of Kansas City v. Presidio, Inc., 2021 WL 298141 (Del. Ch. Jan. 29, 2021) (the "Opinion").

[2]These facts are taken as true from the Opinion, and are therefore the facts alleged in and reasonably inferable from the plaintiff's complaint. They should be understood here as allegations only.

[3]Opinion at *2-3.

[4]Opinion at *3.

[5]Opinion at *4.

[6]*In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 817 (Del. Ch. 2011).

[7]Opinion at *5-6.

[8]Opinion at *7.

[9]Opinion at *7.

[10]Opinion at *9-10.

[11]Opinion at *11.

[12]Opinion at *12-13.

[13]Opinion at *13-14.

[14]Opinion at *18.

[15]Opinion at *18.

[16]Opinion at *21.

[17]Opinion at *22.

[18]Opinion at *23-24.

[19]Opinion at *25.

[20]Opinion at *29.

[21]Opinion at *27.

[22]Opinion at *27-28.

[23]Opinion at *28.

[24]Opinion at *18-19.

[25]Opinion at *47.

[26]Opinion at *47 (citing *In re Cornerstone Therapeutics Inc, Stockholder Litigation*, 115 A.3d 1173, 1179-80 (Del. 2015)).

[27]Opinion at *47.

[28]Opinion at *48.

[29]Opinion at *48.

[30]Opinion at *46.

[31]Opinion at *46.

[32]Opinion at *47.

[33]Opinion at *48.

[34]Opinion at *48-50.

[35]Opinion at *44-46.

[36]Opinion at *39-43.

[37]Opinion at *37 n.15 (citing Joel Edan Friedlander, *Confronting the Problem of Fraud on the Board*, 75 Bus. Law. 1441 (2020)).

[38]Opinion at *49 (citing *Shandler v. DLJ Merchant Banking, Inc.*, 2010 WL 2929654, at *16 (Del. Ch. July 26, 2010)).

PROPOSED ANTITRUST REFORM LEGISLATION: SEA CHANGE OR NOTHING TO SEE?

By Tiffany Lipscomb-Jackson, Aimee DeFilippo, Debra Belott, and Larissa Bergin

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Antitrust reform has become a popular topic in the halls of Congress, academia, and even some (socially distant) gatherings. The topic has slowly picked up pace over the years as lawmakers and academics have decried the growth and conduct of large technology companies and pointed to consolidation across a wide range of industries as a source of concern for consumers

and the economy as a whole.[1] Even some Republicans—historically supporters of deregulation and limited enforcement—have supported reevaluation of merger laws and certain other reforms. And while some lawmakers remain hesitant to embrace sweeping antitrust reform, others have criticized the broad discretion courts currently enjoy in shaping the antitrust laws.

In early February, Senator Amy Klobuchar (D-MN) introduced the first major piece of antitrust reform legislation of the new 117th Congress. Titled the Competition Antitrust Law Enforcement Reform Act of 2021 ("CALERA" or "the Bill"), Klobuchar's proposed legislation is one of the most comprehensive attempts to overhaul the antitrust laws in recent history. Among its many reforms, CALERA:

- attempts to address a host of claimed concerns related to small businesses and the impact of non-price competition on consumers;
- aims to create conditions that purport to facilitate market entry or greater success by smaller competitors. It targets areas traditionally outside of antitrust law's scope, such as employee wages and employment opportunities;[2] and
- seeks to make it more difficult for companies—particularly large ones—to engage in M&A activity.

But not everyone is supportive of such comprehensive reforms. An overarching concern voiced about CALERA is that the Bill will harm competition and the economy, rather than help it. Some worry that CALERA will discourage investment across the economy, and deter innovation to the extent that smaller, disruptive firms enter markets specifically for the possibility of financial reward via acquisition.[3] Others worry that CALERA is overly focused on protecting competitors, and thereby creates additional harm to consumers.[4] Nonetheless, with Democrats in control of the White House and both houses of Congress—the first time since 2011—and uncommon Republican sympathy for more aggressive antitrust enforcement, the potential for some antitrust "reform" to become law is higher than it has been in a long time. The critical question is how far those reforms will actually go, both as written and as enforced.

