Client Alert

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DOJ Announces Efforts to Reduce Time and Burden of Merger Review

In a speech delivered on September 25, 2018, Makan Delrahim, Assistant Attorney General of the Antitrust Division of the Department of Justice (the Division), announced an initiative to "modernize[] the merger review process." Saying that the job of US antitrust enforcers is "to get the right result in an efficient manner," Mr. Delrahim announced a plan to complete all but the most complex of investigations within six months of submitting a Premerger Notification and Report (also known as a Hart-Scott-Rodino or HSR Filing). But he also acknowledged that achieving this goal is a "two-way" street. In addition to several initiatives that the Division will undertake to increase the efficiency of its process, the Division will also expect certain commitments from merging parties and witnesses.

Key Takeaways

1. Parties must be prepared for early substantive engagement with the Division.

The Division has indicated an intention that increasing transparency will ensure a speedier merger review process going forward. But the timing of a merger review is not solely in the Division's control. For their own part, the merging parties must respond to the investigators in a timely fashion. These recently announced process reforms underscore the importance for merging parties to be prepared for substantive engagement with the Division early in the process—even in instances when the parties may not expect significant review.

2. Merger review is not "one size fits all."

In recent years, time and expense burdens on parties and nonparty witnesses in merger reviews have significantly increased. We commend the Division for its thoughtful efforts to reduce these burdens. We note, however, that merger review is not "one size fits all." There may be matters in which timing agreements, voluntary request letters or the other parts of this present initiative may not be appropriate or desired or may require changes to fit the facts of the transaction and review at hand. As the Division implements these initiatives, we hope that the Division staff, management and the Front Office retain sufficient flexibility to adjust these processes when doing so makes sense for the merging parties and the Division.

Merger Process Reform Summary

The Division has committed to:

1. Involve Division management (the Front Office) in meetings with the filing parties early during the initial HSR 30-day waiting period. This will help the Division focus its investigation early by getting a better understanding of the parties, the industry and the rationale for the transaction.
2. Publish a Model Voluntary Request Letter, which will enable parties to better anticipate the kinds of documents and information that the Division may request during the initial waiting period.

3. Have a concrete plan for the Division staff to handle instances in which the parties pull and refile HSR filings to make the best use of the additional time to either close or narrow the scope of investigations.
4. Limit the scope of Second Requests. The Division will now limit its document requests to 20 custodians and depositions to 12 witnesses. But note that the Deputy Assistant Attorney General overseeing a matter may authorize additional custodians and witness depositions as needed.
5. Publish a model timing agreement. This is intended to limit the amount of time spent negotiating these agreements so parties and staff can focus on the underlying substantive arguments. But it is not clear how flexible the Division will be in altering the model agreement to meet the needs of specific transactions—will Division staff be authorized to make minor tweaks, or will all changes to the timing agreement require approval from the Front Office?
6. Require nonparties to comply with Civil Investigative Demands in the specified return date/time periods. Mr. Delrahim specifically addressed the issuance of CIDs to nonparties, saying that the Division is "going to hold CID-recipients to the deadlines and specifications in the CIDs we issue. When necessary, we will not hesitate to bring CID enforcement actions in federal court to ensure timely and complete compliance." We worry that this will create significant burdens on nonparties. In our experience, CIDs are typically written with the expectation of compliance within two weeks of issuance. In many if not most cases, compliance in such a short timeframe—particularly for uninterested nonparties—is just not possible.
7. Coordinate better with parallel investigations occurring in foreign jurisdictions.
8. Reevaluate the Division's remedies policies. Mr. Delrahim announced that the 2011 Policy Guide to Merger Remedies had been withdrawn so that the Division may review the standards. The 2004 Remedies Guide is in effect until further notice.

In exchange for these commitments from the Division, the Division will expect parties to:

1. Make faster and earlier document productions. Mr. Delrahim specified that the Division would expect a "more robust rolling production" in instances when traditional document reviewers are employed. In instances where the parties utilize technology-assisted review, "the bulk of the production" must be completed a certain number of days before the parties certify substantial compliance.
2. Produce data earlier in the process. The Division will expect "early cooperation on identifying relevant data" and "production of usable data substantially before the second request compliance date." But this expectation relies on the assumption that "[f]requently, there is no reason that data cannot be produced substantially earlier than production of the main bulk of documents." In our experience, data is frequently requested in formats not used by the filing parties, or the parties are expected to produce data that is not normally kept in the ordinary course of business.
3. Do a better job of complying with production obligations, particularly with regards to privileged (or non-privileged) documents. The Division believes that many parties engage in "gamesmanship" with regards to claims of privilege, and has had issues with parties producing large numbers of previously withheld documents shortly before depositions in the past. While this issue may exist, it is not clear whether the Division will still allow parties to defer on producing privilege logs.
4. Agree to longer post-complaint discovery periods. In order to have a faster review process prior to issuing a complaint to enjoin a merger, the Division will expect the parties to agree to longer timelines to conduct discovery after a complaint is issued.

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