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M&A ACADEMY: WHAT TO KNOW ABOUT MERGER CONTROL FILINGS, AND AVOIDING ANTITRUST TRAPS

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Agenda

- HSR Act: High-level summary of procedure and strategy
 - HSR nuts & bolts: The basics
 - HSR traps for the unwary: Avoid most frequent HSR mistakes
 - DOJ pledges quicker merger reviews: What this means and likely outcome
- Document creation: Creating bad 4(c)/(d) documents can delay or imperil HSR approval; discussion of practical tips for document creation
- Information exchanges: Approaches to maximize information exchanges necessary to complete an M&A transaction while minimizing antitrust risk
- A global perspective on merger control
- Contract negotiations
 - Strategy for defending transaction

HSR Nuts & Bolts: The Basics

- Updated HSR thresholds identified below will go into effect on April 3, 2019
- Pre-closing notification (a.k.a. suspensive)
 - Transaction value above \$359.9 million ***or***
 - Transaction value above \$90 million and Size of Person test is met
 - Keep in mind that “value” means *HSR value*
- Each side of the transaction files
 - Filings submitted to DOJ and FTC
 - Fees: \$45K, \$125K, \$280K depending on deal value
- Exemptions, exemptions, exemptions
- \$42,530 per day in civil fines

HSR Nuts & Bolts: The Basics

- Signed writing
 - Non-binding LOI/term sheet
- Confidentiality
 - Information confidential
 - Public notice if ET granted
 - Informal public notice if government contacts third parties
- Assets, voting securities, exclusive IP licenses
 - Non-passive minority acquisitions of voting securities
 - Conversions into voting securities
 - Economic control of partnership or LLC
 - Joint venture formations

HSR Nuts & Bolts: The Basics

- Initial 30 calendar day waiting period
 - Early termination (ET) of the waiting period
 - “Pull & refile” (another 30 days)
 - Second request (6-plus months)
 - 10.5 months average from announcement to agency action in 2018, down slightly from 2017 but up from prior years
 - Timing agreement
 - Under HSR Act, DOJ and FTC have 30 days to make decision
 - Merging parties and DOJ/FTC typically entering into a Timing Agreement, giving DOJ/FTC additional time (e.g., ~70-90 days total) to make decision; in return DOJ/FTC gives relief to Second Request burdens
 - DOJ model timing agreement (as of Nov. 2018) is 60 days

HSR: Traps for the Unwary

- Two HSR violations result in fines more than any other: misuse of Investment Only Exemption; and 1 year and 5 year rules
- **Investment Only Exemption**
 - 10% or less of an issuer's voting securities if held solely for purposes of investment
 - Inconsistent actions include (not limited to):
 - Having a representative serve as a board member of the issuer
 - Requesting membership on the board of the issuer
 - Having discussions with third parties to gauge their interest in employment at the issuer as an officer or director
 - Making a public announcement that the Acquiring Person is ready to propose a slate of directors
 - Attempting to influence an issuer's merger or acquisition strategy or decision making (other than inquiring with the issuer to assess whether the particular merger or acquisition is in the best interest of shareholders)
 - Acquiring 10% or less of an issuer with the intent to subsequently acquire control of the issuer
 - Attempting to influence two merging parties' antitrust defense strategy
 - Engaging in written and in-person communications with an issuer regarding its business strategy (e.g., sales growth and acquisition plans)
- **1 year and 5 year Rules**
 - HSR approval is good for only 1 year
 - Need to re-file after 5 years
 - Important to consider when executives exercise options or other conversions into voting securities (recent FTC focus)

DOJ Proposes Shorter Second Request Review Timeline

- AAG Delrahim announced goal of 6 months for Second Request reviews, including following steps
 - Opening the front office to an early, introductory meeting with key executives
 - Publishing a model voluntary request letter asking the parties to provide crucial information early in the investigation
 - Outlining a model timing agreement to reduce the number of depositions the government will take and seeking documents from fewer custodians
- Will these steps make Second Requests and review period shorter?

