KKR Financial Holdings LLC, which requires a fully informed vote of disinterested, uncoerced stockholders before an irrebuttable business judgment presumption may apply. In *Singh v. Attenborough*, the Delaware Supreme Court affirmed the dismissal of an aiding-and-abetting claim against a financial advisor, holding that because "the stockholder vote was fully informed and voluntary, the Court of Chancery properly dismissed the plaintiffs' claims against all parties."

- When responding to a subpoena, financial advisors should keep in mind that the court may be less receptive to arguments about undue burden, in part because the court does not credit financial advisors as mere nonparties with marginal involvement in the dispute.

- Financial advisors also should be aware that even if they are not named as defendants at the outset of litigation, they could be named later on in the case. Accordingly, financial advisors should consider developing litigation strategies with their counsel early, before they are named as defendants, and approach subpoenas or other nonparty discovery (including potential objections as to privilege, relevance and scope) with that strategy in mind. Financial advisors should take these precautions not only in traditional deal cases alleging breaches of fiduciary duty but also in appraisal litigation.

- In addition to litigation strategy, financial advisors that are named as defendants also need to understand their indemnification and settlement rights and consider strategy around those rights as early as possible once litigation is filed.

ENDNOTES:

[1]"M&A Litigation Developments: Where Do We Go From Here?" Insights: The Delaware Edition (May 29, 2018); *see also* "Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2017 M&A Litigation," Cornerstone Research (July 18, 2018) (reporting that "[t]he number of deals litigated in Delaware declined 81 percent from 2016 to 2017").

[2]*See, e.g., Vento v. Curry*, 2017 WL 1076725 (Del. Ch. Mar. 22, 2017) (requiring disclosure regarding the amount of financing-related fees the financial advisor for the acquiror stood to receive in connection with stock-for-stock merger).

[3]*Cumming v. Edens*, C.A. No. 13007-VCS (Del. Ch. July 12, 2018) (Transcript).

[4]Stockholder plaintiffs also have increasingly turned to Section 220 books-and-records requests for documents they can use to bolster post-closing breach of fiduciary claims for money damages relating to a merger or other transaction on behalf of a stockholder class. *See, e.g., Lavin v. West Corporation*, 2017 WL 6728702 (Del. Ch. Oct. 9, 2017).

[5]*See, e.g., Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd*, 177 A.3d 1 (Del. 2017).

U.S. ANTITRUST AGENCIES INTRODUCE REFORMS TO SPEED UP MERGER REVIEWS

By Craig A. Waldman, J. Bruce McDonald, Ryan C. Thomas, Michael A. Gleason, and Keira M. Campbell

Craig Waldman co-chairs the Antitrust & Competition Law Practice of Jones Day. He is based in Jones Day's San Francisco office. Bruce McDonald is a partner in Jones Day's Houston office. Ryan Thomas and Michael Gleason are partners in Jones Day's Washington, D.C. office. Keira M. Campbell is an associate in Jones Day's New York office. Contact: cwaldman@jonesday.com or bmcdonald@jonesday.com or rcthomas@jonesday.com or magleason@jonesday.com or kcampbell@jonesday.com.

The Trump Administration leadership at the U.S. Department of Justice and Federal Trade Commission have announced reforms regarding merger reviews. This article reviews these reforms and their strategic implications for merging parties. As described more fully below, there is good, bad, and unknown. The agencies' reforms will improve some merger reviews by reducing document and data requests and providing at least a soft commitment to published timeframes. The reforms may actually add burden in some circumstances, and they may have little impact for mergers with complex or significant competitive implications.

Introduction

The Hart-Scott-Rodino Act grants DOJ and FTC a 30-day initial waiting period to decide whether to conduct an extended investigation and issue a Second Request (or allow the merger to proceed), then 30 additional days after the parties have complied with their Second Requests to decide whether to challenge the deal.[1] According to one source cited by DOJ, the average length of reviews conducted by the U.S. agencies for "significant" mergers increased 65% to 10.8 months between 2013 and 2017.[2] This is beyond the timeframe that Congress contemplated when it passed the HSR Act.

