



With Remedies Agreed, We Can Close Our Deal, Right?

Law360, New York (October 11, 2012, 4:21 PM ET) -- The answer to the question we pose in the title is “it depends” — it depends on which U.S. agency you are before, and how prepared you are to get the right “official” to sign off on the agreed remedy.

In many ways, whether you are before the Federal Trade Commission or the U.S. Department of Justice, your merger review will follow similar paths — after the initial Hart-Scott-Rodino filing, overlaps are identified between the merging parties, and some can be resolved through early presentations and responses to voluntary access letters. Issues unresolved by the end of the initial waiting period (which may be extended by a voluntary “pull and refile”) will be targeted in the second request.

After in-depth investigation and analysis, the agency will zero in on the issues that are sufficiently troubling as to require litigation or a remedy. If those issues can be resolved through divestitures and/or other remedies, a consent decree will be negotiated reflecting the agreements reached between the agency and the parties.

At this point, the merging parties are confident that the deal will happen and now turn their attention to timing. Inevitably, top management will ask the lawyers: “How soon can we close?” Understandably, after many months of investigation and negotiation, having reached an agreement to resolve the agency’s concerns, the parties are eager to get on with the deal. Depending on where the expected closing falls in the investor notifications cycle, there may even be pressure to announce that an agreement has been reached — before the ink is actually on the paper.

We do not address here the very real challenges of managing multijurisdictional merger review, and the hard work required to coordinate the timing of closing in such cases. Our focus is on the variability in timing that arises from the different approval processes between the FTC and the DOJ. Companies accustomed to the FTC process, for example, may be surprised that they are not automatically cleared to close once they sign the settlement documents, or even once the DOJ files its complaint, proposed final judgment detailing the negotiated remedies, and the hold separate stipulation and order (“HSSO”) with the relevant federal district court. Without appropriate preparation and an understanding of the relevant triggering events that allow a DOJ-reviewed deal to move forward, the parties may find themselves unexpectedly at the altar, but without the needed official sign-off.

The key is getting a federal district court judge to sign the HSSO, which is the necessary trigger to allow the parties to close. Not surprisingly, the merging parties will be very frustrated if, after negotiating and documenting remedies for weeks or months, they unexpectedly cannot proceed when the deal is signed and the necessary paperwork is filed with the court. Experienced practitioners will understand the triggering events that allow clients to consummate their deal and how to effectively counsel clients regarding potential obstacles to an “immediate” closing after remedies negotiations have concluded.

While the relevant triggering events for both agencies occur after the parties have reached an agreement on required remedies, what differs is the official action needed for sign-off. At the FTC, the required official action is the FTC's vote to accept the agreement containing a consent order ("ACCO"). The ACCO is an agreement between the parties and the FTC on the required divestitures and other remedies. It typically includes a proposed order, submission to the FTC's jurisdiction, waiver of the FTC's obligations to make factual or legal conclusions, and waiver of all rights to judicial review.

While the ACCO will, within a few days, be published in the Federal Register for 30 days for public comment, the parties are free to close upon the acceptance of the ACCO by the majority vote of the FTC. Thus, at the FTC there is greater predictability, as the merging parties know that their bar to closing terminates upon the FTC's acceptance of the ACCO, which will occur on the same day as the issuance of the complaint and the proposed consent decree. Practitioners can feel comfortable advising their client of the likelihood for immediate closing when the deal is reviewed before the FTC.

Should the merging parties be before the DOJ, however, an added layer of complexity arises. While the negotiation process is similar, once the parties and the DOJ have agreed on proposed remedies, the required official sign-off is from a federal district court judge — a third party who, until this point, almost certainly knows nothing about the particular deal or efforts by the parties and the DOJ to resolve anti-competitive concerns. It is possible the judge may have little or no familiarity with merger review cases at all.

The DOJ will file a complaint that is accompanied by a proposed final judgment, a proposed order to be entered by the court detailing the remedies agreed upon; a competitive impact statement detailing the anti-competitive concerns of the proposed transaction and alternatives to the negotiated remedies considered and ultimately rejected by the DOJ; and the stipulation requiring the parties to "hold separate" the assets raising anti-competitive concerns, usually those slated for divestiture per the negotiated agreement.

Like the FTC process, the proposed consent decree and competitive impact statement are published a few days later in the Federal Register, in this case for 60 days for public comment, pursuant to the Tunney Act process. What allows the parties to close, however, is the signature by the judge on the HSSO.

Having advised a client regarding the need for the HSSO to be signed before a deal can close, a client will obviously want to know how long that will take after the documents are filed. The answer is far from simple, as the timeline can vary for reasons both within and out of the control of the parties. In reviewing all major transactions for which an HSSO ultimately was signed by a district court judge over the last five years, it becomes clear that predicting how quickly a client can close a transaction is a daunting task.

