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From HSR filing to closing in six months: The DOJ's new plans for merger reviews

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A resounding complaint from merging parties heard time and time again is the negative impact on operations resulting from protracted merger reviews that consume significant resources. The duration of the merger review process has increased steadily and has shown no indication of abating – until yesterday. In prepared remarks, the head of the Antitrust Division of the U.S. Department of Justice (DOJ) declared lengthy merger reviews a problem and articulated the DOJ's new plans for completing merger reviews within six months of the parties making their Hart-Scott-Rodino (HSR) filings. The result of this new goal could be a major win for both the DOJ and the merging parties.

Makan Delrahim, the assistant attorney general for the DOJ's Antitrust Division, announced major changes to the DOJ's merger review process on September 25, 2018 at the 2018 Global Antitrust Enforcement Symposium hosted by Georgetown University Law Center. Delrahim acknowledged that lengthy merger reviews significantly disrupt normal business operations, citing statistics revealing that, in 2017, second requests conducted by U.S. antitrust enforcers took an average of 10.8 months to resolve, up from 7.1 months (or 65 percent) in 2013. He described the extensive review time as a problem and highlighted three realities underlying the increasing delay:

- the enormous quantity of data and documents merging parties possess in the electronic age and that are required to be produced during the merger review process
- the growing number of transactions that are international in scope, necessitating cooperation among enforcers
- where remedies are needed, the increasingly common requirement that the merging parties offer an acceptable upfront buyer that the DOJ must vet before proceeding to closing

Delrahim, quoting former Assistant Attorney General William Baxter, said that mergers are "an important and extremely valuable capital market phenomenon, that they are to be in general facilitated, and that it is socially desirable that uncertainty and risk be removed wherever possible." To that end, he set out a number of reforms the DOJ will be implementing "to avoid unnecessary interference with the larger universe of mergers that are either competitively beneficial or neutral." These reforms all are aimed at resolving most merger investigations within six months of the parties' HSR filings.

- **Front office staff who are primarily responsible for recommending the scope and issuance of a second request will be available for an initial, introductory meeting with the merging parties.** Historically, the DOJ leadership has not engaged in face-to-face conversations with the merging parties until the end of the merger review process. Early involvement of front office staff should hasten their knowledge and understanding of the products and industry at issue and should bring greater transparency to the merger review process so parties can better plan for burdensome second request investigations.

- **The DOJ will publish a Model Voluntary Request Letter to enable the parties to begin collecting information crucial to resolving DOJ concerns at the earliest point in the process, even before making the HSR filing.** Experienced antitrust practitioners already recognize the information enforcers need to evaluate whether a transaction poses any competitive harm and should counsel clients to begin collecting this information early. The Model Letter, however, is essentially an invitation for the parties to submit information even earlier without necessarily waiting for the DOJ to issue a Voluntary Request Letter. The merging parties thus have greater control over timing and can get the ball rolling on educating staff on the parties and industry by making early, pre-HSR filing submissions.

- **The DOJ has created a system to track what happens following a "pull and refile"** (when the acquiring party voluntary withdraws and refiles its HSR form, re-starting the HSR waiting period and effectively giving the Antitrust Division an additional 30 days to review the transaction). This is an accountability tool that ensures the DOJ has an investigation plan in place to maximize its use of the additional time. This should engender greater transparency that will enable merging parties to better evaluate the strategic decision of whether to pull and refile. Because a pull and refile automatically results in an additional 30-day delay, it generally is not a sound option unless the additional time is highly likely to eliminate or significantly curtail a second request. Experienced counsel can advise on whether or not it makes strategic sense to pull and refile in a given transaction.

- **The DOJ will publish a model timing agreement.** A timing agreement is a mechanism that infuses the merger review process with certainty in terms of timing, number of custodians, number of depositions, and other elements of the merger review process. They can allow the merging parties to plan for closing or to meet certain deadlines outlined in transaction agreements, among other potential benefits.

- **The DOJ outlined a number of reforms to timing agreements aimed at reducing the overall time of the merger review.** Specifically — and subject to modification by a deputy assistant attorney general — the DOJ will seek documents from a maximum of 20 custodians, will take a maximum of 12 depositions, and will make a decision within 60 days of the merging parties declaring substantial compliance. In return, the DOJ will expect faster and earlier document and data productions from the parties, narrower privilege logs, and a longer post-complaint discovery period.

- **The DOJ will enforce deadlines and specifications in civil investigative demands (CIDs) issued to third parties in connection with a merger investigation more vigorously.** Compliance with CIDs is burdensome, time-consuming, and expensive, particularly for third parties who are not benefitting when the

DOJ clears a transaction. This occasionally can lead to slow or incomplete third party compliance. Historically, CID enforcement actions were scarce, but Delrahim's comments indicate that the DOJ is prepared to take a hard line to obtain materials needed for its reviews in a timely manner. We are hopeful enhanced enforcement is accompanied by a corresponding reduction in the scope of data and documents requested from third parties. CID recipients should proceed cautiously and should consult experienced counsel to negotiate the scope of CID specifications and deadlines to minimize the burden and expense of compliance while warding against an enforcement action.

- **The DOJ will improve coordination with foreign enforcers in parallel merger investigations.** Delrahim's goal is to minimize delay resulting from enforcers' inability to cooperate and share information quickly and effectively.

- **The DOJ withdrew its 2011 Policy Guide to Merger Remedies (the Guide).** The Guide will be replaced with an updated policy, but, until that time, the 2004 Guide will be in effect. Delrahim stated that the DOJ's intent is to reduce delay resulting from protracted remedy negotiations. However, the revisions likely will also reflect current DOJ leadership's aversion to behavioral remedies even in vertical cases (where the agencies have traditionally employed such remedies). Delrahim reiterated the DOJ's position on behavioral remedies in his comments at the Georgetown conference, but he did not totally foreclose behavioral remedies. Another DOJ official, Julia Schiller, also commented on behavioral remedies in response to a question at the conference, saying that the DOJ will continue to consider behavioral remedies in a narrow range of cases where the transaction will create significant efficiencies that cannot be achieved if there is a structural remedy.

- **The DOJ will release aggregated merger review statistics periodically.** Current statistics relating to the average length of initial merger reviews and second requests are not regularly released. This reform will hopefully create greater accountability and transparency and will ensure that the DOJ staff follows the principles outlined by Delrahim.

These reforms are concrete steps that could lead to shorter, more transparent merger reviews; however, these welcome benefits do not come without a price. The DOJ's expectation is that the merging parties will implement reforms on their end to ensure the DOJ receives what it needs to evaluate whether a transaction will result in any competitive harm. (In fact, Delrahim titled his remarks, "It Takes Two: Modernizing the Merger Review Process.") This means even earlier and more frequent productions of documents and data; potentially earlier involvement of outside consultants, such as expert economists; and greater availability and involvement of personnel from each of the merging parties to respond to DOJ questions and provide necessary education.

While shorter merger review periods are welcome, these demands on the parties are often burdensome, a drain on the parties' time and financial resources, and disruptive to ordinary course business operations. There are, however, many ways the parties can strategize to maximize their cooperation while minimizing disruption and cost. Experienced antitrust counsel can guide the parties through the process and develop creative ways to satisfy DOJ requests, particularly through the use of timing agreements and appropriately scheduling educational meetings with DOJ staff and the front office. To better understand how you can most benefit from these reforms on your next deal or the extent to which these reforms will impact Federal Trade Commission merger reviews, contact the authors.

Delrahim's full remarks are available here.

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