Document Creation – 4(c)/(d)

- All studies, surveys, analyses and reports
- That were prepared by or for any officers or directors
- Discussing the proposed acquisition
 - Addressing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets, and/or cost or revenue synergies/other efficiencies of the deal

Document Creation – 4(c)/(d)

- Ordinary course documents of Seller if used by Buyer
 - Be careful what is put in dataroom
- Board minutes may need to be submitted, but non-deal content can be redacted
- Cannot redact content specific to other deals from 4(c) documents other than board minutes
 - Consider replacing consolidated board deck reviewing all deals with separate documents for each deal
- 4(c) documents for prior iteration of the deal if used to analyze new iteration of same deal are 4(c)

Document Creation: Best Practices

- Rule No. 1: replace writing with oral
- Rule No. 2: write clearly and avoid hyperbole (no price increases)
- Rule No. 3: consult with legal before putting pen to paper
- Rule No. 4: have counsel review drafts
- Rule No. 5: school bankers, bankers, bankers and other consultants

Document Creation Best Practices Also Important for “Non-Issue” Deals

- Imprecise or exaggerated statements can lead to unforeseen delays even for non-issue deals
- Example (Project Bear):
 - “Would eliminate a competitor for [BIDDING OPPORTUNITY], leaving only the incumbent as a viable threat”
 - **What business person meant:** Buyer, Target and Incumbent made it to final round of bid process for important prospect, increasing chances that Buyer would win post-closing
 - **What FTC/DOJ Read:** There may be a merger to monopoly for a particular type of customer, need to investigate
 - **Outcome:** Investigation opened; delaying approval by a few weeks

Information Exchanges During Due Diligence

- Two Antitrust Concerns
 - Taking control of Target (“gun jumping” risk – Section 7A)
 - Agreements that reduce competition (Sherman Act)
- Practical Risks
 - Sherman Act risk requires an agreement
 - One-way information exchanges rarely reduce competition
 - Customer level product pricing; product level P&Ls; R&D by program
 - Employee specific salary information
 - Clean team solutions abound
- Leverage, leverage, leverage

The background of the slide is an abstract composition of numerous diagonal light streaks. The upper portion is dominated by vibrant red streaks, while the lower portion features bright blue streaks. These streaks vary in thickness and intensity, creating a sense of rapid motion and energy. The overall effect is a dynamic, high-tech aesthetic.

A GLOBAL PERSPECTIVE

Ex-US Merger Control Timing, Confidentiality and Signed Writing

- Pre-closing notifications (a.k.a. suspensive) required in most jurisdictions (*e.g.*, Brazil, China) but not all (*e.g.*, Indonesia)
- Filings tend to be jointly made (*c.f.* in Europe generally the purchaser)
- Some jurisdictions require definitive contracts (*e.g.*, China)
- Some jurisdictions publicize fact of filing (*e.g.*, Germany)
- Some jurisdictions have deadlines for filing (*e.g.*, India)
- Phase I waiting period is typically 30 to 45 days
- Phase II can be several additional months depending on the jurisdiction
- Pre-notification discussions can materially extend the timeline (*e.g.* European Commission)

Ex-US Merger Control Issues

- Sales, asset, and market share test
- Collect sales and assets by country for target
 - Brazil: look at buying group and selling group (20%)
 - Approx. US\$205M/US\$20.5M in local sales
 - Special rules for transactions involving private equity funds
 - China: target has approx. US\$60.4M in local sales
 - Germany: target has EUR 5M in local sales OR EUR 400 M purchase price for some types of deals
- Lots of traps for the unwary, *e.g.*, negative purchase price or US joint ventures may be notifiable ex-US
- China can take several months to get approval
- Other regulatory filings (*e.g.*, Investment Canada)
- In Europe, there may be referrals from Members States to European Commission, and *vice versa*
- Brexit – separate filing to the UK regulator?

The background of the slide is an abstract composition of numerous thin, parallel lines that create a sense of motion and depth. These lines, which vary in length and intensity, radiate from the upper right towards the lower left. The color palette is dominated by deep reds and blues, with some lines appearing as bright white or light blue highlights against the darker background. The overall effect is dynamic and modern.

