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Will New DOJ Timing Agreement Deliver Faster Merger Clearances?

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Since the advent of the second Trump administration, leaders of the U.S. antitrust agencies have emphasized this administration's more deal-friendly approach, such as through their openness to merger remedies. Last week, the DOJ Antitrust Division announced an update to the Division's model timing agreement to formalize a process for narrowly targeted investigations that have the potential to short-cut full Second Request investigations.

By way of background, the U.S. merger review process under the Hart-Scott-Rodino Act of 1976 provides statutory waiting periods for agency review of notified transactions. After an initial 30-day waiting period triggered by the parties' HSR filings (which may be extended to 60 days through a "pull and refile" process), if an agency wishes to continue to investigate, it must stop the clock by issuing a so-called "Second Request," an extensive request for documents, data, and responses to interrogatories. A final 30-day review period does not commence until the parties have certified compliance with the Second Request. This gives the parties some control over timing through the intensity and scope of their compliance efforts.

The Second Request process creates friction and inefficiencies for both the merging parties and reviewing staff. For the parties, complying in full with a Second Request can take several months and cost millions of dollars. And under a strict application of the statutory scheme, the staff potentially face an enormous dump of materials with only 30 days to wrap up their review and make a recommendation to agency leadership as to how to proceed.

Over the years, however, parties and staff have cooperated to manage these drawbacks, with staff agreeing to modifications that narrow the parameters of a Second Request, and parties agreeing to stage production of documents and data to permit a more orderly review. The Division's 2018 model timing agreement included these and other terms, notably a soft limit on the number of document custodians and an extended final waiting period to give the staff more time to review and parties more time to make substantive arguments. Even without a signed timing agreement, parties and staff often agreed to modifications, staged productions, and delayed closing beyond the 30-day HSR final waiting period.

The new timing agreement sets out a middle route that was utilized informally for many years before the Biden administration. In essence, it involves the parties' agreement with DOJ to respond initially to the Second Request only for a subset of products or services, focused on an issue (or issues) that DOJ has identified as likely to be dispositive of the result—that is, the aspects of the deal raising most significant competitive concerns, typically a horizontal overlap. This "quick look" approach frequently resulted in investigations being closed or targeted divestitures being negotiated without the need for full compliance on other aspects of the Second Request. There is a timing risk to the parties with this approach—if the staff ultimately conclude that the overlap raises significant concerns, and there is not an acceptable remedy and the parties want to test the agency's concerns in court, the parties must renew their efforts to comply with the full Second Request in order to restart the review clock and push the agency to make a final decision whether or not to challenge.

The new timing agreement formalizes the "quick look" approach—now called "Expedited Consideration." However, it may not be as quick a look as the parties would like. After making the "Priority Production" of documents, data, and a short-form privilege log, the agreement guarantees a Front Office meeting within 21 days, and a decision about whether to close or proceed to investigate 14 days after that. While it is possible these milestones may take place sooner, the additional five-week delay may be too much for many deals, and parties will elect to proceed with their compliance efforts even while the staff are engaged in Expedited Consideration. Having said that, there are still benefits to engaging with staff and the Front Office on a narrow set of issues if there is a chance of closing the investigation (or accelerating a remedy proposal) even while full compliance efforts take place in the background.

Overall, the current administration's efforts to streamline merger reviews is a welcome development for companies undertaking significant transactions, and consistent with the deal-friendly message of agency leadership.

> **"This change will allow for quicker and more efficient review of proposed transactions; more effective use of taxpayer resources; and above all, helps the Department do its job to safeguard a competitive marketplace while keeping America open for business," Associate Attorney General Stanley Woodward**
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