

DOJ's Antitrust Division Announces Key Changes to Merger Review Process

29 October 2018

On September 25, 2018, in a speech delivered at the 2018 Global Antitrust Enforcement Symposium, Department of Justice Antitrust Division Assistant Attorney General Makan Delrahim announced a series of incremental policy changes to expedite and “modernize” the merger review process.¹ According to statistics cited by Mr. Delrahim, the length of time for the U.S. antitrust agencies to resolve significant merger investigations has increased by 65% between 2013 and 2017, to almost 11 months.² Moving forward, the DOJ will aim to reverse the trend of increasingly longer merger reviews, which Mr. Delrahim described as a “problem” and “concern” among the business community, by taking specific steps to accelerate several aspects of the process.

The DOJ will expect significant cooperation from merging parties to achieve a faster result

There are two particularly noteworthy changes:

- First, the DOJ will aim to complete merger reviews (including those involving significant antitrust issues) within six months.
- Second, the DOJ officially withdrew its 2011 Policy Guide to Merger Remedies, signaling a less interventionist approach towards vertical merger enforcement.

The changes articulated by Mr. Delrahim have a merger-friendly tone. Indeed, Mr. Delrahim approvingly quoted the DOJ Antitrust chief from the Reagan Administration, who believed “mergers are to be in general facilitated.”³ That said, parties considering

strategic transactions should continue to exercise caution and should not necessarily expect a faster outcome or more favorable result, for three reasons we discuss below. Most importantly, as the title of Mr. Delrahim's speech – "It Takes Two" – suggests, the DOJ will expect significant cooperation from merging parties to achieve a faster result.

The DOJ will pursue several initiatives to expedite the merger review process

The remainder of this *Alert* summarizes the specific changes to the DOJ's merger review process articulated by Mr. Delrahim and offers takeaways for parties considering strategic transactions in light of these changes.

Summary of the Changes

Mr. Delrahim described several initiatives the DOJ will pursue to expedite the merger review process:

- **Initial Meetings with the DOJ's Front Office.** During the initial stage of review, the DOJ's Front Office will welcome meetings with the merging parties, including the parties' executives. This is a meaningful change: meetings with the Front Office in the initial stage of an HSR review are rare. Time will tell whether the Front Office realistically will be able to honor this commitment.
- **Model Voluntary Request Letter.** The DOJ will publish on its website a model voluntary request letter in an effort to provide greater clarity to merging parties about the information the DOJ routinely requests in the initial stages of the review. Parties represented by experienced antitrust counsel already have access to this list of questions, so the publication itself is not a material change. Neither is the DOJ's encouragement to provide these materials early in the process, "if not before filing [HSR]." The onus has been and remains on the merging parties to provide relevant documents and information to the DOJ as soon as possible to expedite the process.
- **Tracking Pull-and-Refiles.** The DOJ will be implementing a system to track "what happens" when parties voluntarily withdraw and subsequently refile their HSR filings.⁴ It may come as a surprise that the DOJ did not actively track this information previously. In any event, this is a positive, transparency-increasing

development. (So is the DOJ's commitment to release statistics regarding the length of merger reviews, another change mentioned by Mr. Delrahim.) Although details of the tracking system have not been revealed, it would be very helpful for the DOJ to publish as many additional data gathered from this exercise as possible, as it would assist parties in deciding whether to pull and refile.

- **Model Timing Agreement Publication.** The DOJ announced it is publishing a model timing agreement. Often in the HSR process, the DOJ and merging parties enter into agreements to govern Second Request scope, compliance and timing. In many cases, timing agreement negotiations have extended DOJ investigations. The model agreement is intended to avoid such delays. While everyone can agree that more certainty around timing agreements is a good thing, there are several provisions in the FTC's recently published model agreement merging parties may find difficult to accept without negotiation.⁵
- **Model Timing Agreement Changes.** In addition, in the context of timing agreements, the DOJ signaled an intent to reduce the number of Second Request document custodians and depositions, and to reduce the time from Second Request compliance to a final enforcement decision by the DOJ. At the same time, "[i]n exchange for these benefits," the DOJ is requiring merging parties to produce documents and data faster, eliminate "gamesmanship" with respect to assertion of the attorney-client privilege, and consent to a longer period of post-complaint discovery in the event the DOJ ultimately decides to sue. In other words, merging parties can expect faster review times, but only if the parties are willing to concede to the DOJ's demands that can impact overall deal timing in some cases.
- **CID Compliance.** Mr. Delrahim also stressed the DOJ will more routinely bring actions in federal court to compel compliance with Civil Investigative Demands (CIDs), subpoenas issued to third parties in connection with merger reviews. This is good news for merging parties stuck waiting on key third parties to turn over documents and data to the DOJ. For third parties bemoaning compliance with a CID relating to a competitor's merger, however, this implies the DOJ will be less likely to agree to CID extensions and will take an aggressive approach towards enforcement.
- **Withdrawal of 2011 Policy Guide to Merger Remedies.** Perhaps most notably, Mr. Delrahim announced the DOJ is withdrawing the 2011 Policy Guide to Merger Remedies.⁶ The 2011 Policy Guide meaningfully departed from the DOJ's 2004 Policy Guide by endorsing "conduct remedies" as an acceptable solution to harm caused by mergers, particularly vertical mergers.⁷ By contrast, the 2004 Policy Guide strongly disfavors conduct remedies, in preference of "structural remedies" (i.e., divestitures).⁸

