

APPRAISING DOJ'S NEW INITIATIVE FOR PRE-MERGER REVIEW

by

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For as long as the Hart-Scott-Rodino (“HSR”) Pre-Merger Notification rules have existed (about 25 years now), the private bar and the business community have been complaining that the federal antitrust agencies were misusing the powers granted to them. The most constant complaint has been that the agencies require the production of more information on many more transactions than was ever contemplated by the statute's drafters — or that is truly necessary to do their job. These complaints are clearly well-founded: both agencies have generally allowed their bureaucratic instincts to dominate over the years, stretching the HSR process to their tactical advantage, and justifying their means by the desirable end — the prevention of anticompetitive mergers.

Of course, all bureaucracies, left to their own devices, are genetically programmed to expand rather than contract, so this historical record should shock no one. Still, the complaints have been reasonably consistent over the years, and over the last decade or so have periodically received attention from Congress, with the last Congress even producing some not very useful legislation on this subject. My former partner Charles James, who is now the Assistant Attorney General in charge of the Department of Justice’s (“DOJ”) Antitrust Division, and I have been among the loudest critics for years. Obviously, we have not been very effective, in part because the American business community has not been willing to invest in fixing the problem.

This failure to push for a solution is, unfortunately, quite understandable. For most business entities, these problems are very episodic; while individual matters create great frustration at the time, for most companies serious investigations only come along every once in a while. This tells the story of the most recent legislation. As originally written, it would have provided some significant controls on agency overreaching, including a tool that Assistant Attorney General James and I have been among the few to advocate over the years — the right of merger parties to appeal an overbroad request for information (the so-called Second Request) to a magistrate for resolution. Perhaps, not surprisingly, by the time the legislation passed, that provision had disappeared, and the organized business community acquired something it valued more — an

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increase in the filing threshold that eliminated the need for a large number of filings.

So, we continue with the status quo ante. Today, the antitrust agencies obtain information on mergers in two ways: a Second Request and, for those transactions not covered by HSR, a Civil Investigative Demand. Both compel the production of information, but one — the Second Request — is self-enforcing, because it stays the transaction until it is complied with and provides no independent third party review, while the other — the CID — does not automatically stay the transaction, and can be enforced only by a Motion to Compel before a federal court. It is not surprising that the Second Request, where the agencies basically have no constraints other than their conscience, is much more commonly overbroad and always more difficult to negotiate. Because of this, Assistant Attorney General James and I advanced the notion that the Second Request should be treated like a CID in this respect; we believed that once there was a right of appeal to an independent arbiter and staff knew they would have to defend their positions before a neutral decisionmaker, Second Requests would begin to look more like CIDs, and negotiations on the final scope of search would become much smoother.

The HSR legislation introduced by Senator Hatch contained such a right. The agencies bitterly opposed it, however, and the business community was happy to trade this occasional benefit off for the more regular benefit of higher filing thresholds. Thus, the final legislation left those who receive a Second Request still reliant on the good faith and reasonableness of the agencies.

Time marches on, and as it happens, Charles James is now the Assistant Attorney General in charge of the Antitrust Division, with the opportunity to actually do something to fix this problem. Late last fall, the Antitrust Division unveiled a new Merger Review Process Initiative, clearly the product of James and his Deputy Deborah Majoras (another former partner of mine, who prior to marriage as Ms. Deborah Herman, had joined us in criticizing past practices). *See Sims and Herman, The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST LAW J. 865 (1997). This Initiative is a welcome step in the right direction, and Assistant Attorney General James and Ms. Majoras deserve great credit for the effort. Whether it will make a real difference remains to be seen.

The critical core of the new Initiative is the direct involvement of the three civil Deputy Assistant Attorneys General in the early stages of merger review. Under the new program, the initial HSR waiting period after filing (thirty days in most cases) will be used to aggressively weed out all but the relatively few transactions for which intensive investigation is justified, and to then focus any further investigation only on those areas that would be outcome-determinative. To do this, the Initiative mandates early consultation between staff and the parties, early production of particularly useful information by the parties (*e.g.*, strategic plans and merger documents) and early identification — and most importantly, disclosure — by staff of the concerns they are focused on. Ideally, this would lead to a better basis for determining whether a Second Request should be issued at the end of the initial waiting period, either eliminating unnecessary Requests or producing narrowed ones.

The most obvious break from past practice is the instruction that the Division will no longer rely on a Model Second Request as the standard, and will expect the staff to tailor each Second Request to the particular issues raised by each transaction. Too often in recent years it seems that both the Antitrust Division at DOJ and the Federal Trade Commission (“FTC”) just hit the button on the word processor, changed the names of the parties and the products, and then waited for the parties to come in and explain how the obviously overbroad demand should be narrowed in this particular matter. The agencies excused this by arguing that they did not know enough to ask very focused questions, both because the clearance process frequently took too much time and because the parties would not provide useful information early. Of course, the former was completely under the control of the agencies, and so the use of this as an excuse for failure to focus on the Second Request is pretty unappealing; fortunately, both the Antitrust Division and the FTC (under Charles James and new FTC Chairman Tim Muris) are working to improve this process. The latter problem was also to a large extent agency-generated. There is very little incentive to provide lots of information early if the only result (as was too frequently the case) is that you get a broader, more burdensome Second Request.

The new Initiative shifts the burden to the staff to justify the particular request and states specifically that the possibility of post-issuance modifications "will not serve as a substitute for issuing tailored Second Requests in the first instance." The Initiative goes on to call for regular consultations between staff and the parties, encourages frank exchanges, and says that as issues cease to be a concern, they will be taken off the table. And finally, it authorizes the Division's section chiefs, "in consultation with the relevant Deputy Assistant Attorney General," to make specific commitments to timetables and other procedures in exchange for comparable commitments by the parties.