What is the cause of longer reviews? Probably multiple factors are to blame, including the growing volume of corporate documents and data, agency staffs' desire to ensure they do not overlook relevant evidence, and the agencies' increased willingness to litigate. Yet there remains room for a more focused effort by agencies to reach decisions more quickly, a fact the agencies have acknowledged.

At DOJ, in September 2018, Assistant Attorney General Makan Delrahim announced reforms to improve the efficiency and transparency of the department's merger reviews. AAG Delrahim stated that DOJ would aim to resolve "most investigations within six months of filing," with the expected caveat that complicated transactions might take longer to resolve. Efforts to decrease the length of merger reviews are commendable. To complete a review in that timeframe, DOJ expects that "the parties expeditiously cooperate and comply throughout the entire process."[3]

In November 2018, DOJ implemented plans to reach these goals. Under a new "Model Voluntary Request Letter" and new "Model Timing Agreement," DOJ intends to focus the scope of pre-litigation investigations and to commit to a tighter schedule in exchange for the parties providing more information early and acting to meet new process deadlines.

1. What Is a Timing Agreement and How Do DOJ's Proposals Impact It?

A **Timing Agreement** is an agreement between the parties and the agency setting out their obligations during the investigation and deadlines for concluding the merger review.[4] The Timing Agreement will identify the custodians whose files must be searched, data to be collected, the number of depositions allowed, and any meetings with agency leadership. The Agreement does not override the HSR Act, but sets intermediate deadlines and commits the parties to not close their transaction for a certain period.

For the agencies, a Timing Agreement allows staff to focus on its examination of the merits of the transaction without simultaneously having to prepare a case for possible litigation. For parties, in exchange for agreeing to delay their transaction, the agency will narrow the Second Request, the number of depositions, and other aspects of an investigation. Therefore, while parties can decline a Timing Agreement, such a decision comes at a price: the agency may be less willing to grant modifications to the Second Request, commit to a cap on the number of depositions, or complete the review within a certain time.

The Model Timing Agreement introduces new provisions that differ from current practice. Some of these reforms favor merging parties and others seem to benefit DOJ.

- **60-day decisions**. The Model anticipates that DOJ will complete its review within 60 days following the parties' certification of substantial compliance with Second Requests.[5] This provides DOJ with 30 days beyond the HSR Act's 30-day deadline. Currently, it is not uncommon for DOJ to propose a Timing Agreement that provides staff with 90 or more days after parties have complied with Second Requests. Until now, there was no explicit baseline or goal for DOJ to complete its review. This new, tighter schedule provides some transparency for parties and indicates DOJ leadership's timing expectations for the staff. However, the Model notes this timing "will not be possible for some matters,"[6] which likely will lead to longer schedules for more complex reviews. Conversely, shorter periods of less than 60 days for less complex reviews may now be seen as a concession by DOJ

staff. It would be unfortunate if 60 days becomes a baseline even for merger reviews that could be completed more quickly.

- **20 custodians**. The Model limits to 20 the number of custodians whose files must be searched.[7] The collection and review of custodians' documents for responsiveness to the Second Request and then for privilege is time consuming. Although parties often must search the files of more than 20 custodians (*e.g.*, matters involving multiple product or geographic overlaps or complicated innovation or pipeline issues), there are many matters in which the agencies require fewer than 20 custodians. One may ask whether that number will drift upwards to 20 for those matters. The Deputy Assistant Attorney General ("DAAG") in charge of the matter can override the 20-custodian ceiling,[8] but the Model does not state criteria for this exception.

- **12 depositions**. The Model limits DOJ to 12 depositions per party.[9] Today, few DOJ investigations involve more than 12 depositions pre-litigation, so this is less of an accommodation than it may appear.