The withdrawal of the 2011 Policy Guide does not come as a surprise given Mr. Delrahim's criticism of conduct remedies as ineffective and burdensome.⁹ The official policy change, however, is significant. Indeed, Mr. Delrahim's DOJ challenged the *AT&T/Time Warner* merger earlier this year, and until recently, it was unclear whether the DOJ would continue to intervene in vertical deals. Mr. Delrahim's announcement signals a continued shift away from conduct remedies. It also demonstrates a preference against bringing vertical merger enforcement actions absent a material, imminent threat of input or customer foreclosure that would be likely to harm competition substantially.

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Takeaways

The tenor of the DOJ's policy changes is positive for parties considering strategic transactions. Until we learn more about the implementation of these forthcoming changes, however, parties should not count on immediate or material reductions in the length of investigations, for three reasons.

- First, the DOJ made clear that merging parties must expeditiously cooperate throughout the process, and that not every investigation can be resolved in six months. To realize any timing benefit, merging parties will need to work with an increased sense of urgency to meet the DOJ's standard of compliance. In practice, compliance is often difficult given the adversarial nature of the process. We expect the DOJ will make a significant push for merging parties to produce documents and data earlier in the Second Request process than in the past. And, with only a limited reduction in the burdens associated with the process, we are not convinced there is meaningful upside for merging parties – particularly given the absence of the DOJ's model timing agreement, which may contain onerous provisions. In order for real progress to be made, compromise will be necessary from merging parties and from the DOJ. Whether compromise can actually happen in a way that expedites merger reviews remains to be seen.

- Second, it is unclear whether the FTC will adopt these changes. The FTC and DOJ have concurrent merger enforcement jurisdiction, but different processes, internal rules and influences. It is not always clear whether a transaction will be assigned to the FTC or the DOJ, so it would be unwise to rely on the DOJ's commitment without knowing the DOJ will review a particular transaction. Also, recent remarks by FTC Commissioner Rohit Chopra suggest the FTC may in some respects take a more active approach to merger enforcement, particularly with respect to transactions by private equity sponsors.¹⁰ In a speech delivered one day prior to Mr. Delrahim's, Mr. Chopra urged the Commission to scrutinize "roll-up" transactions and private equity acquisitions of divestiture assets more closely, and generally to better understand the effect of the private equity business model on competition and the economy.¹¹ Mr. Chopra was the lone vote against the divestiture proposed to resolve U.S. competition concerns in the *Linde/Praxair* merger, primarily on the basis that the buyer is a joint venture between a strategic company and private equity sponsor.¹²
- Third, the DOJ has a strong record of recent successful horizontal merger challenges in federal court. In the first 21 months of the Trump Administration, the DOJ has continued to enforce the antitrust merger laws actively, and Mr. Delrahim has shown little reluctance to litigate or seek divestitures to fix anticompetitive mergers. Indeed, in his speech, Mr. Delrahim said the DOJ is not "unilaterally disarming" and "will never compromise [its] ability to enforce the law." Litigated cases, or cases where divestitures are not proposed as an upfront solution but are ultimately required, take longer to resolve.

Merging parties can expect the DOJ to approach vertical mergers like horizontal mergers moving forward

Also, merging parties can expect the DOJ to approach vertical mergers like horizontal mergers moving forward. The DOJ will seek divestitures to resolve vertical concerns and will sue to block vertical deals raising competitive concerns that cannot be resolved by structural remedies acceptable to the DOJ. At the same time, the DOJ will in some instances elect not to require divestitures or to litigate. The DOJ's approach in three recent high-profile vertical transactions illustrates the point. First is the DOJ's highly publicized lawsuit to block the AT&T/Time Warner transaction, which the DOJ lost in district court and remains on appeal. Second, in September, the DOJ approved Cigna's \$52 billion acquisition of Express Scripts without conditions.¹³ Third, in October 2018, the DOJ approved CVS Health's \$69 billion acquisition of Aetna subject

to divestiture of Aetna's Medicare prescription drug plan business to WellCare Health Plans.¹⁴ Given the broad range of potential outcomes and the DOJ's apparent rifle shot approach to vertical cases, merging parties may find the DOJ's revised policy regarding vertical merger enforcement creates more risk and uncertainty.