In the last five years, only one-third of all HSSOs have been signed by a district court judge on the same day they were filed, 40 percent were signed within one or two business days of filing, and the final 27 percent required more than two business days for signature, with the longest delay being 28 days. Advising a client on the time it will take to close the deal obviously is difficult when dealing with such unpredictability.

While the precise factors that delay the signing of the HSSO will be case-specific, some general observations can be made, which can guide practitioners to develop strategies for overcoming obstacles to an immediate signing. The first factor is the effect a holiday or weekend may have on the availability of the judge assigned to review the transaction.

In cases where the delay from filing to signing of the HSSO exceeded two business days, several were filed just prior to a holiday. In Deutsche Borse/New York Stock Exchange Euronext, the DOJ filed the relevant documents on Dec. 22, 2011, but the HSSO was not signed until Jan. 3, 2012, after the Christmas and New Year holidays. Similarly, the HSSO in Exelon/Constellation was filed on Dec. 21, 2011, and signed on Dec. 30, 2011. Thus, in both of these deals, a full seven business days elapsed between filing the HSSO with the district court and obtaining signature of the judge on the HSSO.

Another factor leading to a delay in the signing of an HSSO is the reassignment of the judge. In most district courts, judges are assigned by random and their dockets vary considerably. For example, in AT&T/ Centennial, the HSSO was filed on Oct. 19, 2009, but not signed for two business days, likely due to the delay created by the reassignment of the case to a different judge. Unexpected absences by a judge assigned to a case due to illness or some other emergency can also throw off the ability of a client to close the deal immediately. Even a minor delay of one or two business days can create an enormous logistical headache for a client prepared to close the deal the day the HSSO is filed.

Despite the seeming vagaries of the system, proper preparation can anticipate, and remove, many of the key obstacles to immediate closing. If the client requires an immediate closing, it is imperative that practitioners be prepared to appear before a judge the day the DOJ files the relevant documents. But what if the assigned judge is not even in court that day? Practitioners should consider drafting an emergency motion in advance of filing in such a case. Using local rules pertaining to avoidance of harmful delay, such as Local Rule 40.8(b)(3) in the District of D.C., this motion may allow the parties to get in front of a judge assigned to handle emergency motions and obtain the required signature on the order allowing the parties to move forward with closing the deal.

Whether in front of the assigned judge, or a judge assigned to hear emergency motions, practitioners should come prepared with the facts necessary to persuade the judge both of the urgency of the specific situation and the relatively routine aspect of approving HSSOs. The first tool in that arsenal involves research conducted on all district court judges before whom the case may be heard to catalog similar deals each judge has handled, in order to be able to reference those deals and refresh the judge's memory of having handled similar cases in the past. If some of the judges have never handled DOJ merger filings, it will be prudent to prepare sufficient arguments and information to demonstrate to that judge the "normal process" by which HSSOs are approved.

Working under the assumption that the judge assigned will be unfamiliar with the DOJ merger process, practitioners would benefit greatly by preparing in advance an unopposed motion for expedited entry of the HSSO. This motion serves to assure the judge that the government is unopposed to an expedited entry of the HSSO, that the proposed consent decree is subject to public comment and judicial review under the applicable Tunney Act standard, and the signing of the HSSO is a relatively noncontroversial act.

Judges properly will want to know, "What's the rush, counselor?" Practitioners should come to court prepared with both short, written materials, as well as a brief oral presentation for the assigned, or emergency motions, judge. This means drafting relevant talking points in advance of the day of filing, and being prepared to explain with specificity the harms the parties will suffer from even a day or two of delay, thus answering the question, "What's the rush?" Judges who have never been through the HSSO process may be reluctant to sign off in real time, preferring to review the papers in more detail, and possibly even interrogate the DOJ attorneys. The practitioner should have the relevant DOJ staff attorney available, preferably in the courtroom, to confirm that DOJ does not oppose the immediate entry of the HSSO.

Judges without experience in this process may question what happens if, at the end of the Tunney Act comment period, they conclude the settlement is inadequate, but because the deal has been allowed to close, the “eggs are scrambled.” The practitioner must be prepared to explain that the deal’s closing is regulated by the HSR Act process and DOJ policy and procedures — not the Tunney Act.

The DOJ permits closing as soon as the HSSO has the weight of a court order, and all other aspects of the court’s jurisdiction — including the Tunney Act review — are unaffected. After all, the remedies to be considered during the Tunney Act process may be only a very small part of the entire deal.

We all know that clients hate surprises, especially in the form of unexpected delays to closing significant transactions. While not every conceivable obstacle to immediate closing can be anticipated, there are many that can be removed with thorough advance preparation, enabling you to make that much more enjoyable call to say, “You are free to close now.”

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