- **Front office meetings**. The Model grants the parties "an opportunity to meet" with DOJ leadership. However, the Model does not specify when or how frequently this opportunity may occur. In his September speech, AAG Delrahim indicated that DOJ would permit "an initial, introductory meeting" with the front office and "key executives."[10] Parties must submit any analyses, data, or white papers at least five days prior to any such meeting.[11]

In exchange for these limitations,[12] parties must undertake substantial efforts, as discussed below.

Documents. A party using computer technology to facilitate its document review (as is increasingly common) must provide all documents responsive to the Second Request on a rolling basis, and complete production at least 30 days before certifying substantial compliance.[13] Documents initially identified as privileged, but later determined not to be privileged, must be produced at least 10 days before substantial compliance. A log of privileged documents must be provided at least five days before the compliance date.[14]

Privilege Logs. The Model features additional obligations to eliminate "privilege log gamesmanship"[15]—where, according to DOJ, a party withholds documents on the basis of privilege, only later to withdraw the privilege claim, "often on the eve of a particular deposition."[16] If more than five percent of any custodian's documents initially withheld for privilege later are determined not to be privileged, a party cannot certify substantial compliance until 30 days after that production.[17] If the threshold is triggered for just one custodian, it will delay that party's ability to certify compliance with the entire Second Request.

In practice, it can be difficult to forecast the number of privileged documents in any employee's files, which may vary depending on roles (compare sales versus legal personnel). Parties have a right to protect privileged material, and privilege assessments take time.

Data. Parties must provide certain data, such as granular profit-and-loss reports, at least 45 days prior to the compliance date.[18] Parties must provide other data (*e.g.*, transaction level data and data describing customers) at least 30 days prior to substantial compliance.[19] DOJ's FAQs on the Models criticize parties that produce data late in the Second Request review: "there is no reason that data called for in a Second Request cannot be produced substantially earlier than parties have produced it in the past."[20] In practice, data submissions can be extraordinarily large and complex, involving thousands of fields and links to other databases, some of which may not be easily produced as standalone files or have readily available data dictionaries. In addition, counsel must coordinate with DOJ's economist staff to ensure production of the right information in the right form. These dynamics can make producing data quickly a challenge.

Post-Complaint Discovery. The Model requires parties to commit to a post-complaint discovery period, should DOJ litigate the transaction, in exchange for the pre-litigation concessions described above. DOJ contends

it is "doing its part to streamline and shorten the merger review process by agreeing to significant limitations on document custodians and depositions"[21] and therefore parties must allow DOJ additional time for discovery prior to any trial.[22] The Model does not indicate how much additional time DOJ may seek or what factors may be used to calculate that time, but only notes that the amount of time "will depend on the individual facts and circumstances of each matter."[23]

This is a new requirement that benefits parties in some matters and hinders in others. Because a small number of investigations result in litigation, trading a shorter merger review for a longer post-complaint discovery period is a good deal for most matters, especially where the parties are confident they will not litigate. However, transactions that litigate likely are on a tight schedule to obtain a court decision ahead of the parties' business or contractual deadlines. In those cases, parties should consider the impact of a longer post-complaint discovery schedule on the termination date during negotiation of their agreement.

Deviations from Model. It is possible for agency staff and parties to propose Timing Agreement provisions that vary from the Model, but DOJ emphasizes that "substantial deviation will require approval from the DAAG in charge of the investigation."[24] DOJ then may insist on more time for its review if parties try to negotiate different terms. More important, as the Model is not binding on the agency, parties cannot insist that the staff be held to the Model terms. The strength of these reforms will lie in DOJ leadership declining to frequently impose changes that are more favorable to DOJ or insisting upon the Model's terms even for transactions in which antitrust concerns can be resolved more quickly or in a less burdensome manner.