Given how far CALERA could push antitrust enforcement away from current law and long-established practices, the Bill seems unlikely to pass as written. However, CALERA may serve as the foundation for future compromise, and some of its provisions may well become law. What that final form is in the end, and how the agencies (including staff attorneys and economists) and courts choose to apply it, are obviously open questions. As the most recent and comprehensive legislative proposal for reforming the antitrust laws, however, CALERA merits a close review.

This article explores CALERA's provisions and what the Bill may (and may not) change if adopted in whole or part. It then explores how such changes may affect certain companies, especially larger ones, both in day-to-day business dealings and merger activity. This article concludes with thoughts on the potential direction of antitrust reform in the months ahead.

Bill Analysis

If adopted, CALERA would change the legal

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standard and burden-shifting framework for finding a merger unlawful and could significantly enhance prohibitions on exclusionary conduct. CALERA also attempts to broaden the scope of transactions subject to antitrust scrutiny and likely make it easier for courts and agencies to find that conduct violates the antitrust laws. Further, CALERA heightens post-settlement reporting requirements for mergers, allows regulators to seek broader civil penalties, enhances protections for whistleblowers, and provides for comprehensive data collection and reporting by enforcement agencies. It also would substantially increase the annual budgets of the DOJ and FTC (to $484,500,000 and $651,000,000, respectively), providing the agencies with more resources to investigate and bring enforcement actions.

Increased Merger Control (CALERA Sections 4-5)

CALERA seeks to lower the standard for merger review under Section 7 of the Clayton Act that antitrust agencies and courts apply to determine whether a merger is unlawful. At present, Section 7 prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly." CALERA would lower the standard to a showing of an "appreciable risk of materially lessening" competition, where "materially" means only more than a *de minimis* amount. CALERA also would expressly prohibit transactions that tend to create a monopsony.[5]

Separately, CALERA seeks to create a presumption of unlawfulness for certain transactions and would shift the burden to the transacting parties to overcome the presumption. The presumption would apply in the following circumstances:

(1) the acquisition would lead to a "significant increase in market concentration in any relevant market;"

(2) either party to a deal has a pre-merger market share of more than 50% and would gain control over entities or assets that have at least a reasonable probability of competing in that market;

(3) the acquisition would combine competing assets and one party or its assets would have at least a reasonable probability of disrupting the relevant market;

(4) the acquisition likely would enable or increase the ability of acquirer to "unilaterally and profitably" exercise market power, or would "materially increase" the probability of coordinated interaction among competitors in a relevant market; or

(5) the acquirer would hold more than $5 billion in the target's voting securities and assets, or either party has over $100 billion in assets or market capitalization and the acquirer would hold more than $50 million in the target's voting securities and assets.

In addition to stricter merger review protocols, CALERA would heighten reporting requirements of post-settlement data: for five years following any settlement agreement with the FTC or the DOJ resolving a merger investigation, the parties would have to provide annual reports that provide information sufficient for the FTC or DOJ to assess, retrospectively, the competitive

impact of the acquisition. While it is not unusual for the government to impose limited reporting requirements in its consent decree settlements, CALERA would significantly increase the amount of detail provided. The new information required by CALERA includes the pricing, availability, and quality of any product, service, or input; the source, magnitude, and extent of any cost-saving efficiencies or benefits that were claimed as an acquisition benefit; the extent to which any cost savings were passed on to consumers or trading partners; and the effectiveness of divestitures or any conditions placed on the acquisition.

Broadened Definition of Exclusionary Conduct (CALERA Sections 9-11)

CALERA also reaches beyond mergers and attempts to redefine antitrust concepts that could apply to a company's day-to-day business conduct. Today, Section 2 of the Sherman Act prohibits companies from using "exclusionary" or predatory conduct to build or attempt to build a monopoly. Courts have described the standards for exclusionary conduct in general terms, and there is no one definition. CALERA would redefine and recodify "exclusionary conduct" under Section 2 of the Sherman Act with a new Section 26A of the Clayton Act. CALERA defines exclusionary conduct as that which "materially disadvantages" one or more actual or potential competitors, or that "tends to foreclose or limit the ability or incentive" to compete of one or more actual or potential competitors. CALERA would make exclusionary conduct unlawful if it presents "an appreciable risk of harming competition."

