JONES DAY | One Firm Worldwide℠

WHITE PAPER

January 2019

U.S. Antitrust Agencies Introduce Reforms to Speed Up Merger Reviews

The Trump Administration leadership at the U.S. Department of Justice and Federal Trade Commission have announced reforms regarding merger reviews. This Jones Day *White Paper* reviews these reforms and their strategic implications for merging parties. As described more fully below, there is good, bad, and unknown. The agencies' reforms will improve some merger reviews by reducing document and data requests and providing at least a soft commitment to published time frames. The reforms may actually add burden in some circumstances, and they may have little impact for mergers with complex or significant competitive implications.

TABLE OF CONTENTS

The Trump Administration leadership at the U.S. Department of Justice and Federal Trade Commission have announced reforms regarding merger reviews. This Jones Day White Paper reviews these reforms and their strategic implications for merging parties. As described more fully below, there are good, bad, and unknown factors. The agencies' reforms will improve some merger reviews by reducing document and data requests and providing at least a soft commitment to published time frames. The reforms may actually add burden in some circumstances, and they may have little impact for mergers with complex or significant competitive implications.

INTRODUCTION

The Hart-Scott-Rodino ("HSR") Act grants the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") a 30-day initial waiting period to decide whether to conduct an extended investigation and issue a Second Request (or allow the merger to proceed), followed by 30 additional days after the parties have complied with their Second Requests to decide whether to challenge the deal.[1] According to one source cited by the DOJ, the average length of reviews conducted by the U.S. agencies for "significant" mergers increased 65 percent to 10.8 months between 2013 and 2017.[2] This is beyond the time frame that Congress contemplated when it passed the HSR Act.

What is the cause of longer reviews? Multiple factors are probably to blame, including the growing volume of corporate documents and data, agency staffs' desire to ensure they do not overlook relevant evidence, and the agencies' increased willingness to litigate. Yet there remains room for a more focused effort by agencies to reach decisions more quickly, a fact the agencies have acknowledged.

At the DOJ, in September 2018, Assistant Attorney General Makan Delrahim announced reforms to improve the efficiency and transparency of the department's merger reviews. AAG Delrahim stated that the DOJ would aim to resolve "most investigations within six months of filing," with the expected caveat that complicated transactions might take longer to resolve. Efforts to decrease the length of merger reviews are commendable. To complete a review in that time frame, the DOJ expects that "the parties expeditiously cooperate and comply throughout the entire process."[3]

In November 2018, the DOJ implemented plans to reach these goals. Under a new "Model Voluntary Request Letter" and a new "Model Timing Agreement," the DOJ intends to focus the scope of pre-litigation investigations and to commit to a tighter schedule in exchange for the parties providing more information early and acting to meet new process deadlines.

WHAT IS A TIMING AGREEMENT, AND HOW DO THE DOJ's PROPOSALS IMPACT IT?

A Timing Agreement is an agreement between the parties and the agency setting out their obligations during the investigation and deadlines for concluding the merger review.[4] The Timing Agreement will identify the custodians whose files must be searched, data to be collected, the number of depositions allowed, and any meetings with agency leadership. The agreement does not override the HSR Act, but sets intermediate deadlines and commits the parties to not close their transaction for a certain period.

For the agencies, a Timing Agreement allows staff to focus on their examination of the merits of the transaction without simultaneously having to prepare a case for possible litigation. For parties, in exchange for agreeing to delay their transaction, the agency will narrow the Second Request, the number of depositions, and other aspects of an investigation. Therefore, while parties can decline a Timing Agreement, such a decision comes at a price: the agency may be less willing to grant modifications to the Second Request, commit to a cap on the number of depositions, or complete the review within a certain time.

The Model Timing Agreement introduces new provisions that differ from current practice. Some of these reforms favor merging parties and others seem to benefit the DOJ.