2. What Is a Voluntary Request Letter and Do the Proposals Change It?

A **Voluntary Request Letter** is a routine agency request in the first 30-day period following the HSR filing that seeks key information from merging parties to help the agency develop a preliminary understanding of the parties' businesses and the competitive impact of their combination. A Voluntary Request typically seeks company business plans, documents on competition, and customer contacts, among other things. The agencies use the merging parties' responses, along with the results of their own investigation, to determine whether to conduct an extended investigation. The Model Voluntary Request generally does not change what materials are sought, but should lead to greater predictability in the specific content of the request. In one change, DOJ expects parties will submit this information "within a few days" after receiving a Voluntary Request.[25]

3. What Are the Practical Implications for Merging Parties?

At each stage of the process, from initial HSR filing to Second Request compliance to Front Office meetings, parties must be proactive, thoughtful, and diligent.

Gather Voluntary Request materials early. If parties anticipate questions from the agencies, they would be wise to identify and compile responsive materials so that they can react quickly if a Voluntary Request arrives. Materials should include top customer lists with contact details, win/loss reports, lists of possible product overlaps, strategic plans, and documents about competition in the relevant industry.

Providing these materials soon after receiving a Voluntary Request may help avoid a Second Request, or at least narrow the areas of further investigation. In some cases, parties may decide that, while this material is available, it does not make sense to provide all of it at that stage of the investigation. Preparing in advance will allow them to make a considered and strategic decision.

Organize the Second Request response. To complete a Second Request review in six months, parties will have only 90 days to comply with the Second Request. Because parties must produce documents 30 days prior to certifying compliance, they are left with just 60 days to negotiate a custodian list with the staff, collect and review all potentially responsive documents, produce documents on a rolling basis, and complete privilege determinations. To meet this schedule, parties should take the following steps:

- **Prepare potential custodians**. Discussions with agency staff about the appropriate custodian list sometimes delay the parties' Second Request compliance. Unless appropriately managed, on both sides, these discussions can last weeks. To avoid unnecessary delay, parties should prepare to identify likely custodians early in the process and address agency staff questions on the roles of company personnel.

- **Assess data**. Discussions with agency economists about data also can delay the Second Request response. To avoid delay, parties should investigate the data they have, brief data personnel on the process, and prepare them to speak with agency staff about relevant computer systems. In addition, parties should collect data dictionaries for key systems, including those holding transaction data or financial statements; if they do not exist, consider generating them.

Monitor privilege review. Under the Model Timing Agreement, if more than five percent of any custodian's documents initially withheld based on privilege are later determined not to be privileged, a party cannot certify substantial compliance until 30 days after that production. Parties should monitor the reinject rate for documents identified as possibly privileged to stay below five percent. A party even may need to delay producing certain documents to ensure it does not breach the five percent threshold.

Anticipate Front Office meetings. Front Office management, the AAG or DAAG, have final decision-making authority on whether DOJ will clear a deal without restrictions, require a remedy, or litigate. Parties should consider what materials (*e.g.*, party documents or white papers) would help the management come to the right conclusion about the deal and ensure that they have produced those documents to the agency staff ahead of time.

4. Will These Models Actually Speed Up Merger Review?

The Models may very well shorten the *average* merger review, so long as the new ceilings do not also become a floor even in more routine reviews. In the average review, parties probably will spend less time negotiating a Timing Agreement, as the Model now sets default terms for most provisions, and the review period following Second Request compliance will be shorter, if DOJ holds to its 60-day review period.

However, 60 days is not realistic for all deals, especially transactions with complex antitrust issues. Illustrating this, on the same day that DOJ published its new Models, DOJ reported that it would complete its review of Sprint's proposed merger with T-Mobile within *six months*, not 60 days, of when those parties complied with Second Requests. Especially for the most complex transactions, the goal of completing merger reviews within six months of HSR notification is ambitious given what is required to comply with most Second Requests. Further, the Model reforms do not address the increasing breadth and depth of Second Requests, a problem that DOJ leadership has acknowledged.[26]

5. Will These Models Reduce the Costs of Merger Review?

Possibly. The Models, while promoting shorter timeframes, do not reform the depth and breadth of typical Second Requests, which are a major driver of the costs of merger review. In most cases, the DOJ's reforms will require the same volume of work (and cost) but in a shorter timeframe.

