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Antitrust Division: Merging Parties Must Disclose Antitrust Side-Letters in HSR Filing

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Signaling possible future enforcement efforts, Antitrust Division Chief Christine Varney recently brought to the foreground the vexing question of including antitrust side-letters in Hart-Scott-Rodino filings – “you execute [a side-letter] and you don’t give it to us, do it at your own peril, because we will likely find out about it.”

Most parties don’t tell opposing counsel at the start of negotiations the *most* they are secretly willing to pay to settle a case. Doing so would hardly be considered sound negotiation strategy. Yet this is effectively what Christine Varney, the Assistant Attorney General for the Department of Justice’s Antitrust Division, recently suggested may be *required* when parties seek clearance for mergers that raise competitive concerns.

The allocation of antitrust risk is often a key point in negotiating the business terms of a strategic merger. When the deal is signed, parties rarely know how long it will take to obtain antitrust clearance of a proposed transaction, what issues will turn into sticking points, or what the Agencies will demand as a remedy. This creates risks, for example, for sellers who must sit idly by while key employees leave for greener pastures or customers who seek other more stable sources of supply. To shift the risk, sellers frequently negotiate for, and receive, detailed commitments from the buyer to divest assets (or to accept other onerous remedies) in order to win timely antitrust approval.

In many cases, however, parties want to keep these commitments confidential. The reason is simple. Disclosing such commitments telegraphs the existence of a problem and tips the balance decidedly in the Agencies’ favor. Even Christine Varney acknowledged the concern, adding “I’m not going to say don’t worry about it being a roadmap."

Playing poker when your opponent knows that you will fold rather than call his bluff would allow your opponent to clean up. So too here, disclosing these side commitments eliminates the Agencies' downside risk of threatening to block the transaction. Put simply, the Agencies will now *know* that the parties *will* bow down in the face of pressure rather than litigate their rights. This is hardly a recipe for a narrowly crafted remedy.

The question, therefore, has always been how to avoid disclosing a binding commitment among the parties. Some practitioners have taken the view that disclosure of these side commitments in the HSR filing is not always necessary. For one thing, the deal for which the parties seek clearance is the one contained in the Merger Agreement, *not* a hypothetical transaction modified by the side-letter which, at best, constitutes a second-best alternative *contingent* on the Agencies' expressions of concern. Moreover, because these commitments invariably arise out of joint defense settlement strategy discussions among antitrust counsel, some parties believed that these side commitments are privileged and, therefore, immune from disclosure.

The Agencies have never formally endorsed this view, but neither have they flatly rejected it. The closest the Agencies came to doing so was during the Clinton Administration, when the Director of the FTC's Bureau of Competition, suggested in a speech that the FTC may seek to gain access to such side-letters during the Second Request phase of an investigation.[1] But it is unclear whether the FTC has ever followed through by actually demanding such disclosure. Notably, the FTC has not suggested that the parties must automatically disclose such letters as part of the *initial* HSR filing. Nor has there ever been an enforcement action based on the failure to disclose a side letter. Thus, given the absence of further commentary from the Agencies, the issue had become academic, giving practitioners greater comfort that disclosure was generally unnecessary.

Statements, however, made by Christine Varney and Deputy Assistant Attorney General, Katherine Forrest at a recent ABA sponsored event appear to go further. This issue is now "on our radar screen" according to DAAG Forrest. Rejecting a view among some practitioners, Forrest admonished that the Department's position is "very clear" that side-letters "should be part of the HSR filing, . . . are part of the merger agreement and it is our view that they are not privileged." The message was that failure to disclose a side-letter may put the parties' HSR filing at risk, possibly delaying or jeopardizing antitrust approval.

Whether this is indeed a major policy shift to which the Division will devote enforcement resources remains to be seen but, at the very least, it counsels caution in the use of side-letters and may have the effect of chilling parties' willingness to put such agreements to paper.

So what can the parties do to address this issue? Unfortunately, given the unsettled state of the law, there are no easy answers or one-size-fits-all approach. Rather, the parties now have a range of options, broadly summarized as follows:

- **Status Quo:** Continue with the current prevailing practice of non-disclosure, hoping that your deal won't become the test case or that, if it does, the Agencies will fail in their efforts to sanction the non-disclosure.
- **Disclose:** Disclose the side-letter, avoiding the risk that the HSR filing will be rejected, but accepting the consequences of providing the information.
- **Log:** Disclose the existence of the side-letter on a privilege log, but not its terms. This might signal to the Agencies that the parties will agree to some form of remedy rather than litigate, but it would not tell the Agencies *where* the line in the sand has been drawn.
- **Wait:** Wait until after HSR notification has been filed before discussing the contents of the side commitments. Because a request for clearance can be filed based on a non-binding letter of intent, filing early would not necessarily diminish any protection the seller may obtain as part of a signed definitive merger agreement.
- **Forego:** Finally, the parties could forego any side-letter, and employ other provisions – like break-up fees and walk-away rights – to allocate antitrust risk and incentivize the parties to do what it takes to obtain antitrust clearance.

Now that the Agencies have raised this issue, making the right decision about the best course for your transaction must be addressed head-on, at the deal negotiation stage, and as part of the overall strategy for obtaining antitrust clearance.

[1] Prepared Remarks of Richard G. Parker, Director Bureau of Competition, Federal Trade Commission; Before the American Bar Association Spring Meeting 2000, Federal Trade Commission Committee

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