- **60-Day Decisions**: The Model anticipates that the DOJ will complete its review within 60 days following the parties' certification of substantial compliance with Second Requests.[5] This provides the DOJ with 30 days beyond the HSR Act's 30-day deadline. Currently, it is not uncommon for the DOJ to propose a Timing Agreement that provides staff with 90 or more days after parties have complied with Second Requests. Until now, there was no explicit baseline or goal for the DOJ to complete its review. This new, tighter

schedule provides some transparency for parties and indicates DOJ leadership's timing expectations for the staff. However, the Model notes this timing "will not be possible for some matters,"[6] which likely will lead to longer schedules for more complex reviews. Conversely, shorter periods of less than 60 days for less complex reviews may now be seen as a concession by DOJ staff. It would be unfortunate if 60 days becomes a baseline even for merger reviews that could be completed more quickly.

- **20 Custodians:** The Model limits to 20 the number of custodians whose files must be searched.[7] The collection and review of custodians' documents for responsiveness to the Second Request and then for privilege is time-consuming. Although parties often must search the files of more than 20 custodians (e.g., matters involving multiple product or geographic overlaps or complicated innovation or pipeline issues), there are many matters in which the agencies require fewer than 20 custodians. One may ask whether that number will drift upwards to 20 for those matters. The Deputy Assistant Attorney General ("DAAG") in charge of the matter can override the 20-custodian ceiling,[8] but the Model does not state criteria for this exception.
- **12 Depositions:** The Model limits the DOJ to 12 depositions per party.[9] Today, few DOJ investigations involve more than 12 depositions pre-litigation, so this is less of an accommodation than it may appear.
- **Front Office Meetings:** The Model grants the parties "an opportunity to meet" with DOJ leadership. However, the Model does not specify when or how frequently this opportunity may occur. In his September speech, AAG Delrahim indicated that the DOJ would permit "an initial, introductory meeting" with the front office and "key executives."[10] Parties must submit any analyses, data, or white papers at least five days prior to any such meeting.[11]

In exchange for these limitations,[12] parties must undertake substantial efforts, as discussed below.

Documents

A party using computer technology to facilitate its document review (as is increasingly common) must provide all documents responsive to the Second Request on a rolling basis, and complete production at least 30 days before certifying substantial compliance.[13] Documents initially identified as privileged, but later determined not to be privileged, must be produced at least ten days before substantial compliance. A log of privileged documents must be provided at least five days before the compliance date.[14]

Privilege Logs

The Model features additional obligations to eliminate "privilege log gamesmanship"[15]—where, according to the DOJ, a party withholds documents on the basis of privilege, only to later withdraw the privilege claim, "often on the eve of a particular deposition."[16] If more than five percent of any custodian's documents initially withheld for privilege later are determined not to be privileged, a party cannot certify substantial compliance until 30 days after that production.[17] If the threshold is triggered for just one custodian, it will delay that party's ability to certify compliance with the entire Second Request.

In practice, it can be difficult to forecast the number of privileged documents in any employee's files, which may vary depending on roles (compare sales versus legal personnel). Parties have a right to protect privileged material, and privilege assessments take time.

Data

Parties must provide certain data, such as granular profit-and-loss reports, at least 45 days prior to the compliance date.[18] Parties must provide other data (e.g., transaction level data and data describing customers) at least 30 days prior to substantial compliance.[19] The DOJ's FAQs on the Models criticize parties that produce data late in the Second Request review: "there is no reason that data called for in a Second Request cannot be produced substantially earlier than parties have produced it in the past."[20] In practice, data submissions can be extraordinarily large and complex, involving thousands of fields and links to other databases, some of which may not be easily produced as standalone files or have readily available data dictionaries. In addition, counsel must coordinate with DOJ's economist staff to ensure production of the right information in the right form. These dynamics can make producing data quickly a challenge.

