

“MODERNIZING MERGER REVIEWS”: DOJ ANTITRUST DIVISION AIMS TO SHORTEN TIME AND INCREASE EFFICIENCIES OF MERGER REVIEWS WITH PROCESS CHANGES

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The U.S. Department of Justice Antitrust Division's ("Antitrust Division") Assistant Attorney General Makan Delrahim announced last week that the Antitrust Division is instituting a series of policy changes aimed at expediting its merger review process. [1] The changes aim to resolve most investigations within six months of filing (down from the current average of more than ten months), and include internal process and policy changes, as well as new expectations and requirements from merging parties. Delrahim assured that the changes will not compromise the quality of merger reviews, warning that the Antitrust Division is "not unilaterally disarming." Companies considering transactions that require antitrust review should take note of the changes and be prepared for increased expectations of cooperation in merger reviews.

The changes seek to "modernize" the merger review process at every distinct stage and include the following:

1. **Meet with the Parties Earlier** – The Antitrust Division "will be open to an initial, introductory meeting" with key executives "to understand their deal rationale" and listen to facts they believe will be important to the Antitrust Division's analysis.
2. **Model Voluntary Request Letter** – The Antitrust Division will e-publish a model voluntary request letter so as "to give the parties a head start in identifying the kind of information they should look for" to help the Antitrust Division assess quickly whether there is any potential anticompetitive harm that would require a longer, more in-depth investigation.
3. **Pull-and-Refile Accountability** – The Antitrust Division has implemented a system to track what happens when a party pulls-and-refiles its HSR filing, which occurs when the Antitrust Division fails to resolve all issues within the 30-day waiting period and the party wants to avoid a second request it believes is unnecessary. Delrahim explained that the new system is designed to help the Antitrust Division "determine whether we can close the investigation without issuing a second request, or, if one is necessary, narrow it as much as possible."
4. **Model Timing Agreement** – The Antitrust Division will e-publish a model timing agreement, which the Antitrust Division utilizes "to encourage an orderly process by which the parties comply with the second request and the Antitrust Division analyzes the transaction and decides whether to clear it, seek remedies, or seek to block it." While these timing agreements bring certainty to both parties, the negotiations often take "too much time," thus "slowing our ability to get to the heart of the matter,"

Delrahim said. Thus, to facilitate reaching a timing agreement, the Antitrust Division will e-publish a model timing agreement as a benchmark.

5. **Reforming Timing Agreements** – The Antitrust Division will also make substantive changes to the model timing agreement in order to narrow potential areas of disagreement, facilitate more efficient reviews, and bring the process closer in line with the HSR Act. These changes will include:
 - **Fewer Custodians** – The Antitrust Division will seek documents from fewer custodians than it generally has in the past, assuming that 20 custodians per party will be sufficient in most cases.
 - **Fewer Depositions** – The Antitrust Division will take fewer depositions than in the past, and generally will not seek more than 12 depositions in most cases.
 - **Shorter Overall Time** – The Antitrust Division will "strive to make a decision as quickly as possible from the time the parties' certify compliance"—no longer than 60 days (and sooner if possible) in most cases.

In exchange for these efficiencies, Delrahim explained that the Antitrust Division will modify what it "expects from the parties," namely:

- **Faster and Earlier Productions of Documents** – the Antitrust Division will expect to receive documents and other information earlier in the compliance period.
 - **Earlier Production of Data** – the Antitrust Division will expect (1) to receive early cooperation on identifying relevant data for its economists to analyze, and (2) production of useable data substantially before the second request compliance date.
 - **No More Privilege Log "Gamesmanship"** – While the Antitrust Division "respects the attorney-client privilege and the work product doctrine," the Antitrust Division expects the parties to reexamine their aggressive approach to classifying documents as "privileged" and thus withholding large numbers of documents as privileged, "only to de-privilege and dump many of these documents on us much later in the process, often on the eve of a particular deposition."
 - **Longer Post-Complaint Discovery Period** – the Antitrust Division will require adequate time to conduct post-complaint discovery in the event that it results in contested litigation. "Because most merger investigations do not result in contested litigation," Delrahim explained, "parties therefore can reduce the burdens of the second request review by agreeing to defer some discovery until after a complaint is filed."
6. **CID Enforcement** – The Antitrust Division will "take steps to ensure that third parties comply with [its] civil investigative demands in a timely manner," since such parties often possess critical documents and data. Namely, the Antitrust Division promises to hold CID recipients to the deadlines and specifications the Antitrust Division issues, and it will "not hesitate to bring CID enforcement actions in federal court to ensure timely and complete compliance."

7. **Parallel Investigations** – The Antitrust Division is also "seeking ways to improve coordination with foreign enforcers in parallel investigations," and welcomes the parties' requests for the Antitrust Division's help in reducing "the burdensome red tape wherever possible."
8. **Withdrawing the 2011 Remedies Guide** – The Antitrust Division also announced (1) the withdrawal of the 2011 Policy Guide to Merger Remedies, and (2) that it is reviewing its remedies policy with a "commitment to shortening the duration of merger reviews extend[ing] to the remedies phase." Until a new Policy Guide is released, the 2004 Policy Guide to Merger Remedies will be in effect.
9. **Release of Merger Review Statistics** – Finally, in an effort to "increase transparency" regarding whether the aforementioned changes have had any impact, the Antitrust Division will "release statistics that show, on average, how long the Antitrust Division is taking to review mergers"—specifically, (1) the average duration of second request investigations and (2) the average length of time from the opening of a preliminary investigation to the early termination or closing of the investigation, including investigations that did not result in the issuance of second requests.

If you are considering a transaction that will be subject to review by U.S. antitrust enforcement agencies, consult with antitrust counsel early to ensure a thorough understanding of the Antitrust Division's merger review process changes and how they could effect your transaction, strategy, and timing when approaching the review process.

Notes:

[1] "Assistant Attorney General Makan Delrahim Delivers Remarks at the 2018 Global Antitrust Enforcement Symposium," Washington, DC (September 25, 2018), *available at* <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-2018-global-antitrust>.

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