PE Hub

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OPINION

Biden's antitrust crackdown: five things dealmakers should know

Even in a turbulent macroeconomic environment, firms continue to see M&A opportunities.

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Dealmakers these days face not only M&A headwinds like inflation, high interest rates and geopolitical unrest, but also skepticism from the antitrust agencies and an uncertain enforcement landscape. Antitrust enforcers' calls to expand reporting requirements and increase the scope of investigations invite uncertainty in merger review, making deals in this environment more complicated and costly.

Despite a challenging start to 2022, recent years have seen tremendous growth in PE-backed M&A transactions. Even in a turbulent macroeconomic environment, firms continue to see opportunities, and with PE firms sitting on over a trillion dollars in dry powder, M&A activity is still tracking at high levels. As dealmakers look to execute on M&A, here are five key antitrust developments to keep in mind as they consider regulatory risk for their transactions:

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Agency leaders' skepticism of the PE business model

Over the last three years, the PE business model and its strategies have faced increasing hostility from antitrust agency leaders. In a September 2021 letter to agency staff about her vision and priorities, FTC chair Lina Khan stated that the PE model may distort competitive incentives and endanger productive capacity, fair methods of competition and consumer protection, particularly in marginalized communities. In a recent interview, Jonathan Kanter, the head of DOJ's Antitrust Division, described PE firms' motives as "to hollow out or roll up an industry and essentially cash out," which is "very much at odds with the competition we're trying to protect." Former FTC commissioner and current CFPB director Rohit Chopra critiqued PE firms' strategies to "buy, strip and flip" companies rather than creating a strong, long-term competitor. Investors should be prepared to face a distrustful audience at the antitrust agencies.

Roll-up strategies in the crosshairs

One oft-cited concern from Biden administration enforcers is that PE firms employ "roll-up" strategies, which in the aggregate, result in undue consolidation. Former commissioner Chopra in particular called for sharp eyes to ensure that such deals were not flying under the radar of the Hart-Scott-Rodino (HSR) Act's requirements, which generally require that deals valued in excess of $101 million be notified to the government and subject to a pre-closing review. In remarks about a FTC study into non-reportable deals by large tech platforms, commissioner Rebecca Slaughter echoed this sentiment about "stealth" roll-ups of industries, calling serial acquisitions a "Pac-Man strategy" that could create a "monopolistic behemoth." When considering bolt-on acquisitions (even small ones), dealmakers should make sure that they consider the competitive implications of the transaction.

No safety in non-reportable deals

In the wake of the FTC's study of tech deals, nearly all FTC commissioners called for greater scrutiny of non-reportable deals, particularly in healthcare, where PE acquisition activity has boomed in recent years. Both DOJ and FTC leaders have also cited alleged "loopholes" and other deficiencies in the HSR reporting regime and suggested that PE firms may not be taking their reporting obligations seriously. In response, the FTC is considering potential rule changes to expand the scope of reporting requirements that could significantly increase the volume of PE deals being reported to the agencies. Buyers should take care to ensure compliance with HSR Act requirements, particularly for deals close to the HSR reporting threshold.

More expansive investigations, including into ESG issues

Current agency leaders have shown an increasing inclination to inquire into a broader set of issues than have historically been examined in merger reviews, including effects on labor, environmental, privacy, and other social issues. Antitrust practitioners report receiving questions, for example, about PE sponsors' prior track records and future plans related to topics such as layoffs, unionization, follow-on acquisitions, cost-cutting measures and more. With these new areas of inquiry, PE firms should expect antitrust reviews to take longer and/or entail greater burden than under prior administrations.

Agencies leveraging procedural processes to increase scrutiny

Beyond simply asking more questions during their reviews, the agencies have used several procedural devices to slow down M&A activity and give themselves greater latitude to investigate deals. First, in February 2021, they "temporarily" suspended the practice of "early termination," which permitted the 30-day HSR waiting period to be ended early for deals presenting no competitive concerns. Prospects for its return – at least in this administration – are slim. Additionally, since August 2021, the agencies have often issued companies letters indicating that the waiting period is expiring but parties close "at their own risk," warning that the investigation could continue post-closing. Finally, in October 2021, the FTC adopted a new "prior approval" policy in merger settlements, obliging the buyer to report and secure Commission approval for all future acquisitions for ten years in the same market.

Amidst growing skepticism of PE deals, navigating agency antitrust review in the current enforcement climate requires effective planning to manage risk, achieve your strategic objectives and ensure a timely closing for your deal.

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