

# Few merger deals immune from regulatory scrutiny, M&A attorney says

By Jack Needham

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Increased regulatory scrutiny of proposed mergers and acquisitions has led to a renewed focus on incorporating terms like “drop dead” dates into deal documentation and deterred some parties from pursuing deals altogether, a leading M&A attorney says.

This was despite the lack of success the Department of Justice and Federal Trade Commission have been experiencing in the courtroom.

“I think it’s fair to say that the current regulatory environment – and, in particular, the U.S. antitrust environment – has been less conducive to getting deals done than during prior administrations,” Richard Climan, global head of Hogan Lovells’ Tech M&A practice, wrote.

Climan was responding to questions from the Daily Journal ahead of the firm’s M&A forum, to be held in Silicon Valley April 24. He wrote that the FTC’s advancement of novel theories and new merger guidelines initiated in December had contributed to this chilling effect.

“Today, it seems that very few M&A transactions of significant size are immune from antitrust scrutiny. Deals that would have sailed through the Hart-Scott-Rodino process without a hitch half a dozen years ago are now being routinely challenged, or at least routinely examined and delayed, by the FTC or the Department of Justice,” he wrote.



Richard Climan, global head of Hogan Lovells’ Tech M&A practice | File photo

This “tendency” to challenge merger proposals had, “at least at the margins, deterred some parties from initiating M&A transactions they might have otherwise pursued, and has led some parties to abandon announced transactions before they get to the courthouse.”

In response to the shifting regulatory environment, “deal documentation has been evolving,” Climan explained, with provisions designed to limit the damage caused by regulatory intervention in focus.

“Dealmakers anticipating heightened antitrust scrutiny are paying particularly close attention to reverse break-up fees, covenants to litigate against the government and “drop dead” dates (and related extension provisions), for example,” he wrote.

These changes were occurring even though regulators had yet to see legal success.

“Despite all this, both the FTC and the DOJ have been losing in the courtroom,” Climan wrote. “Our firm has beaten the FTC in

court recently on the Meta/With-in transaction, and was involved the successful defense against the DOJ’s challenge of the UHC/Change Healthcare transaction.” *Federal Trade Commission v. Meta Platforms*. 3:22-CV-04325 (N.D. Cal. filed October 7, 2022);

While overall M&A activity was down in 2023, partly in response to changed financial conditions, there were some bright spots. Climan’s practice in Northern California had been “unusually busy,”

with deals conducted including Walmart's pending multi-billion-dollar acquisition of tech-focused smart television maker VIZIO, announced in February.

"2023 was by all accounts a down year for M&A activity. I expect the Q1 2024 stats will show meaningful improvement in overall M&A activity, particularly in the number of M&A deals valued at over \$1 billion given that there have been a number of large deals announced in Q1," he reported.

He added that "overall M&A deal volume has not returned to the levels we saw in 2021 and is not likely to reach those levels this year. I also expect the Q1 data will not show any meaningful improvement in the dollar volume of buy-side M&A activity on the part of private equity sponsors."

In particular, the reduced presence of private equity players in the tech sector had opened growth opportunities for other buyers, Climan explained.

"What I'm seeing generally in the tech M&A marketplace is that large strategic buyers with strong balance sheets, including many of the clients my group represents, are in an excellent position to grow and innovate through M&A. Valuations in the tech sector have declined meaningfully, so these strategic buyers are able to negotiate attractive purchase prices in their deals. They are not facing the same level of competition from private equity buyers – financial sponsors – as they were several years ago," he wrote.



A recent Hogan Lovells M&A Forum.

"Even though PE sponsors are sitting on vast quantities of so-called "dry powder", they are encountering significant challenges in the current M&A marketplace. It's partially because of the change from a low interest rate environment to a higher one, which makes it more difficult for PE sponsors to get inexpensive debt financing for their deals, especially from syndicated lenders. Without meaningful leverage on their deals, these sponsors can't generate the kinds of financial returns their investors expect," he added.

The forum includes an investment banker's presentation, a mock negotiation of deal terms, a panel on "M&A and the media," and an update on recent M&A-related cases and legislative developments.

AI, and the potential for related dealmaking, will take prominence, Climan wrote.

"This upcoming Forum is built around three major themes. The first is artificial intelligence (AI) – and the M&A aspects of this increasingly important area. This is very timely as we are in the midst of what could be characterized as an AI revolution," Climan wrote. Zaheed Kajani, senior managing director at investment bank Evercore, will lead the AI session.

"The second theme is pre-announcement deal leaks – we will explore how these leaks come about and their legal ramifications," Climan wrote. That panel will feature Sheila Ennis of public relations firm H/Advisors-Abernathy, former Bloomberg deals reporter Serena Saitto

and Hogan Lovells partner Keith Flaum.

The third theme involves the negotiation of 10b-5 representations in the deal documentation for private company acquisitions.

"That theme is somewhat technical, but M&A practitioners and their clients need to understand it because failing to properly negotiate a "10b-5" representation can give rise to substantial liability," Climan wrote.

The forum isn't only for attorneys, Climan said, with company executives and law students also welcome.

Hogan Lovells' Silicon Valley M&A forum will be held April 24 at the Four Seasons Hotel in Silicon Valley and livestreamed.

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