

SPOTLIGHT REPORT

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Antitrust Reforms' Shifting Center of Gravity

What's Happening: With the release of five new bills on Friday, the House has reignited the debate about federal antitrust legislation and the push to crack down on Big Tech, though the more likely action in the near term is taking place at the state level.

Why It Matters: House Judiciary Committee Subcommittee on Antitrust Chairman David Cicilline's (D-RI) push on new legislation is the product of the committee's report from last October on antitrust. **This legislation, outside of an update to merger filing fees, will face an uphill battle in the House let alone in the Senate.** With the likelihood for passage of federal antitrust legislation looking dim, lawmakers have increased attention on the role that regulators and enforcement agencies can play in advancing the issue. **The difficulty with this is that because of President Biden's delays in naming personnel at the Federal Trade Commission (FTC) and Department of Justice's (DOJ) Antitrust Division, any major new rulemaking is likely delayed at least until early 2022.** While the agencies can pursue more aggressive enforcement actions, these are likely to be mitigated by the conservative judicial legacy of former President Trump. In the absence of federal lawmakers and regulators successfully advancing antitrust reform, state government officials of both parties have stepped into the void with novel approaches to trying to regulate these large tech companies. **While these efforts at the state level have not yielded significant results yet, we expect that the pressure will continue to build and more states will look to attempt these initiatives themselves.**

What's Next: The biggest issue to watch will be who Biden chooses to appoint as his top antitrust enforcers at the DOJ and FTC. While the most progressive efforts of either nominee will likely be mitigated by the conservative courts, these nominees will allow the administration to advance its anti-Big Tech agenda. In addition, there remains an outside chance that some sort of bipartisan antitrust legislation is agreed to, though we remain skeptical of this possibility given the hyperpartisan environment in Washington and the amount of political capital that passing this legislation would require. Lastly, watching to see just how many states look to copy these novel approaches will signal to what extent we can expect this issue to turn from a few lone instances to a groundswell that increases pressure on Washington to act.

Congressional Landscape

The House's introduction of new antitrust legislation on Friday represents the most significant bipartisan legislative effort to challenge Big Tech in recent memory. While the bills do not name any companies, the only ones who meet all of the standards laid out in the legislation are **Facebook (FB)**, **Amazon (AMZN)**, **Apple (AAPL)**, and **Google (GOOGL)**. **Microsoft (MSFT)** may meet some of the standards, subjecting it to parts of the new legislation. The bills are based largely on the results of the House Judiciary Committee's [antitrust report](#) released last October. The set of five bills seeks to address a wide range of perceived issues with the state of play among tech companies. Below is a short outline for each along with links to the full text:

- The [American Innovation and Choice Online Act](#) seeks to “prohibit discriminatory conduct by dominant platforms, including a ban on self-preferencing and picking winners and losers online.” In other words, this bill aims at limiting the ability for a platform like Google to favor results on Youtube.
- The [Platform Competition and Opportunity Act](#) looks to prevent “acquisitions of competitive threats by dominant platforms, as well acquisitions that expand or entrench the market power of dominant platforms.” This issue was a major focus of last summer's congressional hearing and would require companies to show that a new acquisition will not harm competition.
- The [Ending Platform Monopolies Act](#) would end “the ability for dominant platforms to leverage their control over multiple business lines to self-preference and disadvantage competitors.” This bill takes aim at Amazon's ownership of the platform as well as its own products that it offers and promotes on there. If passed, Amazon would be required to break up. Google could also be required to divest Youtube given the bill would not allow a search engine to own a video services company that it has incentives to favor.
- The [Augmenting Compatibility and Competition by Enabling Service Switching \(ACCESS\) Act](#) looks to promote “competition online by lowering barriers to entry and switching costs for businesses and consumers through interoperability and data portability requirements.” This bill borrows from the concepts that allow for customers to keep their phone number even if they switch service providers. This bill could weaken the hold on personal data that some websites like Facebook have.
- The final bill is the [Merger Filing Fee Modernization Act](#), which will update fees for merger filings. An identical bill already passed the Senate as part of the US Innovation and Competition Act and was not viewed as controversial during the package's consideration on the Senate floor.

