

## MERGERS AND ACQUISITIONS

### Don't Panic! The Insider's Guide to Surviving an Agency Merger Review



BY JAMES TIERNEY AND ALEX OKULIAR

**Y**our carefully crafted media plan has done a wonderful job explaining that your merger involves complementary products, will result in substantial cost savings, will drive the development of new, innovative products, and will benefit consumers. The press and analysts' reaction is generally favorable, but there are a few outliers that speculate the merger will eliminate a price maverick. And there are one or two unhelpful documents that suggest reduced competition—

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depending on who's reading them and the prism through which they are viewed. After you make your Hart-Scott-Rodino ("HSR") filing, a few days pass and you begin to hope that your deal had dodged close scrutiny. But then, your phone rings and you're informed by staff at the Federal Trade Commission or DOJ Antitrust Division (the "Agencies") that they are investigating the competitive effects of the merger.

Now what? Your client wanted to close this deal last week and now you have to tell the CEO that there will be a delay of weeks . . . maybe even months . . . that may postpone product development and have negative tax consequences. What is worse, the entire deal might get scuttled and your client may have to pay a significant bust up fee. Although you warned the CEO early on that the Agencies have ramped up their litigation capabilities recently and are better prepared and willing to challenge deals, you know that those conversations often are forgotten in the fog of merger battles with the Agencies.

Don't panic. All is not lost. Although each deal presents different competitive issues and how to approach the Agencies can vary depending on the antitrust risk and many other factors, there are steps you should consider to increase the odds of getting your deal through the Agencies quickly. The overriding principle is that in the first instance you should not treat the Agencies like an adversary in private party litigation. It is important

to assist the Agencies in their analysis, to be candid, and to be responsive. Failing to do so can set the process back or even derail it.

**Be Prepared.** Hopefully, the call from the Agencies wasn't your first inkling your deal presented competitive issues. Conduct an antitrust analysis as early in the process as possible to identify issues and to begin developing an accurate and coherent explanation of the competitive dynamics of the market.

**Call the Agency.** If it's clear your deal will be in the press and looks strategic or creates significant overlaps, give the Agencies a heads-up and consider delaying the filings to give the Agencies the opportunity to resolve clearance and get an investigation opened. If it's not clear your deal will be looked at, keep your head down. Check with the Agencies' pre-merger office to determine which Agency and which Agency shop will review your merger.

**Send a Courtesy Copy of the HSR Filing.** After you file, don't waste one day of the initial waiting period. It may take a day or two for the HSR filings to hit the staff's desk. Delivery a courtesy copy on day one and provide an electronic copy of the filings.

**Schedule a Meeting Early.** Promptly schedule a meeting with staff, ideally within one week of the opening of the investigation. The purpose of the meeting is to begin to explain the rationale for the deal and begin to educate staff on any overlap products and the structure of the market. This will give staff a story to test during their customer and competitor interviews.

**Use Your Meeting Wisely.** Unless there's a good reason not to, bring high-level company executives to the meeting, for example the head of sales and/or the VP for strategy. Lawyer presentations are not as effective, appear defensive, and usually lawyers do not have complete information which requires follow up that can slow down the investigation.

Lead off with a clear and well-developed explanation of the rationale for the deal. You're halfway home if you can convince staff that there is a procompetitive purpose for the deal and/or expected efficiencies. If you are

unable to articulate a clear procompetitive story, staff may conclude there is an anticompetitive purpose.

Staff will interview all key competitors and as many customers as time permits. Give staff the facts they will need to test the impact of your deal on competition as they conduct these interviews.

**Be Ready to Produce Documents and Data.** The Agencies will issue access or voluntary request letters within a few days of opening the investigation. Be prepared to produce basic information about the overlap products, contact information for your largest customers, sales data, win/loss data, and any other information you believe will assist staff analyze the effects of the merger. Win/loss data can be dispositive in unilateral effects investigations. Keep in mind this is not litigation where it is not unusual to take months to gather, review and produce information. Produce requested information as quickly as possible.

**Build a Good Working Relationship With the Lead Investigator.** Stay in touch and be responsive to reasonable questions and requests.

**Maintain your credibility with staff.** Know your facts and don't overstate or understate the market or your competitive impact. Here, staff are both prosecutor and judge—a loss of credibility may doom the merger.

**Prepare for Litigation.** Of course, if you anticipate the Agencies will likely have significant competitive concerns, approach the investigation from a litigation perspective because that's what the Agencies will be doing. Staff wear two hats—they are factfinders initially, but ultimately have to be prepared to litigate if they see an issue.

- Consider hiring an economist, especially if there is a lot of data.
- Be sure at the outset that the company's documents are consistent with the competitive story you present to staff.
- Only bring executives to meetings who will be effective witnesses at any trial.

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