

A Practical Guide To Merger And Acquisition Antitrust Clearance

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The antitrust laws stand as a potential roadblock, if you will, to the successful completion of a strategic merger or acquisition. Strategic acquisitions – those involving horizontal competitors, or upstream and downstream suppliers and customers – draw the interest and curiosity of antitrust enforcement agencies that could make or break a transaction.

The Value Of Prospective Planning

The value of prospective antitrust planning cannot be overemphasized. The deal may or may not trigger a filing in the U.S. or other countries, but without pre-planning you won't be prepared if a filing is required, and the agency review process, whatever that ultimately may be, will be frustrating and more time-consuming and costly than you dreamed.

Antitrust preparation for a strategic acquisition ideally should begin upon contemplation of the potential transaction. It is not unusual for veterans of strategic mergers to prepare preliminary antitrust analyses a year or more in advance as they "scan the horizon" for complementary acquisitions. Not only is it important to assess potential transactions to determine whether they make business sense; deals must also be reviewed to see what issues may be raised in the antitrust arena. Early assessment of antitrust risks is critical to minimizing those risks and helping the transaction pass governmental antitrust scrutiny.

Common problems that upfront planning can help avoid or minimize are:

1. Failure to make a required pre-merger filing, with the possible attendant government prosecution and civil penalties;
2. Creation of documents that haunt you in the agency review process;
3. Delay in the closing of the transaction; and
4. Pre-closing information sharing that raises "gun-jumping" or other antitrust concerns.

The following is a brief detailing of the kinds of antitrust pre-planning that can help avoid or minimize these problems.

Premerger Filing Requirements

Engaging antitrust counsel, even at the stage of scanning the horizon, can be beneficial. Antitrust advice may be significant in selecting an acquisition target – will a particular deal raise antitrust flags? Will Hart-Scott-Rodino (HSR) premerger notification filings be required? Are there specific competitive issues that the agencies will be interested in that perhaps could be avoided? Will filings in foreign jurisdictions be required? How do I conduct due diligence on a competitor?

Once the decision is made to go forward with a particular merger, antitrust

counsel can be helpful in identifying and analyzing any antitrust risks of the transaction, including the structure of the transaction. What might seem reasonable from a business perspective, for example, a series of follow-on acquisitions, may be problematic under the HSR Act. No company wants to find itself in the unhappy situation of not making a required HSR filing. The civil penalties for failure to file are up to \$16,000 for each day that has passed since the filing should have been made. Obviously, this adds up quickly.

It is not uncommon for an HSR filing violation to result in penalties of \$1 million or more. And, it is likely that a failure to file will eventually be brought to the agencies' attention. While HSR filings bring to the agencies most of their merger investigations, agency staff keep apprised of industry happenings through reading the trade press, etc., and receiving complaints from the public, including your competitors and customers.

The Federal Trade Commission (FTC) and the Department of Justice (DOJ) have concurrent jurisdiction to enforce the antitrust laws. However, there are some historical dividing lines between the two agencies, based on industries. While these lines are blurring, it may be possible to predict which agency will conduct an antitrust investigation of a particular transaction, and this prediction may be important to anticipating outcome and timing.

The Timing Of The Transaction

Once a potential acquisition or merger has been identified, the typical goal is to accomplish it quickly and efficiently. There may be business reasons for delay, but you certainly don't want to have an unexpected delay as a result of the antitrust agency review process.

Antitrust counsel can assist in developing a reasonable expectation as to the timing of the completion of the agency review and the closing of the transaction. Reportable transactions face the statutory 15- or 30-day initial waiting period, which can be terminated early if the agency has no antitrust concerns. Counsel can help predict the likelihood of early termination of the waiting period or of an in-depth agency review involving a second request, and they can analyze possible agency interest in divestitures of assets or other measures designed to solve any antitrust concerns the agency may have.

In the initial waiting period it is fairly common for agency staff to request submission, on a voluntary basis, of certain customer and competitor information and planning documents. Quick cooperative response to these requests may assist in avoiding a second request, or at least may help narrow the scope of any second request that an agency issues.

Issuance of a second request extends the waiting period prior to closing until the parties to the transaction "substantially comply" with the document and information requests contained in it. Once the parties make substantial com-



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pliance, the agency has an additional 20 days within which to decide to permit the transaction to close, or to challenge it. Substantial compliance with a second request is time-consuming and costly. Counsel can help structure an efficient document search and streamline substantial compliance with a second request.

