

Insights

Anticompetitive Mergers Act of 2022

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United States Senator Elizabeth Warren (D-Mass.) and United States Representative Mondaire Jones (D-N.Y.) have introduced legislation to prevent what, in their view, prohibits industry consolidations that are anticompetitive or are “bad” for employees or consumers. The *Prohibiting Anticompetitive Mergers Act* would ban what they view as the biggest, most anticompetitive mergers and give the Department of Justice (DOJ) and Federal Trade Commission (FTC) aggressive tools to reject combinations without court orders and to break up what the agencies view as “harmful mergers.”

- **Prohibited Mergers.** The legislation makes “prohibited mergers” illegal, including:
 - Deals where the voting securities or assets of the acquired entity are valued at over \$5 billion
 - Deals resulting in market shares over 33% for sellers or 25% for employers
 - Deals resulting in highly concentrated markets under the regulatory agency guidelines
- **Overhauling the Merger-Review Process.** The legislation gives the antitrust agencies more aggressive tools to stop what the agencies believe are the most harmful mergers, including:
 - Allowing the agencies to reject mergers without court orders
 - Requiring the agencies to reject certain mergers, including prohibited mergers
 - Prohibiting firms with a history of corporate crime or antitrust violations in the last ten years from acquiring other companies
 - Requiring the agencies to evaluate the labor impacts of transactions and reject mergers harmful to workers
 - Prohibiting private-equity “roll up” strategies that quickly consolidate industries
 - Involving relevant state attorneys general and agencies (such as the Department of Defense for large defense deals), promoting a “whole of government” approach
 - Allowing state attorneys generals to sue to block harmful mergers
 - Removing merger litigation from the appellate jurisdiction of the Supreme Court
- **Breaking Up Prohibited Mergers.** The legislation establishes procedures for the government to conduct retrospective reviews and break up harmful deals, including:
 - Requiring a break-up if the merger resulted in a market share above 50%, a highly concentrated market under the regulatory agency guidelines, or materially harmed competition, workers, consumers, or small or minority-owned businesses

- Reviewing every prohibited merger retroactive to 2000

The bill would require the FTC and DOJ to overhaul their merger processes to make it much harder for companies to challenge agency decisions. Rejected or prohibited mergers could still be appealed in federal court, but such a merger would only be allowed to proceed if the agency was found to have acted in an "arbitrary or capricious" manner.

Not surprisingly, the U.S. Chamber of Commerce and other "pro-business" organizations have opposed the legislation. Moreover, with no Republican support as of this writing, passage has a low chance of success.

So, what would it mean for businesses and many of our clients? Many deals will not meet the size thresholds. However, all parties engaged in a business combination could be impacted by the review powers of the agencies and the ability to break-up what they view as "bad" mergers for employees, customers, etc.

Even if the legislation does not become law, all businesses considering a merger, partnership or joint venture should note:

1. The Biden administration has compelled the agencies to be more aggressive in antitrust enforcement, both with respect to business combinations and distribution practices.
2. ALL mergers or other business combinations such as partnerships and joint ventures, no matter the size, are subject to anticompetitive review by judicial intervention, so consult with counsel before beginning the process.

Please contact **Michael E. Williams** for additional information, or if you have questions regarding information found in this alert.

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