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CLIENT ALERT

Progressives Stake Out Aggressive Position in New Merger Legislation

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Senator Elizabeth Warren (D-MA) and Representative Mondaire Jones (D-NY) introduced the "Prohibiting Anticompetitive Mergers Act" (S. 3847 and H.R. 7101), which, if enacted, would dramatically change the standards and processes for federal merger review across all sectors of the economy, giving the DOJ and FTC powers like those of—if not stronger than—the European Commission. The new bill is perhaps the most aggressive federal legislative proposal yet seeking to halt and reverse industry consolidation, highlighting concerns likely to impact ongoing negotiations on Capitol Hill regarding other pending antitrust legislation.

The bill, introduced last week, would prohibit certain mergers outright, including:

- Transactions valued over $5 billion;
- Transactions that would result in the combined firm having over a 33% market share; and
- Transactions that would result in a highly concentrated market under the more-stringent concentration measures, known as "HHIs," of the DOJ and FTC's 1992 Merger Guidelines.

The bill would also dramatically alter the merger review process by:

- Allowing the DOJ and FTC to block mergers outright without having to seek a preliminary or permanent injunction in federal court, subject only to deferential judicial review thereafter;
- Banning the antitrust agencies from negotiating settlements during the initial HSR or extended Second Request waiting period;
- Extending the initial HSR waiting period from 30 days to 120 days (and from 15 to 60 in certain bankruptcies);
- Requiring the DOJ and FTC to reject a transaction if certain other federal agencies object to the transaction on a substantive ground defined in the legislation;
- Permitting—and in some circumstances requiring—the DOJ and FTC to consider the merger's impact on a range of participants in the economy, such as workers and retirees;
- Prohibiting "roll-up" acquisition strategies by requiring the agencies to reject a transaction if the acquirer has consummated two or more transactions in "any relevant market" during the prior five years; and
- Prohibiting mergers and acquisitions by companies with a history of antitrust violations.

The bill would also require the agencies to review certain mergers consummated since January 1, 2000 and order a divestiture or other remedy if the merger resulted in a market share over 50%; exceeded the HHI thresholds for highly concentrated markets under the 2010 Horizontal Merger Guidelines; "brought material harm to the competitive process;" or meets certain other criteria. The bill does not specify the timeframe in which to apply these thresholds – i.e., at the time of the original transaction or at some subsequent point in time.

Though unlikely to garner bipartisan support, the bill represents the views of the most "progressive" wing of the Democratic party and sends a powerful message. This group has expressed significant concern with—as Senator Warren put it—"the problem of rampant industry consolidation" and its impact on income inequality. One important question is whether this bill will influence other pending antitrust legislation that is proceeding with some bipartisan support.

Although a number of antitrust legislative proposals have been introduced in this Congressional session, two sets of proposals have advanced out of both the House and Senate Judiciary Committees with bipartisan support.

One set appears to be aimed at "big tech" and would prohibit "covered platforms" from engaging in specified acts, including giving preference to their own products on the platform, unfairly limiting the availability on the platform of competing products, or discriminating in the application or enforcement of the platform's terms of service. The reach of this legislation would be broad, covering all applications, operating systems, websites, and services that function as "online platforms," including search engines, e-commerce and transaction platforms, and social media platforms. The "American Innovation and Choice Online Act" (S. 2992) cleared the Senate Judiciary Committee on January 20 by a 16-6 vote, while its companion bill in the House (H.R. 3816, "American Choice and Innovation Online Act") was voted out by the House Judiciary Committee on June 24, 2021 with 14 Democrat cosponsors and 8 Republican cosponsors.

The other set focuses on mobile apps and is reflected in the "Open App Markets Act" (S. 2710), which has strong bipartisan support. It cleared the Senate Judiciary Committee by a 20-2 vote on February 3. This bill, introduced in February by Senator Blumenthal (D-CT), Senator Klobuchar (D-MN), and Senator Marsha Blackburn (R-TN), as well as a House companion bill under the same name (H.R. 7030), would prohibit app stores with more than 50 million U.S. users from engaging in certain practices deemed to constitute self-preferencing, such as requiring developers to use the store's own in-app payment system or favoring its own applications in search results.

Crowell & Moring will continue to monitor developments and provide updates.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Drake Morgan
Counsel – Washington, D.C.
Phone: +1.202.624.2813
Email: dmorgan@crowell.com

Shira Liu
Counsel – Orange County
Phone: +1.949.798.1325
Email: sliu@crowell.com

Rachel Lesser
Associate – Washington, D.C.
Phone: +1.202.624.2572
Email: rlesser@crowell.com

Olivier N. Antoine
Partner – New York

Phone: +1.212.803.4022
Email: oantoine@crowell.com

Alexis J. Gilman
Partner – Washington, D.C.
Phone: +1.202.624.2570
Email: agilman@crowell.com

Shawn R. Johnson
Partner – Washington, D.C.
Phone: +1.202.624.2624
Email: srjohnson@crowell.com

Jeane A. Thomas, CIPP/E
Partner – Washington, D.C., Brussels
Phone: +1.202.624.2877, +32.2.282.4082
Email: jthomas@crowell.com