1. "It Takes Two: Modernizing the Merger Review Process," Makan Delrahim, Sept. 25, 2018,

<https://www.justice.gov/opa/speech/file/1096326/download>↔

2. See Alec Burnside et al., "DAMITT Q2 2018 Update: Duration of Significant Antitrust Merger Investigations May Have Plateaued Despite Unchanged Levels of Enforcement in the US and EU" (July 19, 2018),

<https://www.dechert.com/knowledge/hot-topic/damitt--how-long-does-it-take-to-conduct-significant-u-s--antitr.html>↔

3. See "It Takes Two: Modernizing the Merger Review Process," Makan Delrahim, Sept. 25, 2018, fn. 5.↔

4. Called a "pull and refile," this often is done by merging parties to extend the HSR Act's 30-day waiting period and avoid a Second Request.↔

5. "Timing is everything: The Model Timing Agreement," Bruce Hoffman, Aug. 7, 2018, <https://www.ftc.gov/news-events/blogs/competition-matters/2018/08/timing-everything-model-timing-agreement>↔

6. "Antitrust Division Policy Guide to Merger Remedies, U.S. Department of Justice Antitrust Division," June 2011, <https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf>↔

7. Examples of conduct remedies include the obligation to license or sell an input on commercially reasonable and nondiscriminatory terms to third parties; the extension or modification of an existing contractual commitment; a prohibition on retaliatory conduct; and the imposition of firewalls.↔

8. "[C]onduct remedies generally are not favored in merger cases because they tend to entangle the Division and the courts in the operation of a market on an ongoing basis and impose direct, frequently substantial, costs upon the government and public that structural remedies can avoid." "Antitrust Division Policy Guide to Merger Remedies," October 2004, <https://www.justice.gov/atr/antitrust-division-policy-guide-merger-remedies-october-2004>↔

9. In his November 2017 keynote address at the ABA Antitrust Fall Forum, Delrahim stated, "[I]ike any regulatory scheme, behavioral remedies require centralized decisions instead of a free market process. They also set static rules devoid of the dynamic realities of the market. With limited information, how can antitrust lawyers hope to write rules that distort competitive incentives just enough to undo the damage done by a merger, for years to come? I don't think I'm smart enough to do that." ↔

10. "FTC Commissioner hits out at private equity," Global Competition Review, Sept. 25, 2018, <https://globalcompetitionreview.com/article/usa/1174735/ftc-commissioner-hits-out-at-private-equity>↔
11. The FTC's 2017 Merger Remedy Study addressed this topic. "The FTC's Merger Remedies 2006-2012, A Report of the Bureaus of Competition and Economics," January 2017, https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf. Kirkland previously summarized the implications of the FTC's 2017 Study, see "FTC Merger Remedy Study," Feb. 23, 2017, https://www.kirkland.com/siteFiles/Publications/FTC_Merger_Remedies_Study.pdf↔
12. In the Matter of Linde AG, Commission File No. 1710068, Statement of Commissioner Rohit Chopra (Oct. 22, 2018), available at https://www.ftc.gov/system/files/documents/public_statements/1416947/1710068_praxair_linde_rc_statement.pdf↔
13. Statement of the Department of Justice Antitrust Division on the Closing of Its Investigation of the Cigna-Express Scripts Merger, Sept. 17, 2018, <https://www.justice.gov/atr/closing-statement>↔
14. "CVS, Aetna win U.S. approval for \$69 billion deal," Diane Bartz & Caroline Humer, Reuters, Oct. 10, 2018, <https://www.reuters.com/article/us-aetna-m-a-cvs-health/cvs-aetna-win-us-approval-for-69-billion-merger-idUSKCN1MK1TQ>; "Justice Department Requires CVS and Aetna to Divest Aetna's Medicare Individual Part D Prescription Drug Plan Business to Proceed with Merger," Department of Justice Office of Public Affairs, Oct. 10, 2018, <https://www.justice.gov/opa/pr/justice-department-requires-cvs-and-aetna-divest-aetna-s-medicare-individual-part-d>↔

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