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Proposed Pandemic Anti-Monopoly Act

Proposed Legislation Would Prevent Mergers and Acquisitions by Most Companies and Investment Funds During the COVID-19 Pandemic

SUMMARY

Last week, Representative David Cicilline (D-RI-1), the chair of the House Judiciary Committee's antitrust panel, called for a ban on mergers during the COVID-19 pandemic. On Tuesday, Senator Elizabeth Warren (D-Mass.) and Representative Alexandria Ocasio-Cortez (D-NY-14) announced plans to introduce the Pandemic Anti-Monopoly Act (the "Proposed Act"). The Proposed Act would effectively halt mergers and acquisitions activity for a wide range of companies and investment funds until the Federal Trade Commission (the "FTC") "determined that small businesses, workers, and consumers are no longer under severe financial distress."¹ Entities covered by the Proposed Act include (i) companies with over \$100 million in revenues, (ii) financial institutions with over \$100 million in market capitalization, (iii) private equity companies, hedge funds, or companies that are majority-owned by a private equity company or hedge fund, and (iv) companies with an exclusive patent that impacts the crisis (such as for personal protective equipment). The Proposed Act would also prevent mergers and acquisitions that involve "transactions that must otherwise be reported to the FTC under current law." Under the Hart-Scott-Rodino Act ("HSR"), transactions valued at more than \$376 million without an exemption must submit an HSR filing, and transactions valued in excess of \$94 million but less than \$376 million are reportable depending on the size of the acquiring and acquired entities.²

In addition to banning new M&A activity that meets the above criteria, the Proposed Act could also impact the consummation of pending transactions that have not yet received U.S. antitrust clearance. The Proposed Act would pause all waiting periods and deadlines imposed on antitrust agencies during the moratorium and direct the FTC to engage in rulemaking to establish a legal presumption against mergers and acquisitions that "pose a risk to the government's ability to respond to a national emergency."³

Currently, for transactions that require an HSR filing, the parties must wait 30 days once the filing is complete, or 15 days in the case of a cash tender offer or a bankruptcy, subject to extension if the relevant agency issues a “Second Request” seeking information to evaluate the competitive aspects of the proposed transaction. The FTC and the Antitrust Division of the United States Department of Justice had announced on March 13 that they would temporarily cease granting early termination of the waiting period,⁴ though both agencies resumed early termination of HSR reviews on March 27 while announcing that early termination would be available on a more limited basis than historically has been the case.⁵ The Proposed Act would presumably enable antitrust regulators to extend the HSR waiting period indefinitely.

The legislative text has not yet been released and will likely be introduced by Senator Warren and Representative Ocasio-Cortez when Congress returns to session (tentatively scheduled for May 4).

DISCUSSION

Without the legislative text, several of the key components of the Proposed Act remain unclear, including the length of the moratorium (i.e., the timeframe and the criteria by which the FTC would determine that small businesses are “no longer under severe financial distress”) and the extent to which the legislation would impact the Antitrust Division of the Department of Justice. Regardless of its specific terms, it is unclear whether the Proposed Act could achieve the necessary bipartisan support to be enacted.

If the Proposed Act were to move forward through the legislative process, consideration would need to be given to the following, among other matters:

- The Proposed Act appears to define any mergers and acquisitions transaction of size as potentially monopolistic, without regard to any of the FTC’s and the Department of Justice’s traditional economic or other analyses;
- The Proposed Act appears to redefine the remit of the FTC (which is only one of two Federal antitrust regulators, the other being the Antitrust Division of the United States Department of Justice) to include any change in ownership of certain healthcare-related patents, without regard to whether those changes in ownership raise any substantive antitrust concerns, similar to the remit of the Committee on Foreign Investment in the U.S. (CFIUS) to review transactions with non-U.S. persons that impact national security; and
- The Proposed Act, which is purportedly designed to protect small businesses during the COVID-19 pandemic, does not provide protection for most small businesses given that it only covers companies with over \$100 million in revenues or for which changes in ownership would otherwise require HSR filings.

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ENDNOTES

- ¹ See Summary of “Pandemic Anti-Monopoly Act” (April 29, 2020), <https://www.warren.senate.gov/imo/media/doc/Merger%20Moratorium%20One%20Pager.pdf>.
- ² The FTC is required by law to revise the thresholds annually. These values represent the 2020 HSR reporting thresholds, which are approximately 4% greater than the values in 2019.
- ³ See Summary of “Pandemic Anti-Monopoly Act” (April 29, 2020), <https://www.warren.senate.gov/imo/media/doc/Merger%20Moratorium%20One%20Pager.pdf>.
- ⁴ See Changes in Bureau Procedure During COVID-19 Coronavirus Pandemic (March 16, 2020), <https://www.ftc.gov/news-events/blogs/competition-matters/2020/03/changes-bureau-procedure-during-covid-19-coronavirus>.
- ⁵ See Resuming Early Termination of HSR Reviews (March 27, 2020), <https://www.ftc.gov/news-events/blogs/competition-matters/2020/03/resuming-early-termination-hsr-reviews>.

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