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Antitrust State-of-Play

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OVERVIEW	Whether it is the focus on "big tech" and the market share controlled by the Meta's and Alphabet's of the world, or the "too big to fail" mega-bank argument that has been an ongoing discussion in Washington since 2008, the focus on antitrust continues to grow. Throughout his initial campaign for the White House, President Biden made it a part of his platform to focus on consolidation and mega-mergers with a renewed focus on antitrust enforcement. This has proven to be a campaign promise that the President continues to act on, with key officials in his Administration working to implement his "whole-of-government" approach to antitrust enforcement. While antitrust may not be on the front page every day, material changes are being made to the review processes and the more aggressive enforcement posture must be a consideration in all contemplated deals. It now seems that antitrust can be intertwined with politics, national security, and even major league sports… Below, we review the Administration's work on antitrust from the perspective of key enforcement actions, policy changes related to bank mergers, Hart-Scott-Rodino (HSR) reform, and more.
OUR VIEW	RFA believes significant policy proposals will be finalized and prioritization of antitrust policy and coordination across agencies will continue. In the near term, the outcomes of high-profile merger challenges by the Federal Trade Commission (FTC) will likely impact corporations' appetite for pursuing significant merger activity. As a longer-term view, the adopted reforms to the bank merger review process will see a reformed approach at the Department of Justic (DOJ) that focuses more on "competition law," while allowing the banking agencies to retain their focus on branch footprint, deposit concentration, and financial stability. We also believe that the HSR filing process will change in a way that significantly increases the amount of information that is provided in the filing process. Ultimately, if these rules are adopted in any form close to their proposed forms, the time and costs associated with transactions will increase and this Administration will have a chance to leave a lasting impact on the antitrust review process.
BIDEN ADMINISTRATION APPROACH	**Early Action** Shortly after taking office, President Biden issued an Executive Order (EO) stating that a "whole-of-government approach is necessary to address overconcentration, monopolization, and unfair competition in the American economy." This EO consisted of 72 different initiatives intended to combat consolidation in all sectors, while calling for extra focus on "labor markets, agricultural markets, healthcare markets (which includes prescription drugs, hospital consolidation, and insurance), and the tech sector." To implement this "whole-of-government" approach, the EO also established The White House Competition Council, consisting of leadership from all major federal agencies and regulators, to drive this new approach and coordinate across the federal government. **Key Appointments** Beyond this executive order, the Biden Administration's focus on antitrust was solidified through key appointments within the White House, as well as the DOJ and FTC. These three nominations received praise from the progressives in the Democratic party looking to ratchet up

