

Senator Warren and Representative Ocasio-Cortez Propose Moratorium on Big Mergers and Acquisitions During the COVID-19 Pandemic

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Senator Elizabeth Warren and Representative Alexandria Ocasio-Cortez are proposing a moratorium on mergers and acquisitions involving large companies for the duration of the COVID-19 pandemic.

The “Pandemic Anti-Monopoly Act” (the Act) would freeze certain mergers until the Federal Trade Commission (FTC) determines that small businesses, workers, and consumers are no longer under severe financial distress due to COVID-19. Entities subject to the freeze would include businesses with over \$100 million in revenue or financial firms with market capitalization of over \$100 million, private equity companies and hedge funds, businesses that have exclusive patents impacted by the crisis such as for key medical equipment, and businesses proposing other transactions reportable under the Hart-Scott-Rodino (HSR) Act that are already required by law to be reported to the federal antitrust agencies. Further, the proposal would establish a legal presumption against mergers and acquisitions if they could hinder the government’s ability to combat a national emergency, like COVID-19. It would also temporarily free the federal antitrust agencies of statutory waiting periods and deadlines.

The progressive lawmakers’ effort comes after Representative David Cicilline, the chairman of the House Judiciary Antitrust Subcommittee, [called for a ban](#) on most mergers during the COVID-19 pandemic. Additionally, a recent American Antitrust Institute (AAI) [“report card”](#) on the state of U.S. antitrust law gave the federal antitrust agencies a failing grade for a “step down” in the enforcement of antitrust laws preventing anticompetitive mergers and acquisitions. Winston’s briefing on AAI’s report card is available [here](#).

Citing reports that private equity companies, big technology firms, and pharmacies are considering mid-pandemic acquisitions, Senator Warren explained that the goal of the proposal is to protect already struggling workers, small businesses, and entrepreneurs from being “gobble[d] up”. Representative Ocasio-Cortez added that if “predatory M&As” are not stopped, they will have “decades-long economic consequences” resulting in less competition, job loss, and higher costs for consumers.

The proposal, however, could undermine its stated purpose. In particular, such a moratorium would prevent (or at least delay) some affected businesses from being able to receive capital infusions in exchange for equity. This would further incentivize businesses to add significant debt to ensure short-term survival, increasing and prolonging their financial distress and increasing the chance of bankruptcy.

Notably, though, the current relevant HSR Act threshold is \$94 million. Since the Act's thresholds are \$100 million, the vast majority of the transactions impacted here are already subject to the HSR waiting period(s) during which the government can vet competitive issues. While there appears to be limited upside to the proposal, the likelihood that it would come into effect within the next few months are slim as a bill has yet to be introduced in either house of Congress, and it would face particularly long odds in the Senate.

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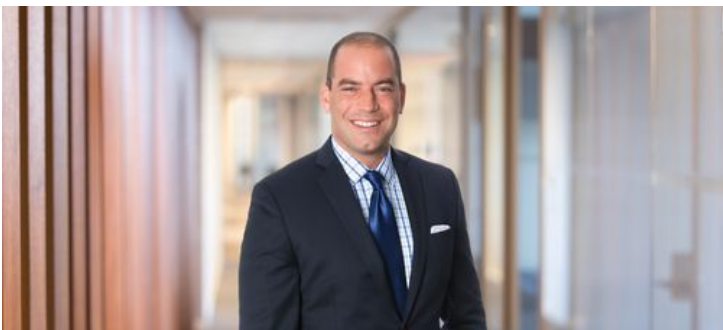
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