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Colorado's New Antitrust Law Empowers Attorney General to Challenge Mergers & Acquisitions

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The Amendment to the Colorado Antitrust Act

Since 1992, the Colorado Antitrust Act (the “Act”) has contained a unique provision barring the state attorney general from challenging a business merger or acquisition under the Act when the merger or acquisition has been reviewed, but not challenged, by a federal department, agency, or commission. Colo. Rev. Stat. § 6-4-107(3). With the passage last week of Senate Bill 64, that bar has been repealed and, in the coming months, the state attorney general will be authorized to challenge these transactions when “the effect of such acquisition may be to substantially lessen competition or may tend to create a monopoly.” *Id.* § 6-4-107(1).

What the Amendment Means

The amendment gives Colorado's attorney general, Phil Weiser, more authority to fulfill a campaign pledge to push back on transactions that reduce competition. Elected in 2018, Weiser has significant antitrust experience from his days at the U.S. Department of Justice during the Clinton administration and as a deputy assistant U.S. attorney general during the Obama administration. His website emphasizes his desire to use this experience:

It's essential that we stand up against the troubling wave of mergers and industry consolidation that have led to higher prices and lower quality offerings in many sectors. Consumers are facing price-fixing at the hands of companies who do not participate in a competitive market. Attorneys General play an important role in standing up to such deception. Entrepreneurs and consumers alike thrive when startups are supported, but increasing mergers have made it more difficult for small businesses and entrepreneurs to get off the ground.

Even before the amendment, Weiser's office has been active in antitrust enforcement. For instance, Colorado was part of a coalition of states that challenged the \$56 billion merger of Sprint Corp. and T-Mobile U.S. Inc. before it won federal approval. Weiser's office settled Colorado's claims in that challenge, securing business commitments from the parties regarding their future conduct in Colorado. In addition, Weiser's office was a key player in the investigation of the \$4.3 billion purchase of DaVita's independent medical clinic operator by Optum, a subsidiary of UnitedHealth Group.

Going forward, the Optum transaction could be indicative of things to come, as Weiser stated “that he plans to use his new powers to scrutinize health-care industry deals more closely.” Given the incentives for consolidation under the federal Affordable Care Act, such transactions have increased over the past several years and show few signs of slowing down.

What Steps Should Businesses Take

While the amendment does not add another formal layer to the pre-merger review process for companies doing business in Colorado, it does mean that companies now need to consider state antitrust and political issues under the Act when contemplating a merger or acquisition that already is subject to review by a federal department, agency, or commission.

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