

Increasing Antitrust and Potentially Other Scrutiny for Defense M&A Deals

Update

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Mergers and acquisitions involving companies that conduct business with the federal government present a unique set of challenges. Several statutes and regulations are implicated in such corporate transactions, whether the federal government is a company's smallest customer or its only customer. On March 18, 2024, U.S. Senators Elizabeth Warren (D-Mass.) and Mike Rounds (R-S.D.) sent a [letter](#) to the Secretary of Defense suggesting additional hurdles that may soon be put in place.

Recent supply chain issues and other geopolitical concerns have resulted in tangible initiatives to increase the resiliency of the domestic defense industrial base. Specifically, both the Executive Branch and Congress have increased their focus on competition in the defense industrial base because the federal procurement process, by design, relies heavily on competition to drive innovation and control costs. Accordingly, many in the government view M&A and consolidation in the defense industrial base as a potential threat to national security.

In October 2023, the Government Accountability Office (GAO) issued a [report](#) examining the Department of Defense's (DoD) oversight process for vetting potential M&A transactions implicating the defense industrial base. GAO concluded that DoD reviews approximately 40 M&A transactions per year of the approximately 400 annual M&A transactions implicating the defense industrial base. The DoD's staff to conduct such reviews is limited to 2-3 people, requiring DoD to triage its limited resources to focus only on larger transactions.

Congress had two responses: First, the FY 2024 National Defense Authorization Act (NDAA) included a provision (Section 857) requiring that "parties to a proposed merger or acquisition that will require a review by the Department of Defense, who are required to file the notification [required under the Hart Scott Rodino (HSR) Act] shall concurrently provide such information to

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the Department of Defense[.]” This ambiguous requirement begs lots of questions, such as – which companies are covered, which office at the DoD should receive the filing and what is the DoD required to review? Importantly, the DoD is a customer and not an antitrust regulator, and it reviews transactions as a matter of internal policy rather than being required by statute to conduct reviews. Accordingly, the DoD’s role, at least currently, is to provide input to the antitrust agencies for its evaluation of a proposed transaction through its lens as a customer.

Second, the March 18 letter to the DoD focused on the GAO Report’s concerns about smaller transactions that do not require HSR filings, and which receive no DoD scrutiny, and the DoD’s practice of limiting its reviews to competition effects and disregarding other factors (e.g., national security, innovation effects) in the DoD’s internal policies. Senators Warren and Rounds raised questions seeking to understand the DoD’s efforts to address the “full range of risks that defense-related M&A pose to the defense industrial base.”

Although no new requirements for M&A transactions in the defense industry have been enacted yet, we can expect the DoD to provide some guidance implementing the NDAA’s new requirement. Additionally, Congress’s (or at least two senators’) focus on smaller transactions below the HSR thresholds and holistic analysis of M&A transactions (beyond effects on competition) signals increased scrutiny, and additional procedures are on the horizon.