There is little to complain about in this Initiative; it is all eminently logical and sensible. There remain, however, a number of potential hurdles to effective implementation. First, this whole scheme depends upon rapid decisions in the clearance process — the mechanism by which the agencies decide which matters are allocated to which agencies. In general, this mechanism works reasonably well, with many clearances coming within 5-10 business days following the filing. But for matters that both agencies would really like to handle (AOL-Time Warner is a great example from the recent past), and even for a non-*de minimis* number of less visible transactions, the process does not work well at all. It is unfortunately not uncommon for clearances to take 15 or 20 days or sometimes (like in AOL/TW) 29 days. Even 9 business days for clearance (the agencies' current goal) eliminates at least one-third of the original waiting period, and thus reduces dramatically the chances that the new Initiative could actually do what is intended. For this effort to be successful, the clearance process has to work in almost every case in about a week, leaving 3+ weeks to actually get something done. Every additional day lost in the clearance process will significantly reduce the chances that this Initiative will actually accomplish anything. Both Assistant Attorney General James and Chairman Muris understand this point, and are working hard to streamline the clearance process.

The second big hurdle is the career staff, especially the section chiefs (and, since the FTC is moving in this same direction, the FTC Assistant Directors). How effectively and aggressively will they implement this directive? Everyone can agree on principle that the more quickly and efficiently decisions can be made about whether particular transactions require careful review, the better. But agency staff will tell you that they are at a disadvantage in a very fast process, because while the parties have had time to get prepared before they start the clock, the staff must begin from scratch and get up to speed very quickly indeed. There is some truth to this concern (although in many cases the staff knows the industry better from prior transactions than the parties' lawyers do), but it is also true that 100% accuracy is not the goal here; it will be perfectly sufficient to get the vast majority of decisions right. That can be done with a look at a relatively small number of documents, and the opportunity to talk to a relatively small number of people. Will an intense focus on deciding as many matters as possible during the initial waiting period result in some things that should be investigated slipping through? Conceivably, although it does seem unlikely in this day of competitor complaints about any transaction that has even a remote possibility of competitive harm. But even if an occasional close call slips through, the benefits to the economy of allowing the vast majority of transactions to close quickly are likely to be much more important than those very few mistakes. And in any event, the agencies are still free to challenge transactions even after the HSR period is over or the transaction is closed, as they have demonstrated with several recent challenges.

Still, the understandable tendency of agency staff is to not make a mistake and let that bad deal through; their job, as many of them see it, is to stop bad deals, and so they prefer to err on the side of thoroughness, not speed. They want to look under all the rocks, not just the big ones. They do not want to have to make judgments in a hurry; they want the time to reflect and absorb. And they are not much moved by the need for speed of the parties. So, under these circumstances, will the section chiefs actually push the staff? Will they really be creative in looking for ways to expedite, rather than ways to delay? It remains to be seen. Assistant Attorney General James has used this Initiative to inject the Deputy Assistant Attorneys General into the HSR process much earlier than they historically have been, and that is obviously intended to increase the odds that the chiefs and Assistant Directors at the FTC will be aggressive in implementing this new Initiative.

A third major hurdle, quite frankly, is how the merging parties react. Many merger lawyers, myself

included, can tell stories about how they provided information early to staff, and found that the only effect that action had was to increase their burdens, as staff used the information mostly to expand the Second Request parameters. For this reason, many merger lawyers have been reluctant to provide much information up front in the process, unless it is so compelling that it is sure to be decisive. This new Initiative will rely on cooperation and not game-playing by the parties' counsel, on the promise that cooperation will be rewarded. Many of us will take that promise at face value, and will in fact be prepared to provide considerable information up front, but I suspect that there will be some who try to game the system to their advantage. So while reluctant staff can torpedo this Initiative, so can non-cooperative party counsel.

Finally, the Initiative does not by its terms treat one of the most serious problems with the Second Request — its use as a discovery weapon, not for an enforcement decision but for possible litigation. Historically, the agencies have viewed the Second Request process as a way to prepare for trial if necessary, thinking that there is no guarantee that they will get the same kind of discovery from a trial judge after a complaint is filed that they can coerce during the Second Request. And, to be frank, some agency staff like broad requests because they like the additional time that provides for the investigation and litigation preparation.

But merger lawyers have now adjusted to this by throwing armies of attorneys and money at the process, producing large volumes of documents in very short periods; thus, the staff does not get more time, but it does get more documents than it can read, and the parties spend lots of unnecessary money. The solution to this problem is to have the parties agree that they will not oppose agency discovery post-complaint on the basis of the prior investigation, but will rely only on the standard grounds available under the Federal Rules of Civil Procedure. This will not put the staff in the same coercive position that the Second Request allows, but it will put them in the same position that other plaintiffs are in — with the advantage of a substantial pre-complaint discovery program that other plaintiffs do not have. And since few matters are actually litigated, it will eliminate the need for the vast majority of material that is currently sought by Second Requests, which has nothing to do with making an enforcement decision but rather is intended to gather potential material for litigation. Hopefully, this approach will be incorporated in the process as it moves forward.

Assistant Attorney General James and the rest of his leadership team (and the FTC leadership, which is pursuing a similar path less formally) want this new approach to succeed, and we should all hope it does. But it will depend to a very great extent on changing old habits of both agency staff and outside lawyers. It will be interesting to see whether either leopard can change its spots.