In the House, these bills could end up passing given that they only require a simple majority of support. There is some bipartisan support, though limited to seven Republicans, in the form of cosponsors, thus far. The first indication of how far these bills will go is what sort of challenge they face in getting out of committee, which will also show how widespread support is for this beyond the sponsors of the legislation. One point worth noting is that Rep. Ken Buck (R-CO), the ranking member of the House Judiciary Committee Subcommittee on Antitrust, is a co-sponsor of the Ending Platform Monopolies

Act, despite having [led his own report](#) in response to the majority's antitrust report in which structural separation was described as a "non-starter." Buck's report does offer some nuance on this point arguing that an approach similar to the prevention of railroad companies entering the mining business would be more palatable than a Glass-Steagall equivalent for Big Tech.

Buck's willingness to work with Democrats to create legislation aimed at combating these issues stands in contrast to most of his Republican colleagues. Rep. Jim Jordan (R-OH), the full House Judiciary Committee ranking member, has urged Republicans to oppose the legislation. **This divide between Buck and Jordan reflects the internal split within the Republican party over how to approach antitrust issues, though given the hyperpartisan environment, it is likely that the overwhelming majority of Republicans will side with Jordan, especially in a vote.**

If these bills do end up passing the House, the only bill that appears to have a real chance at passing the Senate is the Merger Filing Fee Modernization Act. This is in part because this bill has already passed the Senate and because we do not believe that there is enough Republican support for the other measures to surpass the 60-vote filibuster threshold. Democrats will not remove the filibuster to pass this legislation. There could end up being support from a handful of Republicans, as in the House, but most are likely to oppose the bills. Senator Mike Lee (R-UT), the ranking member of the Senate Judiciary Committee Subcommittee on Competition Policy, Antitrust, and Consumer Rights, has not yet commented on this package, though he has previously said that he favors seeing increased enforcement rather than [new legislation](#) leading the antitrust effort against the Big Tech companies. Additionally, the difficulty of getting the US Innovation and Competition Act passed in the Senate, which was overwhelmingly popular on a bipartisan basis, serves as a stark reminder of the challenges to passing bipartisan legislation in the Senate of any kind, let alone on such a controversial topic.

Personnel Delays Policy

While Lee and progressives may be interested in seeing more aggressive regulatory action, the Federal Trade Commission (FTC) and Department of Justice's Antitrust Division are both experiencing significant delays in having permanent leadership nominees announced. At the FTC there is also the question as to who will fill the third Democratic seat once Rohit Chopra leaves. **All of these positions have been caught in battles between various interest groups within the party with all looking for representation either based on their ideology or ethnicity.** Biden, as in other ongoing personnel debates, has declined thus far to weigh in on who he feels the nominee should be. **This is not because Biden does not care about advancing antitrust issues, but they are simply not the top priority for him. Instead, he is more focused on maintaining party unity to achieve his legislative goals in the near term, which could be threatened by choosing nominees that would leave members of the party bitter.** By delaying, Biden is trying to maintain party unity by not making different wings in the party feel neglected.

Unfortunately for the president, there are some signs starting to emerge that this may end up backfiring as members of Congress are becoming restless over the lack of nominees at these and other regulatory agencies. **Some have theorized that Biden is waiting to announce both FTC positions at the same time to try to give maximum representation to groups that have expressed interest. But another emerging thought is that Biden will announce a whole slate of regulators at once filling several of the vacant positions contemporaneously to try to please the maximum number of constituencies within his party.** The longer his infrastructure legislation takes to work its way through Congress, the more likely the latter option becomes as Biden's top priority is passing that legislation which requires near perfect caucus unity.

The biggest effect of Biden's delay in naming these nominees is that it will end up delaying the ability for the FTC to advance new rules likely until 2022 without a Democratic majority. There will be a brief period over the next few weeks, or longer, that there is a temporary majority while Chopra is waiting to be confirmed by the Senate to be director of the Consumer Financial Protection Bureau, but once Chopra is confirmed, which may happen in July, that majority will disappear. It is unlikely that Democrats will be able to take advantage of that brief period to advance rules that they have not gotten for which they have not received Republican support it remains unclear what rules they would prioritize.

