potential employees with the necessary skills and credentials, they should be especially careful about restrictive provisions in their transaction and employment agreements, such as non-compete and non-solicit. Also, government contractors should be wary about engaging in discussions or sharing confidential compensation information sharing with competitors, particularly in light of the government’s recent criminal antitrust actions against “no poach” agreements entered into between competitors.

Conclusion

Though it is early, it is clear that the Biden administration is going to make antitrust enforcement a priority, and we can expect they may be enforcing new, more rigorous laws passed by Congress. Government contractors should therefore be prepared to face increased scrutiny of their operations. Antitrust enforcement can have profound consequences on a company’s business, as it can place limitations on transaction strategy and potentially expose a company to significant civil or even criminal liability.

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