And CALERA goes further still, creating a presumption that exclusionary conduct presents an appreciable risk of harming competition, and is therefore illegal, where the conduct is undertaken by a person or a group acting in concert with a relevant market share of greater than 50% (or otherwise significant market power).[6] The presumption does not apply if the defendant establishes by a preponderance of the evidence (1) that the procompetitive benefits of the conduct *eliminate* the risk of harming competition; (2) one or more other persons have entered or expanded their presence in the market with the effect of eliminating the risk; or (3) the exclusionary conduct does not present an appreciable risk of harming competition. In other words, the presumption will not apply only if the defendant establishes that it should not apply, which is potentially a radical burden shift from current exclusionary conduct analysis under the rule of reason, which places the initial burden on a plaintiff to show a substantial anticompetitive effect from the alleged conduct. As with the changes in merger control policy, there is ambiguity as to how some of these provisions would apply in practice, as there is no known precedent to guide courts on how to implement these new standards or interpret and apply new concepts such as "materially disadvantaging" competitors or "appreciable risk of harming competition."

CALERA provides that finding an appreciable risk of harming competition does not require certain proofs that are, at present, often required before finding Section 2 liability for certain types of exclusionary conduct. For example, many jurisdictions apply the "price-cost test" in evaluating predatory pricing, which provides that a price is not predatory if it is above an appropriate measure of the defendant's short-term costs. CALERA effectively eliminates the price-cost

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test as a safe harbor, as it states that neither the defendant's pricing of a product or service below its cost, nor its likely inability to recoup losses from below-cost prices, are required to find unlawful exclusionary conduct.

CALERA could likewise gut the rule set forth by the Supreme Court in *Ohio v. American Express Co.* for evaluating anticompetitive effects in a multi-sided platform. *American Express* held that a price increase to participants on one side of the credit-card transaction market was insufficient to show an anticompetitive exercise of market power without a showing of anticompetitive harm to the market as a whole.[7] Under CALERA, where the defendant operates a multi-sided platform business, plaintiffs may argue that they need not show an appreciable risk that the defendant's conduct will harm competition on more than one side of the platform. CALERA further provides that a plaintiff generally need not show quantitative evidence regarding the risk of or actual harm to competition, or that the only reasonable purpose for the conduct was its tendency to harm competition.

CALERA also allows for the DOJ and FTC to collect civil penalties for illegal "exclusionary conduct" in addition to its existing ability to collect penalties for criminal antitrust violations. Civil penalties under CALERA have the potential to be substantial—up to the greater of 15% of a violator's total U.S. revenues for the previous calendar year, or 30% of the U.S. revenues of the person in any line of commerce affected or targeted by the unlawful conduct during the period of unlawful conduct. CALERA also amends Sections 1 and 2 of the Sherman Act and Section 5 of the FTC Act to allow the government to collect these same civil penalties for Sherman Act and Section 5 violations.[8] Under the Bill, the FTC and Attorney General would issue joint guidelines reflecting agency policies for determining appropriate civil penalty amounts within one year of enactment. Other antitrust actions, such as private suits under Section 4 of the Clayton Act, remain subject to treble damages.

Reduced Relevant Market Analysis (CALERA Section 13)

Most antitrust claims require a plaintiff to properly plead a "relevant market" in which it alleges the anticompetitive effects occurred. CALERA would do away with this requirement, except when a statutory provision explicitly references the terms "relevant market," "market concentration," or "market share." Where a party presents direct evidence of actual or likely harm to competition, CALERA states that "neither a court nor the Federal Trade Commission shall require definition of a relevant market." While plaintiffs are not always required to define a relevant market under current law, this latter change will encourage plaintiffs and regulators to look for direct evidence (*e.g.*, actual price increases, or company documents and witness testimony) of anticompetitive effects.