	the antitrust pressure, while simultaneously putting the corporate world on notice. Timothy Wu, who has since departed as an advisor for Competitiveness at the National Economic Council, was viewed as the driving force behind the Administration's EO on antitrust. The next appointment was Lina Khan to serve as Chair of the FTC. Khan, a young professor already known for support for more expansive enforcement of antitrust, particularly as it relates to the tech industry, was viewed as a strong choice by those looking to shake up the existing antitrust enforcement regime to which companies had been subject. This enforcement approach was further bolstered with the appointment of Jonathan Kanter, who was confirmed in November of 2021 to serve as Assistant Attorney General for Antitrust at the DOJ.
BANK MERGERS	**Overview:** The bank merger review process has traditionally been one that involves both the DOJ and the banking regulators. Since the publication of the 1995 Bank Merger Competitive Review Guidelines (Guidelines), the review process has largely focused on geographic overlap of banks and deposit concentration in individual markets. There has been recognition that this review process is likely dated, given the evolution of the banking industry and incorporation of more digital banking products. In September of 2020, the DOJ's antitrust division, then still led by Trump appointee Makan Delrahim, requested public comment on the Guidelines and how they could be modified. The antitrust division, now under Kanter, requested further comment in 2021. It now seems that they are ready to act on these comments and have indicated that they will be putting forward new guidelines soon. **Bank Merger reform:** Based on recent comments from Kanter, it seems that the DOJ is poised to move beyond its deposit concentration and branch overlap considerations of the last few decades. Instead, they likely will consider an expanded set of variables, including things like fees, interest rates, and customer service. Kanter has also made it clear that he intends to move away from the practice of negotiating divestitures of branches with merging banks in order to remedy concentration concerns and secure a deal. Instead, he wants to return the DOJ's portion of the review process to one that focuses on competitive factors and issues competitive factor reports, a practice that stopped in 1995. He has suggested that such a practice will empower the independent banking regulators, whose concerns focus on financial stability, convenience, and needs of the community, compared to the DOJ's review through the lens of competitive law. **Recent Merger Activity:** As a result of the recent run of bank failures, there has been an uptick in merger activity within the industry that has drawn scrutiny from the likes of Sen. Warren (D-MA) and others. The transaction receiving the most criticism at the moment is JP Morgan's acquisition of First Republic following First Republic's instability due to deposit outflows in late April. Regulators point to the "least-cost" resolution mandate that they are supposed to follow, along with the fact that the largest banks are those best positioned to actually acquire these banks and shore up the position of the acquired bank's assets and avoid any further issues. That said, critics are concerned that the biggest banks are simply using this as an opportunity to get even bigger and regulators are giving them a pass due to market instability. In the near term, we are watching closely how regulators evaluate and differentiate merger activity by choice versus merger activity by necessity. It is possible regulators will be more flexible in their analysis if the acquiring entity is on strong safety and soundness footing and would shore up instability at the acquired entity. To us, this would result in the regulators relying more heavily on the financial stability prong of their review. Merger activity by choice may see prioritization of other factors that could spell a more complicated road to completion. **Key Player Commentary:** Recently, the perspective on bank mergers has varied across the administration. In one camp, are those who seem to be in support of reforming the bank merger framework, while recognizing

	that bank mergers, when done currently, are important for promoting competition and market stability. This first camp includes Treasury Secretary Yellen and OCC Acting Comptroller Hsu. In a May 9 speech at the Brookings institute on bank mergers, **Acting Comptroller Hsu** expressed his support for updating the bank merger review framework that is "smart on mergers." Based on his view, he stated that under the current framework "there's an increased risk of approving mergers that diminish competition, hurt communities, or present systemic risks." However, he also pointed out that "imposing a moratorium on mergers would lock in the status quo and prevent mergers that could increase competition, serve communities better and enhance industry resiliency." In more recent comments, Hsu reinforced that the OCC is "committed to being open-minded" on the topic of more potential bank mergers, particularly if needed to stabilize the market. **Secretary Yellen** echoed this sentiment in a recent Wall Street Journal interview, when addressing the recent bank mergers, stating, We certainly don't want overconcentration and we're pro-competition, but that doesn't mean no" mergers. These latest comments drew criticism from Sen. Warren, who sent a letter to the banking regulators and the DOJ scrutinizing these comments and encouraging them to "promote greater competition in the banking sector and strengthen your bank merger review guidelines." She went so far as to say that Yellen and Hsu "appear to be taking the wrong lessons from these bank failures, suggesting that they would like to see more bank consolidation." **Recent Senate Banking Subcommittee Hearing:** Sen. Warren continued her pressure campaign on the issue last week when she chaired a Senate Banking Subcommittee hearing entitled, "Bank Mergers and the Economic Impacts of Consolidation." While the hearing only drew three Senators, Warren took full advantage of the opportunity to ask multiple rounds of questions and solidify her views on the topic. She largely followed the themes of the letter referenced above, detailing the negative impacts of consolidation within the industry, criticized the JP Morgan acquisition of First Republic, and promoted her legislation to reform the bank merger review process – the Bank Merger Modernization Act. Both Sen. Warren and the witness testifying on behalf of Americans for Financial Reform (AFR), Ms. Alexa Philo, were both critical of the least-cost regulation requirement and spoke to the need for this to be considered against other impacts of allowing the big banks to get bigger. Among other concerns discussed were the need to apply the banking industry's standards to the non-bank fintech sector and private equity's (PE) encroachment on the banking sector. Sen. Reed (D-RI) expressed concerns about the PE industry acquiring insolvent banks. The AFR representative spoke to the profit motives of these PE firms, as well as the fact that they do not have the same incentive to provide local services that community banks do.
HART-SCOTT-RODINO REFORM	**Overview** The FTC and DOJ have noticed that they are looking to revamp the pre-merger review process established by the Hart-Scott-Rodino (HSR) Act. The HSR process currently involves the filing of HSR forms by merging parties. These forms contain details on the proposed merger and serve as notice to the antitrust agencies, starting the statutory waiting period (30 days after filing, or 15 days in cash tender offers and some bankruptcies) to see if the agencies decide to conduct an in-depth review (Second Request), negotiate changes, or attempt to block the deal. In August 2021, the FTC issued a public notice that they would begin issuing pre-consummation warning letters to deals where the 30-day waiting period has expired before the FTC's investigation was completed. These letters "remind companies that the FTC may subsequently determine that their deal is unlawful and seek to undo the transaction" if the deal proceeds with closing. Chair Khan has cited both the increase in merger filings and deal complexity for the need for these notices, as well as the need to change the HSR forms.

