

October 1, 2018

## DOJ ANTITRUST HEAD SIGNALS MOVE TO SHORTER, LESS BURDENSOME MERGER REVIEW

To Our Clients and Friends:

On September 25, 2018, in a speech at the 2018 Georgetown Law Global Antitrust Enforcement Symposium, Assistant Attorney General Makan Delrahim, head of the Justice Department's Antitrust Division ("DOJ"), announced his intention to significantly reduce the time needed to review proposed mergers and to reduce the burden in responding to a Request for Additional Information and Documentary Material ("Second Request") regarding proposed transactions. The proposed changes raise substantial procedural considerations for clients contemplating transactions posing complex antitrust issues that are reviewed by DOJ, although it remains to be seen whether and to what extent the new policies will be implemented.

Transactions such as mergers and joint ventures that meet thresholds set out in the Hart-Scott-Rodino Act, 15 U.S.C. § 18a, and related regulations ("HSR") must file with the FTC's Premerger Notification Office and go through an initial 30-day waiting period to give the FTC and DOJ time to make an initial evaluation of the transaction's potential effect on competition. During this waiting period, either agency may issue a Second Request, a subpoena that seeks a substantial volume of documents and data regarding potential markets that may be affected by the proposed transaction. Following substantial compliance with a Second Request, the reviewing agency has another 30 days to make an enforcement decision, a second waiting period that is sometimes extended by a "timing agreement" with the parties for another 30 to 60 days.

***Six-month Timeframe for Merger Review.*** Delrahim announced that DOJ would aim to resolve most merger investigations within six months of the parties' HSR filing. Citing a source claiming that "significant merger reviews" in 2017 took an average of 10.8 months to complete, up 65% from just over 7 months in 2011, Delrahim acknowledged that increasingly lengthy merger investigations were "a problem" and that a change was needed to "modernize" the merger review process. Delrahim's stated goal to keep most merger investigations under six months was conditioned on companies' "expeditious cooperat[ion]" throughout the process in the form of prompt production of relevant documents and data. Delrahim noted that not every merger could be completed in this time frame, as some will have thorny issues that will take longer than six months to resolve. Delrahim's willingness implement a specific "benchmark" with regard to DOJ's merger review timeline will come as a welcome retreat from the trend of longer and more burdensome merger investigations. However, it remains to be seen whether a six-month deadline will be implemented in practice, particularly in mergers involving complex global markets, which are often subject to coordinated investigations by the DOJ and other competition authorities around the world, each with different timelines and procedures.

***Second Request Avoidance.*** Delrahim signaled that DOJ would take a harder look at whether merger investigations can be closed without the need for a Second Request. A Second Request for information can extend the deadline for a merger to close by six months or more, and DOJ staff sometimes requests that parties "pull and refile"—that is, withdraw and resubmit their HSR filings to provide the agency 30 additional days to resolve potential issues. Delrahim's guidance suggests that DOJ staff may use this avenue more frequently going forward if it can avoid the need for a Second Request.

***Faster Decision-Making.*** Delrahim promised faster decision-making once parties have complied with the Second Request, indicating that DOJ "will make a decision in no longer than 60 days—sooner, if possible . . ." The HSR Act permits filing parties to consummate their merger as early as 30 days after certifying substantial compliance with a Second Request. In practice, however, DOJ would frequently require that parties enter into "timing agreements" that extend the deadline by 30 to 60 days or more. This change will also shorten the time needed to complete a merger review and render an enforcement decision, but in practice DOJ may be reluctant to shorten this waiting period where litigation is a possibility.

***Fewer Custodians and Depositions.*** Delrahim issued crisper guidelines regarding the appropriate number of custodians and depositions needed to do a fulsome merger review. Regarding custodians, Delrahim stated that "as a general matter we will assume that 20 custodians per party will be sufficient unless the Deputy AAG in charge of the investigation explicitly authorizes more." Regarding depositions, Delrahim said that "we generally will not seek more than 12 depositions unless the deputy in charge of the investigation authorizes a greater number." This is a welcome reduction in the number of custodians, given that a similar reform in 2006 imposed a much higher limit of 30 custodians. This change may further reduce the expense and time needed to comply with a Second Request. Delrahim's proposed limits, however, were conditioned on earlier production of documents and data, less "gamesmanship" on privilege logs, and a longer post-complaint discovery period should the investigation result in litigation. As a result, it is unclear whether this commitment will result in a lighter compliance burden for merging parties.

***Stricter Third Party CID Enforcement.*** Delrahim sought to reinvigorate fulsome compliance with Civil Investigative Demands, noting that the Division would "not hesitate to bring CID enforcement actions in federal court to ensure timely and complete compliance." This suggests third parties in receipt of CIDs may encounter less flexibility on the part of DOJ Staff to modifications that substantially narrow the scope of the CID or extend the deadline to respond. Nevertheless, the DOJ Staff relies heavily on third party cooperation in merger investigations, and should remain willing to limit the scope of CIDs in cases where doing so will speed up compliance.

***Withdrawal of 2011 Policy Guide to Merger Remedies.*** Delrahim announced the withdrawal of the 2011 Policy Guide to Merger Remedies and restored the effectiveness of the 2004 Policy Guide until new guidance could be issued. Merger remedies have been an area of particular focus for Delrahim, who in November of 2017 stated a preference for structural remedies—remedies requiring divestiture of business units—over behavioral ones requiring changes to a company's conduct. The reversion to the 2004 Policy Guide seems to codify Delrahim's preference for structural relief, as the 2011 Guide had

signaled greater willingness to accept conduct remedies of the sort seen in the consent decrees entered in the Comcast/NBCU and Ticketmaster/LiveNation mergers, for example.

