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ANTITRUST DEVELOPMENTS IN M&A

In this article, the authors describe how newly appointed leaders at the FTC and DOJ have set their sights on implementing once-in-a-generation alterations to the U.S. antitrust landscape, including new substantive approaches and recent procedural and policy changes. Next, they turn to changes in antitrust merger policies in select jurisdictions around the world. They close with practical considerations for transactions in this evolving antitrust merger review environment.

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Major changes are taking place in antitrust merger enforcement in the United States and abroad. While only a small percentage of M&A activity is affected by competition issues, the number of deals facing scrutiny by the Federal Trade Commission (“FTC”), the Antitrust Division of the Department of Justice (“DOJ”), and international enforcement agencies is growing. Deals that are investigated by these agencies face increasing delays and difficulties to close.

Newly appointed leaders at the FTC and the DOJ have their sights set on implementing once-in-a-generation alterations to the U.S. antitrust landscape. Both agencies are exploring new substantive theories that have never been tested with courts, and are implementing burdensome policies and procedures that have already begun to impact transactions, and more significant changes appear to be on the horizon. The evolution of antitrust regulation is not limited to the U.S., as stricter merger review processes around the world are affecting the ability and also the timing of parties to consummate transactions.

While it would be impossible to identify all the significant changes taking place, we highlight many of the biggest developments thus far at the FTC, DOJ, and

select foreign antitrust authorities, and discuss other major changes currently under consideration. We also describe practical considerations firms should keep in mind when evaluating M&A opportunities in this environment, and we highlight some ways in which companies are already responding to the increasing uncertainty and new risks faced by dealmakers.

CHANGING U.S. ANTITRUST MERGER ENFORCEMENT

Last summer, President Biden explained that he viewed the last 40 years of U.S. antitrust enforcement as a failure and vowed to reduce the trend of corporate consolidation.¹ He issued an Executive Order that set several priorities for U.S. antitrust enforcers and other government agencies, and called on the FTC and the DOJ to “enforce the antitrust laws vigorously” while highlighting that “the law allows them to challenge prior

¹ President Joseph R. Biden, Jr., *Remarks at Signing of Executive Order Promoting Competition in the American Economy* (July 9, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/>.

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