

CLIENT ALERT

Reform of DOJ's Merger-Review Process: AAG Delrahim Announces Changes Aiming to Complete Most Merger Investigations Within Six Months

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The head of the Antitrust Division at the Department of Justice yesterday announced several reforms intended to expedite the agency's merger-review process and limit the burdens on both the DOJ and merging parties. But the proposed reforms also come with "escape valves" for the agency and impose certain obligations on merging parties in return for the prospect of an expedited review.

At the 2018 Georgetown Global Antitrust Enforcement Symposium held on September 25, Assistant Attorney General (AAG) Makan Delrahim recognized the need to address burdensome and lengthy merger reviews, which, he noted, averaged nearly 11 months according to one source. Under the announced reforms, AAG Delrahim said the DOJ will endeavor to complete most merger reviews within six months in cases where parties receive and comply with a Second Request. In doing so, however, he cautioned that "every case is different" and thus "[n]ot every investigation can be resolved in six months."

SUMMARY OF REFORMS TO THE DOJ'S MERGER REVIEW PROCESS

The key changes are as follows:

1. **Early Front Office Meeting.** A member of the DOJ "Front Office" management team "will be open to an initial, introductory meeting" at the outset of the merger-review process. The purpose of such a meeting will be to provide "key executives from relevant businesses" [i.e. not just lawyers] an opportunity to discuss the "deal rationale and any other facts they believe will be important to [the DOJ's] analysis."
2. **New Model Voluntary Request Letter.** The DOJ will post on its website a model voluntary access letter identifying key information the DOJ will expect merging parties to provide "within the first few days of their HSR [Hart-Scott-Rodino] filing, if not before filing." The purpose of producing this information earlier is to allow the DOJ to promptly "close investigations that do not raise competitive issues" and to narrow the scope of any Second Request if further investigation is needed.
3. **Pull-And-Refile Assessment.** The DOJ has implemented a new system to track what happens when parties agree to pull-and-refile their HSR filings and, when that happens, will ensure the agency has an investigative plan for the second waiting period. The goal (as it is today) is to see if a Second Request can be avoided or at least narrowed.
4. **Revised Model Timing Agreement.** To avoid lengthy negotiations over timing agreements and to give the parties "certainty" over aspects of the Second Request process, the DOJ will publish on its website a model timing agreement. These changes may limit certain burdens on the parties during the merger-review process, but the DOJ expects certain concessions in return.
 - a. **Fewer Document Custodians.** There will be a presumptive limit of 20 document custodians per party, but the supervising Deputy Assistant Attorney General (DAAG) may authorize more.