Proposed Rule

The proposed rule states that the form changes and additional information collected would "improve the efficiency and effectiveness of that initial review" by allowing the agencies to "identify during the initial 30-day waiting period any transaction that may pose competition concerns and potentially narrow the scope of any investigation or reduce the need to conduct a more in-depth investigation." Here are the key changes that must be included or submitted with the HSR forms:

- Deal structure and rationale for the transaction presented as a narrative response.
  - Should include details on horizontal overlap, labor impact, geographic information, among other deal details.
  - Will need to be crafted carefully as to not exclude pertinent details while not portraying the deal in a way that attracts undue scrutiny.
  - Timing of submission is key as business plan details will need to be disclosed.
- Must share all relevant deal materials, including all previous drafts (currently just final unless sent to board) and verbatim English translations of foreign-language materials. This includes materials related to revenue streams, competition, market analysis, and synergies – includes those from third-party advisors.
  - The requirement for submission of draft documents is not just an increased process burden but also will require careful consideration during document production in the leadup to the deal.
- Requirement of a draft agreement or term sheet instead of accepting a preliminary agreement for transactions that have not executed a definitive transaction agreement.
  - Forces transactions to be further along before submission, increasing diligence expense prior to beginning the HSR review process.
- Disclosure of the structure of involved entities – specifically cites PE investments.
- Full detail on organizational structure – identification of ultimate parent entity (UPE); creditors; holders of non-voting securities, options, or warrants totaling >10%; and officers, directors, board members, observers, and those with nomination rights.
- Expansion of M&A lookback review and applying it to the target company as well
  - Doubling lookback window to 10 years and removing previous thresholds to require all acquisitions in overlapping NAICS codes or horizontal overlaps.

Congressional provisions included:

- State Antitrust Enforcement Venue Act – empowering states by exempting antitrust cases from transfer to federal district court.
- Foreign Merger Subsidiary Disclosure Act – disclosure of any subsidies or economic support received from "foreign entities of concern."
  - Includes entities controlled by the governments of China, Iran, Russia, and North Korea.

Impact

If adopted in a form that is close to the proposal, this revised filing process would arguably represent the most significant change to antitrust review in decades. These proposed changes would impact deals of all sizes and industries, increasing the required data collection and preparation burden of the pre-filing process, therefore increasing costs, and extending the transaction timeline. Even the FTC's estimates, which many publications have suggested are woefully conservative, project that on average this new process will quadruple the amount of time needed to prepare HSR filings. The estimates for complex deals are much higher.