Post-Complaint Discovery

The Model requires parties to commit to a post-complaint discovery period, should the DOJ litigate the transaction, in exchange for the pre-litigation concessions described above. The DOJ contends it is "doing its part to streamline and shorten the merger review process by agreeing to significant limitations on document custodians and depositions"[21] and

therefore parties must allow the DOJ additional time for discovery prior to any trial.[22] The Model does not indicate how much additional time the DOJ may seek or what factors may be used to calculate that time, but only notes that the amount of time "will depend on the individual facts and circumstances of each matter."[23]

This is a new requirement that benefits parties in some matters and hinders in others. Because a small number of investigations result in litigation, trading a shorter merger review for a longer post-complaint discovery period is a good deal for most matters, especially where the parties are confident they will not litigate. However, transactions that litigate are likely on a tight schedule to obtain a court decision ahead of the parties' business or contractual deadlines. In those cases, parties should consider the impact of a longer post-complaint discovery schedule on the termination date during negotiation of their agreement.

Deviations from Model

It is possible for agency staff and parties to propose Timing Agreement provisions that vary from the Model, but the DOJ emphasizes that "substantial deviation will require approval from the DAAG in charge of the investigation."[24] The DOJ then may insist on more time for its review if parties try to negotiate different terms. More important, as the Model is not binding on the agency, parties cannot insist that the staff be held to the Model terms. The strength of these reforms will lie in DOJ leadership declining to frequently impose changes that are more favorable to the DOJ or insisting upon the Model's terms even for transactions in which antitrust concerns can be resolved more quickly or in a less burdensome manner.

WHAT IS A VOLUNTARY REQUEST LETTER, AND DO THE PROPOSALS CHANGE IT?

A Voluntary Request Letter is a routine agency request in the first 30-day period following the HSR filing that seeks key information from merging parties to help the agency develop a preliminary understanding of the parties' businesses and the competitive impact of their combination. A Voluntary Request typically seeks company business plans, documents on competition, and customer contacts, among other things. The agencies use the merging parties' responses, along with the results of their own investigation, to determine whether to conduct an extended investigation. The Model Voluntary Request generally does not change what materials are sought, but should lead to greater predictability in the specific content of the request. In one change, the DOJ expects parties will submit this information "within a few days" after receiving a Voluntary Request.[25]

WHAT ARE THE PRACTICAL IMPLICATIONS FOR MERGING PARTIES?

At each stage of the process, from initial HSR filing to Second Request compliance to Front Office meetings, parties must be proactive, thoughtful, and diligent.

Gather Voluntary Request Materials Early

If parties anticipate questions from the agencies, they would be wise to identify and compile responsive materials so that they can react quickly if a Voluntary Request arrives. Materials should include top customer lists with contact details, win/loss reports, lists of possible product overlaps, strategic plans, and documents about competition in the relevant industry.

Providing these materials soon after receiving a Voluntary Request may help avoid a Second Request, or at least narrow the areas of further investigation. In some cases, parties may decide that, while this material is available, it does not make sense to provide all of it at that stage of the investigation. Preparing in advance will allow them to make a considered and strategic decision.

Organize the Second Request Response

To complete a Second Request review in six months, parties will have only 90 days to comply with the Second Request. Because parties must produce documents 30 days prior to certifying compliance, they are left with just 60 days to negotiate a custodian list with the staff, collect and review all potentially responsive documents, produce documents on a rolling basis, and complete privilege determinations. To meet this schedule, parties should take the following steps:

- **Prepare Potential Custodians**. Discussions with agency staff about the appropriate custodian list sometimes delay the parties' Second Request compliance. Unless appropriately managed, on both sides, these discussions can last weeks. To avoid unnecessary delay, parties should

prepare to identify likely custodians early in the process and address agency staff questions on the roles of company personnel.

- **Assess Data**. Discussions with agency economists about data can also delay the Second Request response. To avoid delay, parties should investigate the data they have, brief data personnel on the process, and prepare them to speak with agency staff about relevant computer systems. In addition, parties should collect data dictionaries for key systems, including those holding transaction data or financials statements. If they do not exist, parties should consider generating them.

Monitor Privilege Review

Under the Model Timing Agreement, if more than five percent of any custodian's documents initially withheld based on privilege are later determined not to be privileged, a party cannot certify substantial compliance until 30 days after that production. Parties should monitor the reinject rate for documents identified as possibly privileged to stay below five percent. A party even may need to delay producing certain documents to ensure it does not breach the five percent threshold.