Restricted Antitrust Immunity (CALERA Section 14)

CALERA prohibits an adjudicatory body from finding that federal legislation regulating conduct implicitly precludes application of the antitrust laws to that conduct. There are three exceptions: (1) a federal agency or department actively regulates the conduct under the federal statute; (2) the federal statute does not include any provision preserving the rights, claims, or remedies

under the applicable antitrust laws or under any area of law that includes antitrust laws; and (3) federal agency or department rules or regulations explicitly require or authorize the defendant to undertake the conduct. This provision would not appear to affect state legislation that creates immunity from federal antitrust laws. Further, its exceptions appear consistent with the Supreme Court's reasoning in cases like *Credit Suisse Securities (USA) LLC v. Billing*, where federal regulation of the defendant was a key basis upon which the Supreme Court found that the Sherman Act did not apply,[9] and *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, where the governing federal statute included an antitrust-specific saving clause barring immunity.[10] However, this provision may impact arguments for implied antitrust immunity for conduct that is subject to federal legislation but not so directly regulated that it falls under an exception.[11]

New Studies Commissioned (CALERA Sections 6-7)

CALERA requires the FTC and GAO to conduct and update studies for up to six years after enactment. One such study, to be conducted by the FTC and SEC within two years of enactment, would review (1) the extent to which institutional investors have ownership or control interests in competitors in moderately or very concentrated markets; (2) the economic impacts of such overlapping ownership or control; and (3) the mechanisms by which an institutional investor could affect competition among the companies in which it invests, and whether such mechanisms are prevalent. Depending on the results of the study, the government might revisit the prohibition on interlocking directorates under Section 8 of the Clayton Act and possibly further restrict the circumstances under which individuals can serve as an officer or director of multiple corporations. A second study would assess the success of DOJ and FTC merger remedies in consent decrees within the six years prior to enactment, while a third would review the impact of mergers and acquisitions on wages, employment, innovation, and new business formation. This last study's focus on innovation could plausibly inform regulators' enforcement of the proposed new section of the Clayton Act on exclusionary conduct by better delineating who might be a potential competitor protected under CALERA.

Office of the Competition Advocate Established (CALERA Section 8)

The FTC currently has a Bureau of Competition, an Office of Policy Affairs, and an Office of Policy Planning, all of which focus on preventing anticompetitive business practices, advancing consumer protection, and protecting competition. CALERA would establish within the FTC an Office of the Competition Advocate tasked with soliciting reports from consumers, small businesses, and employees about possible anticompetitive practices. The OCA would also collect data regarding concentration levels across industries and the impact and degree of antitrust enforcement, standardize the types and format of such data, and publish periodic reports on market competition. The OCA would have subpoena power to demand reports to assess competition from any company that has made a filing under Section 7A of the Clayton Act, after making a written finding as to the data's necessity and unavailability from a public source.

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Whistleblowers Protected and Rewarded (CALERA Section 16)

CALERA increases protections and rewards for whistleblowers. It prohibits employers from retaliating against employees, contractors, or agents for providing information to the federal government or a supervisor or for participating in a government investigation or proceeding, as long as those individuals did not themselves plan or initiate a violation of antitrust laws. Whistleblowers who report enforcement actions that result in criminal fines exceeding $1 million may be rewarded by an amount of up to 30% of the collected fine.

Practical Implications

What practical effect could these changes have if they were to become law, and what can companies that are concerned about CALERA's impact do to prepare? Of course, much depends on how the agencies and courts choose to apply any language that is codified. Some of CALERA's provisions, however, could have potentially serious consequences, particularly for large companies with significant market share and/or a broad array of products.

Changes to Merger Control Law

If applied literally, CALERA's change to the existing merger review standard from a "substantial lessening" of competition to an "appreciable risk of materially lessening" competition might lower the bar, in some cases, for the government to bring and win merger challenges against merging parties that compete in more than a *de minimis* way. And, while some mergers are already presumed to be illegal under existing law, these presumptions are based upon increases in market concentration and not, for example, the size of the parties to the transaction, as CALERA proposes for certain transactions. While the new standard is not an outright ban on certain kinds of mergers and acquisitions, it could make merger challenges more likely based simply on the buyer's size or market share, or based on the target's reputation as a "maverick" or nascent competitor.

