

PARLOR TRICKS

DESPITE FEARS OF GUN JUMPING, MORE AND MORE COMPANIES ARE USING NEW TECHNOLOGIES TO BEGIN INTEGRATION PLANNING EARLY

BY WM. RANDOLPH SMITH, JEFFREY H. HOWARD AND CHRISTOPHER E. ONDECK

It is now conventional wisdom that merger integration is the key to realizing value from deals. The mantra of several years ago that “most mergers fail because of lack of planning and poor execution” has been replaced by the new terminology of “clean rooms” and “parlor rooms.” And that process itself is evolving rapidly to new levels of sophistication as business executives work with their antitrust counsel to make the integration planning process even more robust.

Antitrust counsel? Where did that come from? What do they have to do with merger integration?

The answer is that good antitrust counseling can make or break the merger integration process. The antitrust laws enforced by the Justice Department and the Federal Trade Commission prohibit both “gun jumping” and collusion among competitors. These laws have been used over the years to prosecute merging parties that begin changing control or coordinating their competitive activities prior to regulatory clearance

and closing. In fact, the DOJ and FTC have brought six cases in this area in the past decade, obtaining significant fines and broad injunctions. Hence, many lawyers and executives became very conservative and significantly constrained even legitimate premerger activities.

No one questioned that advice for years, largely because everyone followed it. But criticism of merger success, as measured in terms of achieving synergies and other value creation, mounted such that even government officials expressed concern that some antitrust counselors were overreacting. So the paradigm shifted toward a new model. It started with clean rooms in which sensitive competitive data could be reviewed and processed by individuals who were not employees of either company and who would destroy the data if the transaction did not close. This vehicle advanced the planning process but has obvious limitations and can be cumbersome and costly.

More recently, knowledgeable

antitrust counsel have developed a highly supervised process to facilitate integration planning before closing. This process has been nicknamed the parlor room process because, like the parlor in grandmother’s house, folks could meet and talk under constant supervision. The parlor room process has evolved to support a much broader set of integration planning issues for large transactions. Companies now recognize that some of the most critical integration issues involve information technology, human resources and finance, as well as sales and marketing. While all of these areas raise some degree of risk of gun jumping or improper coordination, communications can be structured and managed to significantly accelerate the planning process and yet avoid antitrust pitfalls.

The parlor room process enables a new level of detailed integration planning prior to closing. The process is based on a “structured planning model” designed to allow sharing of information while still complying with

relevant antitrust laws.

To address these laws, the parlor room model incorporates heavy doses of documentation and written records of activities, specialized training to empower the business managers who participate in the parlor rooms and direct attorney monitoring and supervision of intercompany communications. By using this process, the merging companies (primarily at the request of the buyer) request and conduct meetings and exchange documentation and information.

The key difference is that parlor room participants are current employees, who are not isolated from their respective companies during the process, so they can report to and interact with management during the course of their preintegration planning.

Why is this legal? The underlying

concept for the parlor room model is that parties are permitted to share certain information and to communicate for the purpose of planning for integration after closing. The issue, of course, is in the implementation: How much information can be shared, by which employees, for what purposes and when? The parlor room model answers those questions with a carefully structured and managed process for the parties to exchange key data for integration planning, with appropriate legal supervision.

The change from the old model is dramatic: Using the parlor room process, the merging parties can conduct meetings involving virtually every department and unit in the companies, all with the legitimate purpose of creating detailed plans for the rollout of a combined company after closing.

When the day of closing arrives and the deal is finally consummated, the parlor room managers merely “flip the switch.” The new product offerings are ready; the sales teams are selected and know their accounts; the IT systems and infrastructure are interconnected, and the personnel are trained; and HR, finance and all other back-office departments are ready and have a complete game plan.

And the results bear out the value, as companies making the investment in the parlor room model up front find they are reaping the benefits of integration ahead of schedule. ■

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