JONES DAY

COMMENTARY

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IN SHORT

The Situation: Previously, neither the Federal Trade Commission nor the Department of Justice has provided clear guidance on whether side letters must be submitted with filings associated with the Hart–Scott–Rodino Antitrust Improvements Act of 1976 ("HSR").

The Development: The FTC recently issued a press release making it clear that all documents that are part of an agreement between the merging parties, including side letters, must be submitted with the HSR filing.

Looking Ahead: The FTC is more likely in the future to impose penalties if parties fail to disclose side letters in an HSR filing. During negotiations, parties should consider when and whether to draft a side letter that reflects their antitrust review obligations, risk-sharing commitments, and potential remedial measures.

The Federal Trade Commission recently clarified that filing parties must include so-called antitrust side letters with their HSR Act Premerger Notification forms. In a recent press release, the FTC made clear its position that Item 3(b) of the HSR form requires filers to submit *all* documents that constitute the agreement between the parties, including specifically "any binding agreement that reflects the parties' antitrust review obligations, risk-sharing commitments, and potential remedial measures." According to the Premerger Notification Office ("PNO"), such side agreements may not be withheld on the grounds that they are ancillary to the main agreement, or privileged pursuant to a common interest doctrine or joint defense agreement.

The instructions for Item 3(b) of the HSR form states that the parties must:

> Furnish copies of all documents that constitute the agreement(s) among the acquiring person(s) and the person(s) whose assets, voting securities, voting securities or non-corporate interests are to be acquired. Also furnish agreements not to compete and other agreements between the parties. Do not submit schedules and the like unless they contain agreements not to compete, other agreements between the parties, or other important terms of the transaction. For purposes of Item 3(b), responsive documents must be submitted; identifying an internet address or providing a link is not sufficient….

> With its latest statement, the FTC squarely disapproves withholding side agreements.

The FTC's policy concerning inclusion of side letters has been vague until now. Then-Department of Justice Assistant Attorney General Christine Varney stated in a 2011 speech that parties who execute side letters and don't include them in their HSR filings "do so at their peril," but neither the FTC nor DOJ published clearer guidance at the time. As recently as 2016, the FTC declined to explicitly state whether the HSR form's instructions to include "other agreements" captures "ancillary agreements such as employee agreements, escrow agreements, supply agreements, etc." The PNO instead directed parties to submit schedules and attachments that were "relevant to understanding the deal."

With its latest statement, the FTC squarely disapproves withholding side agreements, on the grounds that side agreements are ancillary to the definitive merger or acquisition agreement that triggers the parties' obligation to file under the HSR Act. According to the FTC's statement, the terms of the reported transaction "includes any agreement that alters the terms of the merger during the antitrust review process, regardless of *where* those commitments are written down. If there is an enforceable agreement that binds the parties to take actions related to antitrust clearance, it must be submitted as part of the HSR form."

The FTC also rejects the notion that a filing party may withhold a side letter on efforts to obtain antitrust clearance based on a claim of privilege solely because such commitments arose out of joint defense strategy discussions. The FTC statement acknowledges that "analyses, recommendations, and strategy explanations that are not binding or enforceable by the merging parties need not be turned over pursuant to Item 3(b)," but it notes that these may nonetheless be responsive to Items 4(c) and 4(d) and, if privileged, should be properly disclosed on a privilege log.

Implications

To date, there have been no enforcement actions based on a failure to include a side letter in an HSR

filing. Having made its position on the submission of side letters plain, the FTC is more likely in the future to impose penalties, such as fines, if parties fail to disclose side letters in an HSR filing.

During negotiation of the deal, parties should consider when and whether to draft a side letter that reflect the parties' antitrust review obligations, risk-sharing commitments, and potential remedial measures. If drafted, the side letter should be included in the filing to avoid potential sanctions and the risk that the HSR filing will be rejected. Parties should consider whether they should instead wait to discuss the contents of such side agreements until after the HSR notification has been filed, or to forego a side letter entirely and instead employ other provisions (such as break-up fees and walk-away rights) to allocate antitrust risk for the deal.

THREE KEY TAKEAWAYS

1. Because side letters must be submitted as part of the HSR form, parties should carefully consider whether they should draft a side letter, and, if so, what timing would be most appropriate.
2. Just because a side letter arises out of a joint defense strategy discussions does not mean that the letter may be withheld based solely on privilege claims.
3. Now that the FTC has clarified its position, the FTC will be more likely to impose penalties if parties fail to include side letters in HSR filings.

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