***Earlier Front Office Engagement.*** Delrahim offered parties the opportunity to meet with Front Office staff earlier in the merger review process, indicating that these personnel would "be open to an initial, introductory meeting." This suggests parties will be given a greater opportunity to dialogue with Antitrust Division decision-makers much earlier in the investigative process. Delrahim's guidance responds to private sector complaints about the merger review and may portend meaningful changes in the merger investigation process, at least at the DOJ. This is not the first and is unlikely to be the last attempt to reform the Second Request process or reduce the burden on merging parties. Prior initiatives have largely failed to achieve their core goal of reducing the time to clearance, although some (such as the 2006 reform) have reduced the cost of compliance.

If the announced changes are fully implemented, companies may look forward to meaningfully shorter merger investigations. Transactions subject to Second Requests should have lower burdens of compliance in the form of fewer depositions and custodians. Finally, parties can look forward to greater and earlier engagement with Front Office leadership before critical junctures in merger investigations are reached.

Delrahim's announcement contrasts notably with recent pronouncements by the FTC. Under Chairman Joseph Simons, who took the reins of the agency on May 1, 2018, the agency recently revised its Model Timing Agreement to formalize *adding* time to merger reviews. Specifically, the model agreement links parties' opportunity to present advocacy to FTC senior leadership to agreeing to provide additional time post-compliance—60 to 90 days—for FTC staff to review submitted Second Request materials. While the revision is generally consistent with current practice, at minimum, it reflects continued use of an elongated merger review period, and therefore suggests that the FTC may be diverging from DOJ with respect to the desire to shorten and streamline the full-phase merger review process.

**A copy of the Assistant Attorney General's remarks can be found at:** <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-2018-global-antitrust>.

**A copy of the FTC's Revised Model Timing Agreement can be found at:**

<https://www.ftc.gov/news-events/blogs/competition-matters/2018/08/timing-everything-model-timing-agreement>.



*Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Antitrust and Competition practice group, or the authors:*

# GIBSON DUNN

*Daniel G. Swanson - Los Angeles (+1 213-229-7430, dswanson@gibsondunn.com)*  
*Cynthia Richman (+1 202-955-8234, crichman@gibsondunn.com)*  
*Adam Di Vincenzo (+1 202-887-3704, adivincenzo@gibsondunn.com)*  
*Richard H. Cunningham (+1 303-298-5752, rhcunningham@gibsondunn.com)*  
*Brian K. Ryoo - Washington, D.C. (+1 202-887-3746, bryoo@gibsondunn.com)*  
*Chris Wilson\* - Washington, D.C. (+1 202-955-8520, cwilson@gibsondunn.com)*

*Please also feel free to contact any of the following practice group leaders and members:*

## **Washington, D.C.**

*D. Jarrett Arp (+1 202-955-8678, jarp@gibsondunn.com)*  
*Adam Di Vincenzo (+1 202-887-3704, adivincenzo@gibsondunn.com)*  
*Scott D. Hammond (+1 202-887-3684, shammond@gibsondunn.com)*  
*Joshua Lipton (+1 202-955-8226, jlipton@gibsondunn.com)*  
*Richard G. Parker (+1 202-955-8503, rparker@gibsondunn.com)*  
*Cynthia Richman (+1 202-955-8234, crichman@gibsondunn.com)*

## **New York**

*Eric J. Stock (+1 212-351-2301, estock@gibsondunn.com)*

## **Los Angeles**

*Daniel G. Swanson (+1 213-229-7430, dswanson@gibsondunn.com)*  
*Samuel G. Liversidge (+1 213-229-7420, sliversidge@gibsondunn.com)*  
*Jay P. Srinivasan (+1 213-229-7296, jsrinivasan@gibsondunn.com)*  
*Rod J. Stone (+1 213-229-7256, rstone@gibsondunn.com)*

## **San Francisco**

*Rachel S. Brass (+1 415-393-8293, rbrass@gibsondunn.com)*  
*Trey Nicoud (+1 415-393-8308, tnicoud@gibsondunn.com)*

## **Dallas**

*Veronica S. Lewis (+1 214-698-3320, vlewis@gibsondunn.com)*  
*Brian Robison (+1 214-698-3370, brobison@gibsondunn.com)*  
*M. Sean Royall (+1 214-698-3256, sroyall@gibsondunn.com)*  
*Robert C. Walters (+1 214-698-3114, rwalters@gibsondunn.com)*

## **Denver**

*Richard H. Cunningham (+1 303-298-5752, rhcunningham@gibsondunn.com)*

## **Brussels**

*Peter Alexiadis (+32 2 554 7200, palexiadis@gibsondunn.com)*  
*Jens-Olrik Murach (+32 2 554 7240, jmurach@gibsondunn.com)*  
*David Wood (+32 2 554 7210, dwood@gibsondunn.com)>*

# GIBSON DUNN

## **London**

*Patrick Doris (+44 20 7071 4276, pdoris@gibsondunn.com)*  
*Charles Falconer (+44 20 7071 4270, cfalconer@gibsondunn.com)*  
*Ali Nikpay (+44 20 7071 4273, anikpay@gibsondunn.com)*  
*Philip Rocher (+44 20 7071 4202, procher@gibsondunn.com)*  
*Deirdre Taylor (+44 20 7071 4274, dtaylor2@gibsondunn.com)*

## **Munich**

*Michael Walther (+49 89 189 33 180, mwalther@gibsondunn.com)*  
*Kai Gesing (+49 89 189 33 180, kgesing@gibsondunn.com)*

## **Hong Kong**

*Kelly Austin (+852 2214 3788, kaustin@gibsondunn.com)*  
*Sébastien Evrard (+852 2214 3798, sevrard@gibsondunn.com)*

*\*Not admitted in D.C.; practicing under supervision of principals of the firm.*

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