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DOJ Antitrust Review Changes Unlikely To Make A Difference

By **Tod Northman** (December 19, 2018, 9:20 AM EST)

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The U.S. Department of Justice Antitrust Division is seeking to improve its antitrust review process, but there are reasons to be skeptical. Assistant Attorney General Makan Delrahim announced that the DOJ would seek to resolve most merger "investigations within six months of filing"[1] in a September speech at the 2018 Global Antitrust Enforcement Symposium. The announced changes are also intended to reduce the burden of responding to a request for additional information and documentary material, also known as a second request.

Delrahim's aim is admirable and well-taken: Merger review has grown increasingly burdensome and the results are less predictable. Delrahim quoted then-Assistant Attorney General William Baxter, who defended 1982 merger rules by observing that mergers are "an important and extremely valuable capital market phenomenon, that they are to be in general facilitated, and that it is socially desirable that uncertainty and risk be removed wherever possible to do so, subject, of course, to the very important limitation that where a merger threatens significantly to lessen competition, it should be halted."[2]

In his speech, Delrahim acknowledged that delay "is a form of uncertainty and risk, which we should seek to remove from the merger-review process whenever possible."[3]

Welcome words. Unfortunately, Delrahim's suggested modifications confront broader business trends of increasingly global mergers, changing deal participants; therefore, while helpful, they are unlikely to significantly improve the merger-review process.

To make his case for the importance of the reforms, Delrahim observed that the length of time for U.S. antitrust agencies to resolve significant merger investigations has increased by 65 percent between 2013 and 2017, to almost 11 months.[4] However, to reduce the review time and otherwise improve the DOJ's review process, Delrahim's theme is that "it takes two" — meaning that the DOJ would be relying on the parties to cooperate better to shorten the review process.

Less than 2 percent of deals notified to the DOJ result in a second request.[5] But the raw percentage obscures the reality that annually about half of the second requests issued by the DOJ are for transactions valued at over $1 billion. And transactions valued at over $500 million make up over 75 percent of the second requests issued.[6]

While not a perfect proxy for complexity, in general the DOJ (and the Federal Trade Commission, which has a similar pattern) issues second requests in transactions that involve large global businesses, where antitrust review must be coordinated among multiple countries' agencies. That's just one of several factors that suggests skepticism about the effectiveness of the announced changes.

In roughly rank order of likely impact on merger review, Delrahim's proposed changes and our thoughts are as follows:

- Acknowledgement of benefits of mergers. Adopting Baxter's perspective of the economic benefits of mergers is invaluable. The DOJ has a brief to investigate and prevent anti-competitive behavior, but informing that inquiry with openness to the potential competitive benefits of mergers is refreshing and will benefit merging parties and the public by facilitating mergers that enhance competition.

- Significantly reduced discovery burdens can be realized if the deputy attorneys general can be convinced to stick within the assumptions that 20 custodians per party and 12 depositions are sufficient. Focusing on fewer inquiries will enhance the DOJ's focus and reduce the burden on merger parties without jeopardizing the integrity of the inquiry.

- Reaching agreement to shift a significant portion of discovery to after the DOJ decides whether to challenge a merger will benefit the more than 98 percent of transactions that are not subject to a second request. This is sensible and long overdue.

- Increased transparency. The DOJ evidently has not previously tracked "pull and refiles," where deal parties, with encouragement from the DOJ, withdraw their Hart-Scott-Rodino Act notification and immediately refile in order to extend the deadline for the DOJ to complete its initial review. The parties' hope is to avoid receiving a second request. In the future, if there is a pull and refile, the DOJ is to establish an investigative plan to effectively use the additional time. Coupled with Delrahim's commitment to publish information about the length of merger reviews generally, disclosing statistics about the frequency and effectiveness of pull and refiles will provide useful guidance to merger parties.

- Publication of a model voluntary request letter. Delrahim intends for the DOJ to publish a model voluntary request letter describing the information the DOJ routinely requests at the start of the review. It's unclear how this will benefit the parties, since the requested information is already widely known.

- Early meetings between DOJ officials and key business people.[7] While this would seem to be a welcome departure from current practice, it is difficult to envision how this will be useful in practice. The parties' motivations for a transaction are not generally at issue and, frankly, before the parties have provided significant information, DOJ officials are unlikely to be in a position to thoughtfully evaluate merger parties' statements. It is rare that the antitrust difficulty with a merger is the parties' intention; instead, it is the unintended consequences of a deal that raises the DOJ's concerns. Early meetings will not reshape those facts nor, prior to significant factual disclosure, are the DOJ officials likely to identify potential difficulties where the parties have missed them.

- Model timing agreement. Several of the proposed reforms to the DOJ's investigatory process will be set forth in an as-yet-unreleased model timing agreement. The model agreement is intended to provide a framework for the DOJ and deal parties to agree on the scope and

duration of this aspect of the DOJ's investigation. Notably, while the contemplated 60 days to resolve matters after the parties certify substantial compliance is shorter than current practice, the announced timing would still not bring the DOJ's practice in line with the Hart-Scott-Rodino Act, which permits parties to consummate their merger as early as 30 days after certifying substantial compliance.