Timeline

The proposed rule is currently in its 60-day public comment period, which is scheduled to close on August 28, 2023. After this, the FTC and DOJ will have the chance to amend the rule based

	on this feedback before noticing a final rule and voting on its adoption. We anticipate that this process could take a few months, resulting in a final vote later in Q4, or slipping into 2024. **Impact on Private Equity** While not solely targeted at PE, it seems that the references to increased complexity of deals and structuring when justifying the HSR reforms are tied to the increased prevalence of PE investment. Many of the new disclosure provisions seem to have at least some relation to many of the common critiques of PE investment strategies, including things like M&A history, labor impact, and geographic footprint, as well as increased disclosure of UPE, creditors, holders of non-voting securities, warrants, and more mentioned above. This was reinforced by Chair Khan when she appeared before the House Judiciary Committee last week and stated that some of the changes to the HSR filing would allow them to better identify PE rollup strategies, in response to a question about PE's negative impact on healthcare. She pointed to blocked PE-backed hospital mergers as an example of the FTC's focus on this issue, while also referencing emergency medicine and doctor groups as other subcategories in which they are focused.
ANTITRUST ENFORCEMENT TO TARGET PE	**Whole-of-Government Approach** This increased focus on PE through the lens of competition is not limited to the DOJ and FTC. Under the President's competition EO discussed earlier, other agencies are also taking steps to increase oversight of anticompetitive practices. For example, PE investment in healthcare has received a lot of scrutiny in recent years, such as investments in hospitals, nursing homes, staffing agencies, and more. As a result, and backed by this broader focus on antitrust, steps are being taken to scrutinize PE ownership further. As an example, CMS and HHS have focused heavily on PE ownership of nursing homes and have used the competition EO as the justification. Most recently, this included a proposed rule related to disclosure of "additional ownership and management information" before specifically referencing PE and REITs. This is just one example, but clearly something that at the very least will lead to increased scrutiny of any PE involved deals and could be the blueprint for the next industry where PE's involvement comes into focus. **State Level Action** Additionally, this action is not exclusive to the federal level. Dating back to when HHS Secretary Becerra was the Attorney General in California, he has been focused on PE investment in healthcare. At the time, he was working with state lawmakers to advance legislation to heighten scrutiny of proposed PE backed healthcare mergers in the state. The focus of these proposals has included a focus on consolidation's impact on cost and access. In January, California passed legislation (SB 184) that created a office for reviewing M&A's impact on healthcare costs and will require a 90-day notice provision for healthcare M&A in the state, beginning in 2024. While not all explicitly targeting PE, other states are now following suit with their own proposals, including NY, CT, MA, OR, and others should be expected.
ANTITRUST AS AN ANTI-ESG ANGLE	**US House Judiciary** Democrats are not alone in using antitrust as a way to advance broader policy goals. Just last week, some House Judiciary Committee (HJC) Republicans, sent letters to large asset managers and net-zero focused coalitions, questioning their coordination on ESG issues as a violation of antitrust laws. They state that the HJC is looking into "the sufficiency of existing antitrust laws to address collusive agreements to promote and adopt progressive ESG goals." While the prospects of this resulting in material change to antitrust law in Congress are low, this creative approach acts as a cautionary example of how the focus on antitrust is prevalent across the board in Washington.
NOTEWORTHY ACTIVITY	Below are examples of recent antitrust actions from the FTC and DOJ spanning across industries. These efforts have yielded different results. At times, the mere burden of heightened scrutiny has been enough to end potential deals, while other companies have chosen to press forward, and have done so successfully. Either way, the agencies continue to look for marquee

rulings to support their position of heightened standards as they pursue reforms elsewhere to the merger review process.