Anticipate Front Office Meetings

Front Office management, the AAG or DAAG, have final decision-making authority on whether the DOJ will clear a deal without restrictions, require a remedy, or litigate. Parties should consider what materials (e.g., party documents or white papers) would help the management come to the right conclusion about the deal and ensure that they have produced those documents to the agency staff ahead of time.

WILL THESE MODELS ACTUALLY SPEED UP MERGER REVIEW?

The Models may very well shorten the *average* merger review, so long as the new ceilings do not also become a floor even in more routine reviews. In the average review, parties will probably spend less time negotiating a Timing Agreement, as the Model now sets default terms for most provisions, and the review period following Second Request compliance will be shorter, if the DOJ holds to its 60-day review period.

However, 60 days is not realistic for all deals, especially transactions with complex antitrust issues. Illustrating this, on the same day that the DOJ published its new Models, it reported that it would complete its review of Sprint's proposed merger with T-Mobile within *six months*, not 60 days, of when those parties complied with Second Requests. Especially for the most complex transactions, the goal of completing merger reviews within six months of HSR notification is ambitious given what is required to comply with most Second Requests. Further, the Model reforms do not address the increasing breadth and depth of Second Requests, a problem that DOJ leadership has acknowledged.[26]

WILL THESE MODELS REDUCE THE COSTS OF MERGER REVIEW?

Possibly. The Models, while promoting shorter time frames, do not reform the depth and breadth of typical Second Requests, which are a major driver of the costs of merger review. In most cases, the DOJ's reforms will require the same volume of work (and cost) but in a shorter time frame.

WHAT CHANGES HAS THE FTC IMPLEMENTED? ARE THE FTC's CHANGES MORE FAVORABLE FOR MERGING PARTIES THAN THE DOJ's?

The FTC's initiatives have a narrower scope than the DOJ's reforms. The FTC published its own Model Timing Agreement in August 2018. Shorter than the DOJ's Model, the FTC's version does not identify a set number of custodians, establish deadlines for productions, or cap depositions. It provides 60-90 days for the FTC to complete its review following the parties' Second Request compliance date.[27] The FTC commented that the "proposed date range shall not be interpreted as either a cap or a limit on the number of the days." Thus, compared to the DOJ's Model, the FTC's Model provides a longer time frame, by at least 30 days, for the FTC to complete its own review.

The FTC's Model states that its staff will meet with the parties "as reasonably requested by either FTC Staff or either Party." However, the FTC's Model does not override the FTC's practice to permit only one meeting with the front office.[28]

A comparison of the DOJ's Model Timing Agreement to the FTC's Best Practices for Merger Investigation, published in August 2015, illustrates the potential for divergence between

the agencies.[29] The FTC's Best Practices refer to the 2006 Merger Process Reforms, which established a "presumptive limit of 35 custodians if the parties met certain conditions,"[30] considerably more than the DOJ limit of 20.

The DOJ's reforms therefore may lead to further divergence with the FTC on merger processes. This will increase the stakes of the outcome of "clearance," the process by which one agency or the other is tasked to handle the investigation, which is largely based on which has more recent experience in the affected business (e.g., computer hardware versus software, metals and mining versus chemicals, oilfield services versus petroleum). Although as a policy matter the length and burden of a merger review should not depend on which agency handles an investigation, for a number of reasons, it does. Recently, there have been more clearance fights between the agencies and therefore more delay in one agency energetically pursuing the investigation. At a congressional hearing in December, the heads of the agencies testified that they are working together to develop a new process for clearance.

DO THESE REFORMS ALIGN WITH INTERNATIONAL ENFORCERS' TIMELINES?

The U.S. agencies' reforms do not change international coordination and agency cooperation, which the DOJ acknowledges can add more time.[31] Many large transactions now implicate numerous antitrust regimes, necessitating premerger filings in multiple jurisdictions. Authorities typically coordinate with counterparts in other jurisdictions. Occasionally, coordination reduces duplicative requests to the parties. More often than not, coordination adds time as authorities around the world seek to understand, and if possible, align evidentiary records, arguments, and remedies. Much of this falls outside the U.S. agencies' control.