In turn, for such commitments from the DOJ, the DOJ will expect deal parties to provide "faster and earlier productions of documents"; to eliminate privilege "gamesmanship" where the parties ostensibly withhold documents initially in bad faith and then "deprivilege" significant numbers of documents that "never should have been withheld in the first place" on the eve of a deposition. Both expectations imply that parties have intentionally acted to frustrate or hinder the DOJ's review. While there are undoubtedly examples of unprofessional behavior, more typically the parties provide documents more slowly than the DOJ.

Likewise, Delrahim stated that the DOJ will be more aggressive in enforcing timely compliance with civil investigative demands, which are issued to nonparties with information relevant to merger investigations. From the deal parties' perspective, this is a welcome initiative — since the CID can provide valuable information to help the DOJ evaluate the deal and delayed or incomplete responses slow the DOJ's evaluation. However, from the perspective of recipients of a CID, the deal parties' burdens are being shifted to a third party. Further, litigation over a CID will, at least, initially slow merger clearance and increase the DOJ's cost, since litigation will be neither quick nor cheap. With diligent prosecution of CIDs, perhaps the DOJ will engender an attitude of "resistance is futile" among CID recipients, but that is hardly a development to be cheered.

Finally, Delrahim announced that the DOJ is withdrawing its 2011 policy guide to merger remedies and reinstating the 2004 policy guide until new guidance is issued. Among other things, this action demonstrates an explicit return to a strong policy preference for structural remedies (i.e., remedies requiring business unit divestitures) over conduct remedies, something that Delrahim has repeatedly stated. Indeed, under the 2004 policy, conduct remedies are disfavored and appropriate only when required to ensure an effective structural remedy or when "significant efficiencies" would be lost if a structural remedy were imposed or the deal were blocked altogether. In addition, under the 2004 policy, the DOJ requires that a remedy will only be accepted if there is a "sound basis for believing" that a merger will substantially reduce competition. "The Division should not seek decrees or remedies that are not necessary to prevent anticompetitive effects, because that could unjustifiably restrict companies and raise costs to consumers."[8]

More generally, there is reason for skepticism about whether the DOJ has correctly identified the cause of delayed merger reviews. Delrahim mentioned the increasing number of international transactions — particularly among the largest transactions — which requires coordinating among antitrust authorities in multiple jurisdictions. However, there was no attempt to evaluate whether such coordination is amenable to being hurried.

Similarly, the growing importance of sponsored transactions (private equity) in the transactional market may change the antitrust dynamic.[9] Over the past several years, deals by sponsors have risen to be, at least in the current environment, over half the market, including importantly deals of the largest size, where antitrust scrutiny is at its highest. While it is unclear whether and how sponsor participation will affect antitrust considerations, such a large shift in deal flow in the United States deserves study. For example, perhaps sponsors will be less likely to run into anti-competitive difficulties than would a

strategic buyer, since they may not be as constrained to look for transactions within industries in which they already participate.

In sum, Delrahim's proposed reforms are heartening to the extent that they signal the DOJ understands the burden that antitrust clearance places on deal parties. However, the actual relief provided to participants is likely to be modest, if it exists at all. Various factors, such as the increasing globalization of deal flow and the sponsored transactions, are likely to be much larger factors in the time it takes the DOJ to evaluate proposed transactions.

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[1] Makan Delrahim, "It Takes Two: Modernizing the Merger Review Process" (Sept. 25, 2018). www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-2018-global-antitrust. See also, Bernard A. Nigro, Jr., "A Partnership to Promote and Protect Competition for the Benefit of Consumers" (Feb. 2, 2018). www.justice.gov/opa/speech/deputy-assistant-attorney-general-barry-nigro-delivers-remarks-annual-antitrust-law.

[2] Id.

[3] Id.

[4] Delrahim cited Alec Burnside et al., "DAMITT Q2 2018 Update: Duration of Significant Antitrust Merger Investigations May Have Plateaued Despite Unchanged Levels of Enforcement in the US and EU" (July 19, 2018). www.dechert.com/knowledge/hot-topic/damitt--how-long-does-it-take-to-conduct-significant-u-s--antitr.html.

[5] Hart-Scott-Rodino Annual Report Fiscal Year 2017 (April 2018). www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014_fy_2017_hsr_report_final_april_2018.pdf.

[6] See Id. and the annual reports for each of the previous years.

[7] The purpose is to "to understand their deal rationale and any other facts they believe will be important" to the DOJ's analysis. Delrahim, "It Takes Two: Modernizing the Merger Review Process."

[8] Antitrust Division Policy Guide to Merger Remedies (Oct. 2004). www.justice.gov/atr/archived-antitrust-division-policy-guide-merger-remedies-october-2004.

[9] See, for example, Sean Lightbrown, "SBOs and Beyond: PE Playing Pass the Parcel" (Nov 27, 2018), PitchBook. https://pitchbook.com/news/articles/sbos-and-beyond-pe-playing-pass-the-parcel.