Depending on the severity of the antitrust issues that arise in the analysis of the proposed transaction, and the mindset of the company regarding possible divestiture or other remedies, an early proposal to the agency to "fix" the competitive problem can positively affect the timing of the closing. If an early fix is not palatable, later agreed-to consent decree remedies can avoid a lawsuit. Think through these possibilities early with antitrust counsel, and be prepared, so that your transaction may close within a reasonable timeframe.

Document Creation

From the time a company begins contemplating a transaction, it is likely that business executives, consultants, and others are writing documents – and emails – analyzing the goals, advantages, disadvantages, costs, etc. of the deal. While these documents may be necessary for the decision-making process, proper planning can help minimize, if not avoid, some of the potential antitrust harm from the creation of these documents.

It is particularly important in a strategic acquisition that will undergo agency review that documents not be created that will give the agency ammunition for opposing the deal, or at a minimum cause you and your company angst during the investigation process. The agencies like documents. They are tangible evidence of the corporate mindset and often set the framework for the agency's understanding of the transaction. And documents are among the first information the agency obtains about the transaction. The HSR filing itself requires the attachment of what are called 4(c) documents: *studies, surveys, analyses, and reports prepared by or for officers or directors for the purpose of evaluating and analyzing the acquisition with respect to market shares, competition, competitors, markets, and potential for sales growth or expansion into product or geographic markets.*

Obviously, business executives, investment bankers, and other consultants in contemplation of a proposed transaction will create 4(c) documents. Antitrust counsel can give the appropriate cautions as to types of statements, or words to avoid, if possible, as the documents are created. And, to the extent these cautions cannot be adhered to, or aren't, for whatever reason, antitrust pre-planning will help counsel's understanding of the reasons for the possibly harmful statements in such documents, and will help counsel understand the "story" that ultimately may have to be presented to the agency.

Additionally, since Item 4(c) requires only the final or latest draft of a document presented to officers or directors, antitrust counsel can review draft documents prior to their presentation to officers or directors and point out any antitrust problems, some of which may be solved by the next or final draft.

The agency review process initially

focuses on the filing itself, with its attached 4(c) documents. But, once an investigation is opened, the agency may issue a formal request for additional information, referred to as a "second request." The second request is a broad-based subpoena-type demand that covers the waterfront of corporate documents. Substantial compliance with the second request is required in order for the agency to complete its investigation and hopefully clear the transaction so that it may close. Documents created within the past several years prior to the issuance of the request are called for, thus, the need for caution in document creation as a general corporate practice.

Problematic Information Sharing

Information sharing between the parties to an un consummated transaction, from the time of first discussions through due diligence and onward, can raise antitrust concerns at the agency. Antitrust counseling on the kinds of information sharing that causes concern inside or outside the context of a proposed acquisition is, again, a good corporate practice as part of a compliance program. Sharing competitively sensitive information raises red flags at the agencies.

Information sharing during the process of completing a transaction, but prior to closing, may result in an accusation by the agency of "gun-jumping" – engaging in behavior that indicates that the acquiring company is taking operational control of the yet-to-be-acquired company. Again, penalties are severe, with the parties subject to a maximum civil penalty of \$16,000 per day for each day they are in violation of the HSR Act's prohibitions in this regard.

Post-Consummation Filing

When persons discover that they have consummated a reportable acquisition without filing and waiting, they should immediately notify counsel, engage the FTC Premerger Notification Office, and subsequently file their HSR notification as soon as possible. In addition to submitting a completed form, the FTC will require the parties to provide detailed information, signed by a company official, explaining all of the facts relating to why the HSR Act procedures were not followed.

Parties that fail to follow appropriate HSR Act procedures may be liable for a civil penalty of up to \$16,000 for each day of each violation and may be subject to other equitable relief. In determining whether and how much civil penalties are warranted, the FTC and DOJ will consider all of the facts, including, among other factors, the parties' explanations.

Additional Information

Kelley Drye's Antitrust and Trade Regulation practice issues a reference guide, "Premerger Antitrust Requirements: The 2010 Hart-Scott-Rodino Premerger Notification Sourcebook," designed to help executives and professionals stay abreast of developments that may impact their business or next deal. The Sourcebook, which includes antitrust clearance guidance and the HSR premerger notification form and instructions, is available for download at http://www.kelleydrye.com/news/articles_publications/0607.

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