6. What Changes Has FTC Implemented? Are FTC's Changes More Favorable for Merging Parties Than DOJ?

FTC's initiatives have a more narrow scope than DOJ's reforms. FTC published its own Model Timing Agreement in August 2018. Shorter than DOJ's Model, FTC's version does not identify a set number of custodians, establish deadlines for productions, or cap depositions. It provides 60-90 days for the FTC to complete its review following the parties' Second Request compliance date.[27] FTC commented that the "proposed date range shall not be interpreted as either a cap or a limit on the number of the days." Thus, compared to DOJ, FTC's Model provides a longer timeframe, by at least 30 days, for the FTC to complete its own review.

FTC's Model states that its staff will meet with the parties "as reasonably requested by either FTC Staff or either Party." However, FTC's Model does not override the FTC's practice to permit only one meeting with the front office.[28]

A comparison of the DOJ's Model Timing Agreement to the FTC's Best Practices for Merger Investigation, published in August 2015, illustrates the potential for divergence between the agencies.[29] The FTC Best Practices cites to the 2006 Merger Process Reforms, which established a "presumptive limit of 35 custodians if the parties met certain conditions,"[30] considerably more than the DOJ limit of 20.

The DOJ reforms therefore may lead to further divergence with the FTC on merger process. This will increase the stakes of the outcome of "clearance," the process by which one agency or the other is tasked to handle the investigation, which is largely based on which has more recent experience in the affected business (*e.g.*, computer hardware versus software, metals and mining versus chemicals, oilfield services versus petroleum). Although as a policy matter the length and burden of a merger review should not depend on which agency handles an investigation, for a number of reasons, it does. Recently, there have been more clearance fights between the agencies and therefore more delay in one agency energetically pursuing the investigation. At a congressional hearing in December, the heads of the agencies testified that they are working together to develop a new process for clearance.

7. Do These Reforms Align with International Enforcers' Timelines?

The U.S. agencies' reforms do not change international coordination and agency cooperation, which DOJ acknowledges can add more time.[31] Many large transactions now implicate numerous antitrust regimes, necessitating premerger filings in multiple jurisdictions. Authorities typically coordinate with counterparts in other jurisdictions. Occasionally, coordination reduces duplicative requests to the parties. More often than not, coordination adds time as authorities around the world seek to understand, and if possible align evidentiary records, arguments, and remedies. Much of this falls outside the U.S. agencies' control.

Conclusion

Merging parties should welcome any reform that shortens the duration and lightens the burden of merger reviews. The U.S. agencies' recent changes will bring some improvement, and they should be commended for the effort to do so. More substantial reform would require addressing the desire of authorities to have reviewed more and more documents and data before deciding whether to allow or challenge a transaction. This dynamic has led to longer and more intense investigations, and the conventional wisdom is that it may have motivated the U.S. agencies to use broader Second Requests to extract longer timing agreements. Nevertheless, more substantial reform (such as decoupling Timing Agreements from limits on the scope of Second Requests) should not be expected in the foreseeable future. Today's merging parties should take advantage of DOJ's goal to quicken merger investigations. With advance planning and diligent work, this should be possible in many investigations.

ENDNOTES:

[1]Parties can "extend" the initial waiting period if they withdraw a filing and refile within two business days. This process, known as a "pull and refile," restarts the initial 30-day waiting period.

[2]Makan Delrahim, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, It Takes Two: Modernizing the Merger Review Process, Remarks at the 2018 Global Antitrust Enforcement Symposium (Sept. 25, 2018) (hereinafter, "Delrahim Speech"), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-2018-global-antitrust. Given the relatively small number of enforcement actions in any given year, a few significant matters can influence the average investigation length. The trend line for much of 2018 is encouraging, as the agencies have completed investigations more quickly.

[3]*Id.*

[4]In some matters, agency staff may ask for a unilateral commitment from the parties on timing, particularly when negotiations over Timing Agreement terms or leadership approvals are prolonged.

