

No Games in Merger Review: DOJ Signals Discipline and Continuity

A photograph of a modern building's curved facade with large glass windows, viewed from a low angle looking up. The building is on the right side of the page, partially overlapping the title.

3 MIN READ

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On May 7, 2026, Acting Assistant Attorney General Omeed A. Assefi delivered remarks at NYU Law's Engelberg Center outlining the Antitrust Division's current approach to merger review. The remarks came as Assefi continues to lead the Division on an acting basis following AAG Gail Slater's departure in February 2026.

For companies considering or defending HSR-reportable transactions, the message was clear: the Division remains focused on affordability-driven enforcement priorities, evidence-based advocacy, disciplined HSR compliance, structural remedies, and litigation readiness. So what should parties take away from the speech? A few points stand out:

- **Affordability remains central.** Assefi emphasized that the Division is focused on cases in sectors that directly affect household budgets, including food, energy, and healthcare. He cited the Division's recent suit against New York-Presbyterian as an example of that priority in action.
- **Process matters.** The Division expects complete and accurate HSR filings, candid advocacy, and transparent engagement throughout the review process. Assefi made clear that HSR noncompliance under Section 7A of the Clayton Act remains an enforcement focus, including document alteration, gun-jumping, and strategic late-stage document or data

productions. For merging parties, process missteps can damage credibility with staff and create independent enforcement risk.

“After a Second Request has been issued, it is imperative that parties do not play games with documents and data.”

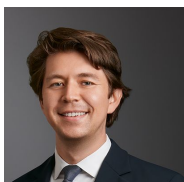
- **Early advocacy must be evidence-backed.** Assefi noted that most HSR-reportable transactions are cleared without a Second Request and encouraged parties to use the initial waiting period for substantive engagement. But conclusory arguments are unlikely to persuade. Parties seeking early clearance should be prepared to support their position with documents, data, and customer evidence.
- **AI and disruption theories require proof.** Parties invoking AI, technological change, or future market disruption should expect those claims to be tested against the factual record. The Division is not foreclosing such arguments, but broad narratives about future disruption are unlikely to carry weight without concrete support.
- **Timing agreements are back.** Assefi confirmed that the Division has returned to negotiating timing agreements, describing them as useful for both staff and parties. In his view, they can reduce incentives for late-stage productions and allow both sides to focus on the substance of the investigation rather than the clock.
- **Structural remedies remain the Division’s preferred path to settlement.** The Division has recently resolved several merger investigations through structural divestitures, including Constellation/Calpine, Columbus McKinnon/Kito Crosby, and Reddy Ice/Arctic Glacier. Assefi described structural relief as more certain, efficient, and administrable than behavioral commitments. Although he did not categorically rule out behavioral remedies, parties should expect the Division to view targeted divestitures as the more durable solution where a remedy is available.
- **Unilateral fixes may not be enough.** Companies that modify or restructure transactions during an investigation should not assume that those changes will resolve the Division’s concerns. Assefi made clear that the Division remains prepared to challenge transactions where it views a unilateral fix as insufficient.
- **The Division is prepared to litigate.** Assefi described going to trial as “a bonus” for the Division and pointed to Live Nation/Ticketmaster and Google/DoubleClick as examples of what he characterized as past under-enforcement. He confirmed that the Division is prepared to litigate novel theories, including those involving future competition.

The AAG’s speech laid out a roadmap for how the Division would like merger parties to engage during review. Companies pursuing HSR-reportable transactions should treat the review process itself as a key part of their merger strategy; arguments around the impact of AI and industry change need strong evidentiary support; and while the Division continues to resolve

many merger reviews principally through structural remedies, the Division will litigate and utilize novel theories where appropriate.



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