- b. **Fewer Depositions.** There will be a presumptive limit of 12 depositions per party, but the supervising DAAG may authorize more.
 - c. **Shorter Time to Enforcement Decision.** The DOJ will make an enforcement decision within 60 days of the parties certifying substantial compliance with a Second Request, but the supervising DAAG may extend that timeframe.
 - d. **Earlier Document Production.** The DOJ will expect parties to produce documents and other information earlier in the Second Request process and on a rolling basis in some cases, though specifics were not revealed.
 - e. **Earlier Data Identification and Production.** The DOJ also will expect parties to identify relevant data earlier in the process and produce “useable data substantially before the second request compliance date.” AAG Delrahim noted that “there is no reason that data cannot be produced substantially earlier than production of the main bulk of documents.”
 - f. **Eliminate “Privilege-Log Gamesmanship.”** AAG Delrahim observed that “too often [the DOJ] sees parties game the process, withholding large numbers of documents as privileged, only to de-privilege and dump many of these documents on [the DOJ] much later in the process, often on the eve of a particular deposition.” AAG Delrahim also observed that “most [of these documents] never should have been withheld in the first place.” Thus, the DOJ expects parties to “eliminate gamesmanship on privilege issues.”
 - g. **Stipulate to Longer Post-Complaint Discovery.** Because the DOJ will limit the information it will demand in the investigation phase, the DOJ will expect merging parties to agree to extend the time allowed for post-complaint discovery, if the DOJ challenges a merger in court.
5. **Enhanced Third-Party CID Enforcement.** Third parties have valuable information and, according to AAG Delrahim, their slow or incomplete compliance with civil investigation demands delays the DOJ’s review of mergers. As such, the DOJ plans to increase CID-compliance (including seeking enforcement in court) if third parties do not comply with deadlines and provide the requisite information.
 6. **Greater International Coordination.** AAG Delrahim said the DOJ is looking for ways to increase coordination with foreign competition authorities in merger reviews. He also suggested that parties should align the timing of U.S. and foreign merger-review timelines (if possible) and offered the DOJ’s assistance in that regard where appropriate.
 7. **Replacing 2011 Merger Remedies Guide with 2004 Policy Guide to Merger Remedies.** AAG Delrahim also announced that the DOJ has withdrawn the agency’s 2011 guide to merger remedies and reinstated the 2004 merger remedies guide until the DOJ issues an updated policy. The change was made to better reflect the DOJ’s current practice, especially with regard to the agency’s skeptical view of behavioral, or conduct, remedies.
 8. **Publishing Merger-Review Statistics.** Finally, AAG Delrahim announced that the DOJ would seek to increase transparency in the merger-review process by collecting, tracking, and publishing statistics on the length of DOJ merger reviews.

KEY TAKEAWAYS

Merging parties have long raised concerns about the costs and delays associated with the DOJ’s and FTC’s merger-review process. In our recent experience that process can take a year or more. The DOJ’s announced reforms seek to reduce that burden and delay by limiting the amount of information that will be sought and aiming to complete merger investigations within six months. This effort is commendable and may offer relief in certain cases. In return, however, the reforms have escape valves

for the DOJ and seek concessions from merging parties that may have business and strategic implications and may ultimately limit the relief that merging parties can realize.

- Many of the proposals to relieve the burdens on merging parties by limiting the number of custodians and depositions are tied to the parties' earlier production of documents and data. Moreover, the reforms do not limit the number of specifications (or requests) that the DOJ will include in Second Requests. As such, the reforms put a premium on the merging parties starting their document collection and review even earlier, which may create burdens of its own and reduce the ability of the parties, and thus the DOJ, to achieve the six-month goal for completing investigations.
- The reforms include "escape valves" that may limit the relief provided to merging parties. The limit on custodians and depositions, and the deadline to issue a decision within 60 days of Second Request compliance, can all be lifted or extended in the discretion of a DAAG. How often and in what types of mergers DAAGs lift these caps and extend the deadline will greatly affect how much relief is ultimately provided to merging parties. In addition, this creates the prospect that the experience of merging parties could vary depending on the DAAG overseeing the review of their transaction.
- Other reforms may do little to expedite the process. For example, the posting of a model voluntary request letter will only modestly quicken merger reviews since experienced antitrust counsel generally know or can predict the type of information that the DOJ will request in a preliminary investigation. Moreover, these requests are made in the initial 30-day HSR waiting period, so timing in this phase of the review is limited by statute already.
- Other important details are still to come. For example, it is not clear yet how much additional time the DOJ will expect in post-complaint discovery in exchange for expediting pre-complaint merger reviews. No specific reforms were announced with respect to reducing "privilege-log gamesmanship." Finally, the specific timing for producing document and data prior to Second Request certification was not revealed.

The DOJ's merger-review reforms take effect immediately for newly filed transactions being reviewed by the DOJ. AAG Delrahim also noted that he did not expect these changes to inhibit the DOJ's ability to conduct comprehensive investigations and challenge mergers where appropriate, but acknowledged that the expedited timeframes could limit the agency's ability to carry out lower-priority activities without additional resources. The changes to the DOJ's model timing agreement follow recently announced changes to the Federal Trade Commission's model timing agreement.

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