[5]U.S. Dep't Of Justice, Antitrust Div., Model Timing

Agreement, at 2 (Nov. 2018) (hereinafter, Model Timing Agreement), *available at* https://www.justice.gov/atr/page/file/1111336/download.

[6]*Id.* at n.2.

[7]*Id.* at 2.

[8]*Id.* at n.3.

[9]*Id.* at 7.

[10]Delrahim Speech at 8.

[11]Model Timing Agreement at 8.

[12]U.S. Dep't Of Justice, Antitrust Div., Frequently Asked Questions—Voluntary Requests and Timing Agreements (November 2018) at 4 (hereinafter, Model FAQs), *available at* https://www.justice.gov/atr/page/file/1111331/download.

[13]Model Timing Agreement at 3. The Model Timing Agreement also provides instructions for parties who are not using technology assisted review, see page 4.

[14]*Id.* at 4.

[15]Model FAQs at 4.

[16]*Id.*

[17]Model Timing Agreement at 3 n.5.

[18]*Id.* at 4.

[19]*Id.* at 5.

[20]Model FAQs at 4.

[21]*Id.*

[22]Model Timing Agreement at 9.

[23]*Id.* at n.14.

[24]Model FAQs at 5.

[25]U.S. Dep't Of Justice, Antitrust Div., Model Voluntary Request Letter (Nov. 2018), *available at* https://www.justice.gov/atr/page/file/1111341/download.

[26]Delrahim Speech at 5.

[27]Federal Trade Commission, Bureau of Competition, Model Timing Agreement (Aug. 2018), *available at* https://www.ftc.gov/system/files/attachments/merger-review/ftc_model_timing_agreement_8-22-18.pdf.

[28]Bruce Hoffman, Director of Bureau of Competition, Timing is everything: The Model Timing Agreement (Aug. 7, 2018), *available at* https://www.ftc.gov/news-events/blogs/competition-matters/2018/08/timing-everything-model-timing-agreement?utm_source=govdelivery.

[29]Federal Trade Commission, Bureau of Competition, Best Practices for Merger Investigations (Aug. 2015), *available at* https://www.ftc.gov/system/files/attachments/merger-review/best_practices_for_merger_investigations_august_2015.pdf.

[30]*Id.* at 3.

[31]Delrahim Speech at 2 ("Necessary coordination with our foreign counterparts—while beneficial—could add time.").

FTC CALLS "FOUL" ON DOLAN FOR HSR VIOLATION: NO FREE-THROW ALLOWED FOR FAILURE TO FILE ON EXECUTIVE EQUITY COMPENSATION

By Joel Mitnick and Ngoc Hulbig

Joel Mitnick is a partner in the Antitrust and Global Litigation groups in the New York office of Cadwalader, Wickersham & Taft LLP. Ngoc Hulbig is a counsel in the firm's Charlotte, NC, office. Contact: joel.mitnick@cwt.com or ngoc.hulbig@cwt.com.

James L. Dolan, owner of New York's Knicks and Rangers and Executive Chairman of Madison Square Garden Company ("MSG"), has agreed to pay $609,810 in civil penalties[1] to settle Federal Trade Commission ("FTC") allegations that Dolan violated the premerger notification and waiting period requirements of the Hart-Scott-Rodino ("HSR") Act of 1976 when he acquired voting securities of MSG in 2017.[2]

As the Executive Chairman and a Director of MSG, Dolan receives restricted stock units ("RSUs") as part of his compensation. Dolan properly filed an HSR notification on August 16, 2016, for an acquisition of MSG voting securities due to vesting RSUs that would result in holdings exceeding the $50 million threshold, as adjusted. Early termination of the HSR Act's waiting period was granted on September 6, 2016, and Dolan completed his acquisition three days later. Until September 6, 2021, Dolan was permitted under the HSR Act to acquire additional MSG shares without filing HSR again so long as he did not exceed the $100 million threshold, as adjusted. On September 11, 2017, without filing under the HSR Act or observing the HSR Act's waiting period, Dolan acquired additional MSG shares due to vesting RSUs that resulted in Dolan holding voting securities of MSG