JetBlue's proposed $3.8 bn acquisition of Spirit Airlines:

- JetBlue and American Airline's Northeast Alliance (NEA) was ruled to be in violation of the Sherman Antitrust Act by a judge, representing a successful challenge by the DOJ.
- JetBlue elected not to appeal this ruling as they are simultaneously trying to acquire Spirit Airlines and continuing the NEA would decrease the chances of the Spirit acquisition being approved – American Airlines is still appealing the ruling.

Microsoft's proposed $69 bn acquisition of Activision Blizzard:

- Announced Jan. 2022, the proposed acquisition has received significant antitrust scrutiny in the US, UK and EU.
- Dec. 2022, the FTC sued to block the deal through its in-house administrative court, challenging the legality of the deal on anticompetitive grounds.
- With Activision looking to close the deal before the FTC's hearing in August, the FTC sought an injunction in federal court to prevent the deal from proceeding while the agency completes its review.
- On July 11, the federal judge ruled in favor of the deal proceeding, stating that "the FTC hadn't shown that Microsoft's ownership of Activision games would hurt competition in the console or cloud-gaming markets." The FTC is appealing this ruling.
- Continuing to pursue this deal will only heighten the importance of this review process.

PGA/LIV Golf Merger:

- In a surprise announcement early last month, the PGA Tour, Saudi Public Investment Fund (PIF) and DP World Tour announced plans (a framework) to merge and create a new entity. The PIF would make a substantial capital investment into the new entity, making it the exclusive investor. Under the framework, PIF Governor Yasir Al-Rumayyan would join a new board of directors; all ongoing litigation, including lawsuits filed by golfers against the PGA Tour would end; and the PGA Tour, DP, and LIV Golf are to "coexist."
- The DOJ's antitrust division is reviewing the proposed merger.
- On July 12, the two parties removed a non-solicitation clause from the framework of the agreement after scrutiny from the DOJ.
- Last week, the Senate Permanent Subcommittee on Investigation held a hearing on the PGA-LIV proposal, where the proposed deal received heavy scrutiny from the Democratic members in attendance as well as Sen. Josh Hawley (R-MO), including questioning of the PGA Tour's tax-exempt status.
- Sen. Durbin (D-IL) has also indicated an expectation the Senate Foreign Relations Committee will investigate the proposal.
- Beyond the stated antitrust angle here, there are other lessons to be learned as this process unfolds as it relates to deal structure, scrutiny of foreign investment, and how the politicization of a potential merger can quickly heighten the scrutiny from DC.

Intercontinental Exchange Inc. (ICE) proposed $11.7 bn acquisition of Black Knight

- This proposal would merge two mortgage loan technology platforms.
- The FTC is attempting to block this deal, claiming that combining two leading mortgage technology platforms "would drive up costs, reduce innovation, and reduce lenders' choices for tools necessary to generate and service mortgages."

	• These two parties control the two largest loan origination systems (LOS) in the US, Empower (owned by Black Knight) with Encompass (owned by ICE). Black Knight has said it would sell Empower, but the FTC has indicated this will not resolve concerns. • The FTC recently delayed its hearing on the case until September 25 to allow time for a federal court to rule on the pending injunction filed by the FTC. **Successful Challenges of Multiple "Anti-Competitive" Hospital Mergers** • Lifespan Corp. and Care New England Health System abandoned a proposed merger after the FTC filed an administrative complaint and the Rhode Island Attorney General challenged the merger. • New Jersey's RWJBarnabas Health and Saint Peter's Healthcare System's gave up on a proposed merger after it was challenged by the FTC on anti-competitive grounds. • HCA Healthcare and Steward Health Care System walked away from a deal involving five hospitals in Utah after the FTC filed a complaint abandoned a merger that would. **Penguin Random House's proposed $2.2 bn acquisition of Simon & Schuster** • DOJ obtained a permanent injunction blocking the merger after the U.S. District Court found that the proposal would substantially lessen competition in the publishing market. **Merger of China International Marine Containers and Maersk Container** • Merger of two large shipping container companies, abandoned after DOJ investigation focusing on antitrust impact.