September 26, 2018

Department of Justice Announces Reforms to Merger Review Process, Aims to Resolve Most Investigations within Six Months

In a speech delivered on September 25, 2018 at the 2018 Global Antitrust Enforcement Symposium at Georgetown University, Assistant Attorney General Makan Delrahim announced that the Department of Justice (DOJ) Antitrust Division "will aim to resolve most [merger] investigations within six months of filing" if parties to the merger cooperate closely with the DOJ throughout the review process.[1] In furtherance of this goal, Delrahim announced several reforms to what the DOJ will generally require from parties in a "second request," as well as reforms to standard practice at other stages of a merger investigation. Delrahim also announced that the DOJ is withdrawing its 2011 Policy Guide to Merger Remedies and will release an updated policy. In the meantime, the 2004 Policy Guide has been reinstated.

"Second Request" Reforms

A small percentage of deals notified to the DOJ will result in an onerous "second request" for information, including documents and data. Many of the significant reforms to the DOJ's investigatory process will be set forth in a new model timing agreement, which will provide a framework for the DOJ and deal parties to agree on the scope and duration of this aspect of the DOJ's investigation.

These reforms include the following (subject to modification by a deputy assistant attorney general):

- an assumption "that **20 custodians** per party will be sufficient"
- a presumptive limit of **12 depositions**
- a commitment to reach a decision within **60 days** from when the parties certify compliance

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[1] Makan Delrahim, It Takes Two: Modernizing the Merger Review Process (Sept. 25, 2018), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-2018-global-antitrust. Delrahim's announcement follows earlier speeches by several of his deputies discussing the DOJ's desire to increase the efficiency of its merger investigations. *See, e.g.*, Bernard A. Nigro, Jr., A Partnership to Promote and Protect Competition for the Benefit of Consumers (Feb. 2, 2018), *available at* https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-barry-nigro-delivers-remarks-annual-antitrust-law; Donald G. Kempf, Jr., Remarks at American Bar Association's Antitrust Fall Forum (Nov. 16, 2017), *available at* https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-donald-g-kempf-jr-delivers-remarks-american-bar. While it has not yet released similar guidance, the FTC has also expressed an intention to try to reduce the length of merger investigations.

In turn, the DOJ will expect from the deal parties:

- "faster and **earlier productions of documents**" and **data**
- **elimination of privilege "gamesmanship"** wherein parties initially withhold and then "de-privilege" significant numbers of documents that "never should have been withheld in the first place"
- when the DOJ challenges a merger in court, **a lengthier period of discovery**

Other Investigation Reforms

Delrahim also announced the DOJ's openness to meeting early on with parties to a deal – especially with key businesspeople – "to understand their deal rationale and any other facts they believe will be important to [the DOJ's] analysis." Further, the DOJ expects to post a model "voluntary access letter" on the Antitrust Division's website with the aim of setting forth the type of information the DOJ will be interested in obtaining from the parties to help the DOJ make an initial assessment during (or perhaps even before) the initial waiting period after the DOJ is initially notified of the transaction. The DOJ has also undertaken "to ensure that [it has] an investigative plan in place to maximize [its] use of the additional time" it gets when the parties to a deal choose to "pull and refile" their HSR notifications prior to the expiration of the initial waiting period, which, in certain cases, may reduce in scope or obviate entirely the need for a formal second request. Finally, the DOJ will be more aggressive in enforcing timely compliance with civil investigative demands issued to non-parties with information relevant to merger investigations.

Withdrawal of Policy Guide to Merger Remedies

Finally, Delrahim announced that the DOJ is withdrawing its 2011 Policy Guide to Merger Remedies and will release an updated policy. In the meantime, the 2004 Policy Guide has been reinstated. Among other things, this action demonstrates an explicit return to a strong policy preference for structural remedies (*i.e.*, remedies requiring business unit divestitures) over conduct remedies, something that Delrahim has repeatedly stated. Indeed, under the 2004 policy, conduct remedies are disfavored and appropriate only when required to ensure an effective structural remedy or when "significant efficiencies" would be lost if a structural remedy were imposed or the deal were blocked altogether. In addition, under the 2004 policy, the DOJ requires that a remedy will only be accepted if there is a "sound basis for believing" that a merger will substantially reduce competition. "The Division should not seek decrees or remedies that are not necessary to prevent anticompetitive effects, because that could unjustifiably restrict companies and raise costs to consumers."[2]

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[2] Antitrust Division Policy Guide to Merger Remedies (Oct. 2004), *available at* https://www.justice.gov/atr/archived-antitrust-division-policy-guide-merger-remedies-october-2004.

Key Takeaways

While the announced process reforms do not affect a deal's underlying substantive risk – and there may be exceptions where the DOJ will push to deviate from these guidelines – the reforms are welcome developments for companies contemplating deals which may be reviewed by the DOJ. They explicitly acknowledge the DOJ's understanding that "[d]elay is a form of uncertainty and risk, [which the agency] should seek to remove . . . from the merger-review process whenever possible." While, as Assistant Attorney General Delrahim stated, the DOJ "will never compromise [its] ability to enforce the law effectively," the reforms nevertheless demonstrate that the Antitrust Division is keenly attuned to the burdens that merger investigations may place on deal parties and is open to close cooperation with those parties to increase the efficiency of what can be quite onerous undertakings. Indeed, the timelines of recent DOJ investigations – including those involving Cigna-Express Scripts[3] and Disney-Fox – indicate that the DOJ has already endeavored to accelerate its merger reviews in accord with this announcement.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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