None of this is to say that companies, even larger ones, will not be able to engage in M&A activity. Many mergers or acquisitions that do not involve competitive overlaps (or vertical issues) likely will still be unobjectionable to regulators and clear HSR review with relative ease—though, in some cases, perhaps with increased effort, time, and cost. Even for deals involving competitive overlap, CALERA does not necessarily mean that the analytical approach of the agencies will change, although they may be emboldened to bring more marginal cases in light of the lower standard and the burden-shift for certain transactions. Many companies involved in mergers with significant competitive overlaps already go to great lengths to vigorously defend their transactions before the agencies. Depending on the language of any final bill, more companies involved in deals subject to CALERA's burden-shifting framework may need to consider a proactive defense even for some seemingly innocuous transactions that present no cognizable threat to competition.

CALERA could not only make merger clearance more difficult for some transactions and companies, but its new post-settlement reporting requirements may force companies to provide significantly more information than is usually required under settlements with the government. Such detailed requirements would impose a sig-

nificant burden on parties that have agreed to a remedy with the government. Indeed, by mandating the disclosure of this additional information to the agencies, the Bill seemingly invites regulators to revisit the efficacy and propriety of remedies to which they have already agreed if subsequent documents and data cast doubt on the propriety or efficacy of the remedy (although CALERA does not expressly give enforcers the ability to revisit or revise remedies). If CALERA passes with this provision intact, companies and their counsel would need to ensure that the parties comply with CALERA's technical reporting requirements and that, in doing so, they do not raise any red flags for regulators. In addition to providing a risk assessment as described above, early engagement of counsel may aid in structuring the transaction to reduce antitrust risk and potentially avoid the need to enter into a remedy with regulators that could result in years of government oversight.

Even for transactions not subject to settlement, the FTC under CALERA would have the authority to subpoena any company that has ever made an HSR filing as long as the agency intends to use that information to assess competition. CALERA would also enable the FTC to conduct, at its discretion, investigations concerning the competitive effects of consummated acquisitions. The statute provides that such investigations could include assessments of "the conditions of the relevant markets affected by the acquisition, over the period since the acquisition was consummated" and the potential impact that the acquisition has had on prices, services, output and quality, innovation, consumer choice, entry or exit of competitors, suppliers, and the labor market. Thus, while the FTC may lack the resources or inclination to study every recently-closed transaction, companies would need to be on notice that their post-close activities could be closely scrutinized by the FTC if these portions of CALERA were passed into law.

Changes to Conduct Enforcement

While the exact nuances of CALERA's revamped conduct enforcement scheme are hard to predict in the abstract, CALERA's expanded definition of "exclusionary conduct" places a greater focus on *competitor* welfare than do antitrust laws in the U.S. today,[12] and only requires that conduct create an "appreciable risk" of harming competition.[13] Depending on how it is adopted and applied, this could be a very significant development.

The Bill takes particular aim at companies whose market shares exceed 50% or otherwise have significant market power. If those companies engage in conduct that "materially disadvantages" an actual or potential competitor or "tends to foreclose or limit" that competitor's ability or incentive to compete, harm to competition is presumed and would need to be rebutted.

CALERA would no doubt result in an increase in claims filed against such companies, as plaintiffs test the various uncertainties in the statute and attempt to shape court precedent. Companies that could potentially be subject to the Bill's presumption would need to critically assess existing (and future) arrangements or practices that might be seen as "exclusionary conduct." Companies not subject to the Bill's presumption would likely need to similarly evaluate their business practices, but take the additional step of determining whether those practices present "an appreciable risk of harming competition." If courts interpret this part of the Bill liberally (or,

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indeed, literally), it could make any number of common business practices illegal (or riskier) under the antitrust laws. For example, the risk associated with common provisions in customer contracts, like exclusivity clauses or bundled discounts that may benefit consumers, may increase following CALERA for companies that have large market shares or could otherwise be accused of having significant market power. While Section 2 of the Sherman Act already made some of this conduct illegal under certain circumstances, CALERA's presumption of illegality, if enacted, could require companies that are considered to have market power or market shares exceeding the thresholds outlined in the Bill to reconsider their antitrust compliance policies and perform internal audits to identify and quickly modify practices that could be labeled presumptively exclusionary.