In addition to the delays in advancing rules until next year, the rules will likely be subject to litigation determined by a judiciary that is [heavily dominated by Republican appointees](#). In his four years in office, President Trump appointed 226 judges in total, including 54 appeals court judges, which is nearly the same as President Obama appointed in his two terms. In this process, Trump flipped the [balance of three of eleven appeals courts](#) to being majority Republican. This impact does not consider the three Supreme Court justices that Trump appointed as well, which will influence the judiciary well into the future.

This impact is already being felt by the FTC with the US Court of Appeals for the 2nd Circuit, one on which Trump flipped the majority, overturning the FTC's lower court victory in an antitrust case against 1-800-Contacts. The case alleged that 1-800-Contacts violated the law by agreeing with rival online contact lens sellers not to advertise on its trademarked terms, which, the FTC alleged, harmed consumers because it led to fewer online ads from companies that sold less expensive lenses. The appeals court ended up adopting [the view of Republican Commissioner Noah Phillips](#), who had dissented from the FTC's original decision to find 1-800-Contacts guilty at the FTC's in-house court. Given the Republican tilt of the judiciary, a progressive FTC could very well face similar difficulties in future cases they choose to bring against businesses.

States Push the Boundaries

While legislation at the federal level looks unlikely and federal regulators are facing challenges to taking a more aggressive approach, government officials at the state

level on both sides of the aisle are looking at novel ways of regulating these tech giants. The lawsuits by state attorneys general have tended to receive the most notice, but there has been an uptick in legislation as well which suggests that the pressure from states is just beginning to ramp up. Given that state legislatures tend to have short periods where they are in session, it is not uncommon that a bill will take multiple years to end up passing, which means that this will be a recurring threat these companies have to face.

The most radical piece of state legislation proposed so far was a bill passed by the New York State Senate that would have seen a [drastic overhaul of the state's antitrust laws](#). **The bill would have changed the legal standard to one based on “abuse of dominance,” which is widely used in Europe. Under this standard, even companies with less than 40 percent market share have had successful antitrust cases brought against them.** In addition, a new line of market power litigation could be opened up with companies being pursued for not just harming the competitive process, but exploiting their dominance by charging supracompetitive prices or unilaterally reducing production or innovation. The new standard would also likely see unilateral actions such as predatory pricing or monopolistic leveraging become easier to challenge than under current statute. New York would have been the first US state to have this standard if the law had been passed, but it ultimately expired in the state Assembly with the end of the legislative session last week.

Also included in this legislation was a 60-day merger filing notice that would have been the first general state-level merger reporting requirement in the US. This was noteworthy for not only significantly lowering the threshold for requiring a report from the current federal standard of \$92 million to \$9.2 million, but also [how far in advance the notice was required](#). This may have had a significant impact on the timing for transactions with such a long lead-time required, though even if an investigation was opened into the transaction by the New York attorney general, there would be no additional waiting period required to consummate the transaction. **While the bill failed this year, we expect it to continue to be an issue raised in the New York state legislature and could see other progressive states, like California, look to pursue similar legislation as well.**

Another novel avenue that state officials are taking to try to rein in Big Tech is to pursue court cases that would result in these companies being classified, and regulated, as utilities. Ohio Attorney General Dave Yost (R) is the [first to try this avenue of litigation](#), having recently filed such a suit against Google. **The focus of the case is on Google's tendency to prioritize its own results rather than rivals, an issue that the House's legislation takes aim at too, and does not seek any monetary damages.** Supreme Court Justice Clarence Thomas has written previously that such regulation of these entities may be merited. Thomas [wrote this in a concurring opinion](#) when addressing President Trump's decision to block users from his Twitter account. Thus while not the same specific issue as Yost is arguing for, there are similar principles that apply in each case.

These two examples in New York and Ohio are illustrative of the kinds of developments that we believe could happen in other states in the future, particularly if either would prove to be successful in the legislative or judicial process. **States officials are going to**

continue to look for novel ways to take away power from these tech companies and will likely continue to increase those efforts in the absence of federal action. This will likely be the battleground that has the most potential for meaningful action against Big Tech in the coming months.



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