ANTITRUST RISK ALLOCATION

Contract Negotiations

- Antitrust covenant
 - “hell or high water” v. “walk-away”
 - Where to file and when to file
 - Who pays fees (filing, attorneys, economist)
 - Cooperation of parties and counsel
 - Who controls strategy?
- Stand-still provisions
- Drop dead dates and reverse break-up fee
- No other actions that would cause delay representation/covenant

Contract Terms: Risk Allocation (Examples)

- Buyer accepts all structural and conduct relief and, at the request of Seller, agrees to litigate; Buyer may direct defense
- Buyer agrees to litigate or pay RBF if unsuccessful
- Buyer agrees to divest up to a specified amount of assets, i.e., assets valued at \$x, or assets generating sales or EBITDA of \$y
- Buyer agrees to divest up to a specified amount of assets AND pay RBF if agency finds divestiture insufficient by drop dead date
- No duty to divest or litigate, but Buyer must pay RBF if no antitrust approval by drop dead date (long timeline)
- Buyer agrees to short drop dead date (with or without RBF)

Defense process / strategy

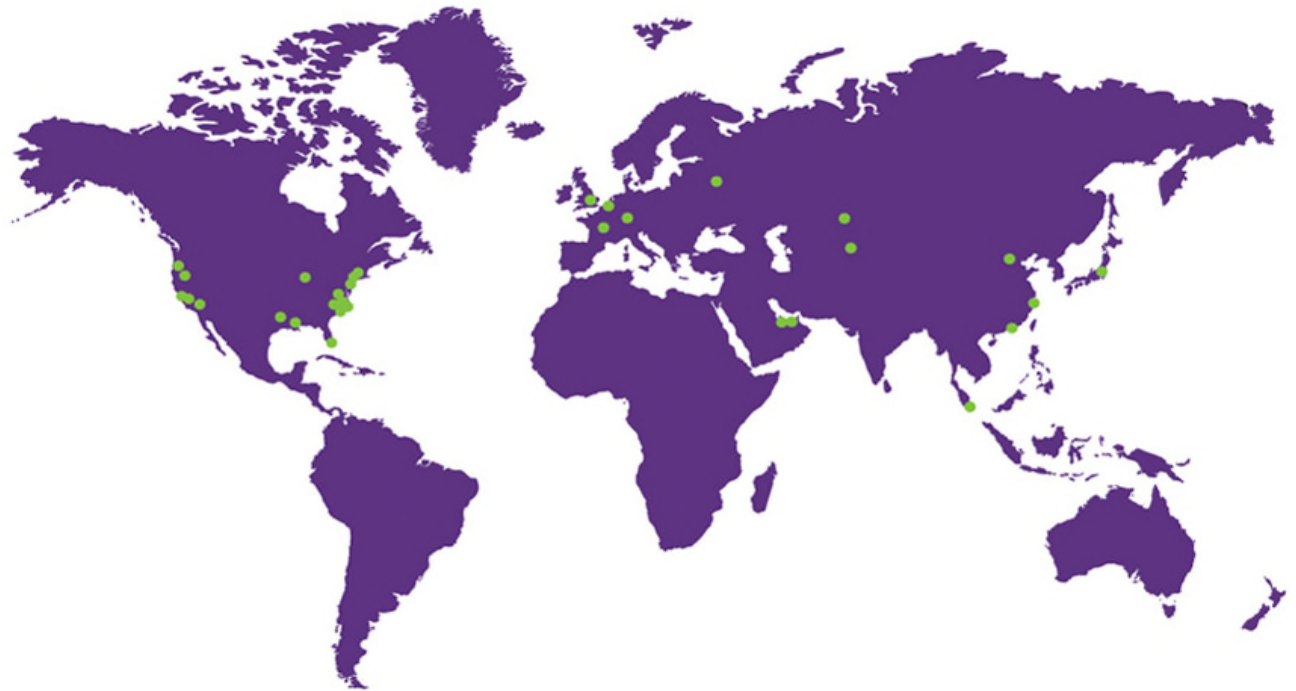
- Pull and re-file? Comply with Second Request?
- Joint defense agreement
- Role of economist
- Presentations and white papers
- Negotiation of Consent (if needed)
- Leverage – can FTC/DOJ win in litigation?

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Abu Dhabi
Almaty
Astana
Beijing*
Boston
Brussels
Century City
Chicago
Dallas
Dubai
Frankfurt
Hartford
Hong Kong*
Houston
London
Los Angeles
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