Market Definition Now Expressly Optional Where Direct Evidence of Harm Exists

Finally, expressly eliminating the need to establish a relevant market could make it easier for enforcers and private plaintiffs to make their case when relevant market evidence is otherwise weak and they can point to direct evidence of harm to competition. At the same time, CALERA's creation of the Office of the Competition Advocate likely will increase review of the concentration levels of various markets; the OCA also seems likely to conduct and make available background market research useful to plaintiffs. Direct evidence of anticompetitive effects will likely take on a new primacy in both merger reviews and litigation. While never helpful, documents or witness testimony that indicate that, post-merger, a company intends to raise prices or reduce output may have even greater importance and may be sufficient to effectively scuttle a deal in the early stages of an investigation. Similarly, in the litigation context, plaintiffs would more easily be able to plead cases in which the relevant market is vague or difficult to determine, so long as alleged harm to competition can be shown some other way. If this provision of CALERA is passed into law, it will be important for companies and their counsel to account for this potential reweighting of evidence in both merger review and litigation strategy and to renew internal trainings on best practices for document creation.

Looking Forward

Given the sweeping changes, it seems unlikely that CALERA will become law as currently drafted. However, with Democratic control of Congress and at least some bipartisan appetite for antitrust reform, it is conceivable that some version of CALERA (or portions thereof) is passed into law or finds its way into future reforms, even if in significantly watered-down form. Thus, as an opening salvo, CALERA may prove to be the baseline from which the 117th Congress shapes any future antitrust debate or legislation. Notably, the House Judiciary Committee's Antitrust Subcommittee Chair, David Cicilline (D-RI), is currently drafting his own legislation that could borrow from CALERA. And Senator Mike Lee (R-UT), the ranking Republican on the Senate antitrust committee, recently set out an antitrust agenda that proposes more modest reforms than those found in CALERA.[14]

Any uptick in antitrust enforcement, however, may require a concomitant spending increase.

Indeed, Acting FTC Chairwoman Rebecca Kelly Slaughter recently stated publicly that the FTC's funding has not kept pace with its growing mission.[15] If true, it is hard to see how giving federal regulators more legal tools or a broader enforcement mandate will result in material change without increased resources and staff to enforce that mandate. The most significant effect of CALERA, therefore, may be the least controversial—increasing funding to both the FTC and DOJ.

While it is unclear whether any of the proposals in CALERA will become law, the bill is a bold conversation-starter for politicians, practitioners, academics, and the broader business community. And even a watered-down version of CALERA or a similar bill, coupled with additional funding, could still embolden regulators, giving them new tools and more favorable standards that could lead to a noticeable increase in enforcement.

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.

ENDNOTES:

[1]Of course, even this is debated. *See* Gregory J. Werden and Luke M. Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration*, 33 Antitrust Magazine 1, 74 (Fall 2018) (arguing that claims of increasing concentration across the economy are flawed).

[2]Although not explicitly mentioned in the Bill, the legislation appears to chip away at the consumer welfare standard (a keystone to the "Chicago School" approach), which focuses courts and enforcers on harm to competition—not individual competitors—and requires an evaluation of competitive effects based on objective economic analysis. Criticisms of U.S. antitrust law's primary focus on price-related harms has been a hot topic in academia for years, with more progressive critics advocating for abandonment of the Chicago School approach in favor of solutions that rely less on economics and more on non-price and output-related factors to address perceived socio-political problems.

[3]*See, e.g.,* Jennifer Huddleston, *Implications of the Competition and Antitrust Law Enforcement Reform Act*, American Action Forum, https://www.americanactionforum.org/insight/implications-of-the-competition-and-antitrust-law-enforcement-reform-act/ (Feb. 10, 2021).