CONCLUSION

Merging parties should welcome any reform that shortens the duration and lightens the burden of merger reviews. The U.S. agencies' recent changes will bring some improvement, and they should be commended for the effort to do so. More substantial reform would require addressing the desire of authorities to have reviewed more and more documents and data before deciding whether to allow or challenge a transaction. This dynamic has led to longer and more intense investigations, and the conventional wisdom is that it may have motivated the U.S. agencies to use broader Second Requests to extract longer timing agreements. Nevertheless, more substantial reform (such as decoupling Timing Agreements from limits on the scope of Second Requests) should not be expected in the foreseeable future. Today's merging parties should take advantage of the DOJ's goal to quicken merger investigations. With advance planning and diligent work, this should be possible in many investigations.

The Model documents can be found on the DOJ's website.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/.

Craig A. Waldman
San Francisco/Silicon Valley
+1.415.875.5765/+1.650.739.3939
cwaldman@jonesday.com

J. Bruce McDonald
Houston/Washington
+1.832.239.3822/+1.202.879.5570
bmcdonald@jonesday.com

Ryan C. Thomas
Washington
+1.202.879.3807
rcthomas@jonesday.com

Michael A. Gleason
Washington
+1.202.879.4648
magleason@jonesday.com

Keira M. Campbell, an associate in our New York Office, assisted with the preparation of this White Paper.

ENDNOTES

1 Parties can "extend" the initial waiting period if they withdraw a filing and refile within two business days. This process, known as a "pull and refile," restarts the initial 30-day waiting period.

2 Makan Delrahim, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, "It Takes Two: Modernizing the Merger Review Process," remarks at the 2018 Global Antitrust Enforcement Symposium (Sept. 25, 2018) (hereinafter, Delrahim Speech). Given the relatively small number of enforcement actions in any given year, a few significant matters can influence the average investigation length. The trend line for much of 2018 is encouraging, as the agencies have completed investigations more quickly.

3 *Id.*

4 In some matters, agency staff may ask for a unilateral commitment from the parties on timing, particularly when negotiations over Timing Agreement terms or leadership approvals are prolonged.

5 U.S. Dep't Of Justice, Antitrust Div., Model Timing Agreement, at 2 (Nov. 2018) (hereinafter, Model Timing Agreement).

6 *Id.* at n.2.

7 *Id.* at 2.

8 *Id.* at n.3.

9 *Id.* at 7.

10 Delrahim Speech at 8.

11 Model Timing Agreement at 8.

12 U.S. Dep't Of Justice, Antitrust Div., "Frequently Asked Questions—Voluntary Requests and Timing Agreements" (November 2018) at 4 (hereinafter, Model FAQs).

13 Model Timing Agreement at 3. The Model Timing Agreement also provides instructions for parties who are not using technology assisted review, *see* page 4.

14 *Id.* at 4.

15 Model FAQs at 4.

16 *Id.*

17 Model Timing Agreement at 3 n.5.

18 *Id.* at 4.

19 *Id.* at 5.

20 Model FAQs at 4.

21 *Id.*

22 Model Timing Agreement at 9.

23 *Id.* at n.14.

24 Model FAQs at 5.

25 U.S. Dep't Of Justice, Antitrust Div., Model Voluntary Request Letter (Nov. 2018).

26 Delrahim Speech at 5.

27 Federal Trade Commission, Bureau of Competition, Model Timing Agreement (Aug. 2018).

28 Bruce Hoffman, Director of Bureau of Competition, "Timing is Everything: The Model Timing Agreement" (Aug. 7, 2018).

29 Federal Trade Commission, Bureau of Competition, "Best Practices for Merger Investigations" (Aug. 2015).

30 *Id.* at 3.

31 Delrahim Speech at 2 ("Necessary coordination with our foreign counterparts—while beneficial—could add time.").