[4]*See, e.g.,* Steve Pociask, *Klobuchar's Antitrust Bill Reveals Lack of Understanding of Today's Big Tech Economy*, Inside Sources (Feb. 18, 2021).

[5]A monopsony is the inverse of monopoly. A monopolist is a single seller of goods or services, whereas a monopsonist is a single buyer of goods or services.

[6]CALERA defines "market power" as "the ability of a person, or a group of persons acting in concert, to profitably impose terms or conditions on counterparties, including terms regarding price, quantity, product or service quality, or other terms affecting the value of consideration, exchanged in the transaction, that are more favorable to the person or group of persons imposing them than what the person or group of persons could obtain in a competitive market." This definition of market power is more expansive than the prevailing common law definition and could make it easier for plaintiffs to prove that a defendant has market power. *See, e.g.*, *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 27 (1984) ("As an economic matter, market power exists whenever prices can be raised above the levels that would be charged in a competitive market.").

[7]*Ohio v. American Express Co.*, 138 S. Ct. 2274, 2287 (2018). In the credit-card transaction market, the Supreme Court held that plaintiffs needed to have proven that Amex's conduct "increased the cost of credit-card transactions

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above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market." *Id.*

[8]Note that the Supreme Court is currently considering whether the FTC has authority to seek disgorgement from civil defendants; Section 13(b) of the FTC Act, the current law that gives the FTC powers to seek injunctive relief, does not explicitly provide for monetary relief.

[9]551 U.S. 264, 285 (2007).

[10]540 U.S. at 406-07.

[11]*See*, *e.g.*, *Jes Properties, Inc. v. USA Equestrian, Inc.*, 458 F.3d 1224 (11th Cir. 2006) (holding that the Amateur Sports Act conferred implicit antitrust immunity on the defendant's promulgation of a rule governing the locations and dates of certain equestrian competitions even though neither the legislation itself nor any federal agency or department directly regulated the rule promulgation).

[12]CALERA's emphasis on competitors is, however, akin to abuse of dominance laws in the EU and other jurisdictions which view conduct that excludes competitors from the market as among the most harmful of abuses.

[13]Critically, there is no indication as to the role that factors like intent and foreseeability play into the analysis. The Supreme Court has previously articulated concern about "[m]istaken inferences and the resulting false condemnations" and warned that the "cost of false positives [where conduct is condemned that in fact benefits competition and consumers] counsels against an undue expansion of § 2 liability." On its face, CALERA seems an attempt to supersede this guiding principle, at least with respect to the Clayton Act, as one of the Bill's express purposes is to correct perceived deficiencies in Section 2 jurisprudence. *Trinko*, 540 U.S. at 414.

[14]Press Release, Sen. Mike Lee, Ranking Member, Senate Judiciary Antitrust Subcommittee, Sen. Lee Sets Senate Republican Antitrust Agenda for 117th Congress (Feb. 16, 2021), https://www.lee.senate.gov/public/index.cfm/press-releases?ID=C99C6DA7-D8EE-42FB-B51E-A26B2A2F2A8A (supporting reform to address inequities in the merger review process, while opposing any drastic changes to antitrust laws, including to the current consumer welfare standard).

[15]In the first month of the Biden Administration, the FTC has made some noteworthy changes to antitrust enforcement. For example, in February, the FTC temporarily suspended the discretionary practice of granting early termination of the waiting period to filings made under the HSR Act. While the purported justification was to provide the new administration time to adequately review proposed transactions, the move was controversial and may signal the administration's intent to take more time to more closely review transactions.

DELAWARE SUPREME COURT RESUSCITATES SUIT CHALLENGING DECISION TO VALUE PENDING LITIGATION CLAIMS AT ZERO IN MERGER

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In *Morris v. Spectra Energy Partners (DE) GP, LP*,[1] the Delaware Supreme Court held that the plaintiff had adequately pled a direct claim challenging the fairness of the merger because the defendant failed "to secure value for his pending derivative claims" in negotiating the