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MANAGING REGULATORY RISK IN M&A TRANSACTIONS: UPDATE 2024

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Zarema A. Jaramillo

Office Managing Partner, Washington, DC
Partner, Antitrust / Competition

Amy Mushahwar

Partner, Chair, Data, Privacy & Cybersecurity

Doreen M. Edelman

Partner, Global Trade & National Security

Jacob D. Bernstein

Deputy General Counsel & Secretary
at Booz Allen Hamilton

I INTRODUCTIONS



**ZAREMA A.
JARAMILLO**

**Office Managing Partner, Washington, DC Partner,
Antitrust / Competition
Lowenstein Sandler**



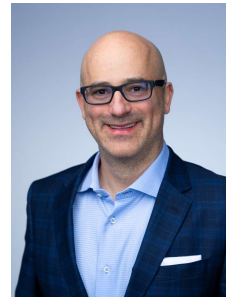
**DOREEN M.
EDELMAN**

**Partner, Global Trade & National Security
Lowenstein Sandler**



**AMY S.
MUSHAHWAR**

**Partner, Chair, Data, Privacy & Cybersecurity
Lowenstein Sandler**



**JACOB D.
BERNSTEIN**

**Deputy General Counsel & Secretary
Booz Allen Hamilton**

PRESENTATION AGENDA

- Introduction
- M&A Process & Integration
- Antitrust Considerations
- Trade & National Security Considerations
- Privacy and Data Security
- Q&A



M&A PROCESS & INTEGRATION



| CORE PHASES OF M&A

- Due Diligence – Enhanced assessment of risks and outcomes, with an eye towards understanding risk and informing integration process.
- Regulatory Filings and Clearances.
- Transaction / Agreement Negotiation.
 - Focus on structure, valuation, and documentation, with an eye towards minimizing known and unknown risks via contractual protections.
- Integration
 - When the M&A is over, the real work begins, informed by diligence process.

M&A DUE DILIGENCE



I DILIGENCE

- By the time legal gets involved, a decision has usually been made at the management level with respect to a possible transaction.
- Diligence is about finding red flags / blockbuster issues to protect the company as well as preparing for integration.
- Items legal focuses on, among others: IP validity, any non-standard or high risk obligations in contracts, regulatory compliance, and employee issues.
- Key to identify your diligence team and clearly delineate roles and expectations.
- For a buyer procuring representation and warranty insurance, start the process early.

DILIGENCE: DATA PRIVACY

- Does the company have any data protection policies or controls?
- What data privacy laws apply (GDPR, U.S. state laws).
- In-house or outsourced IT/privacy functions?
- Is there sensitive data collected?



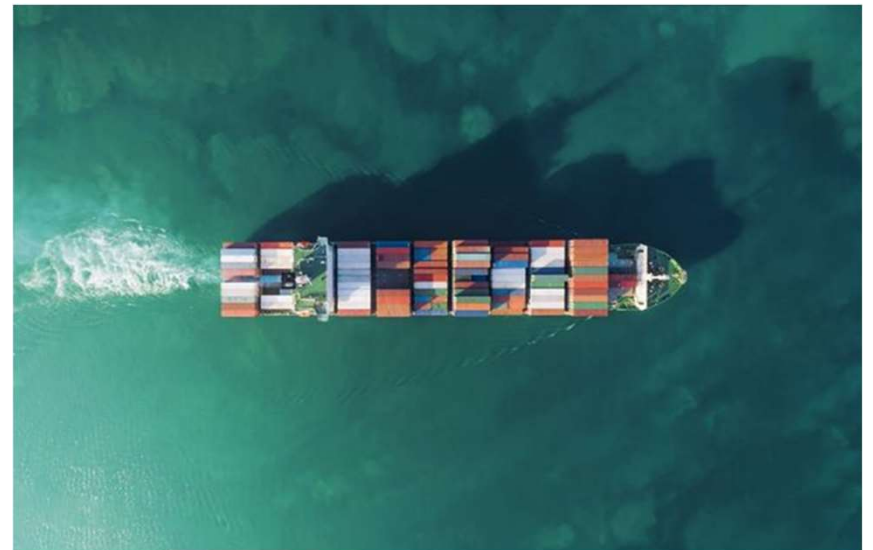
DILIGENCE: CLEAN TEAM AGREEMENTS

For strategic acquisitions or where there is a competitive overlap or competitively sensitive information is being shared as part of due diligence:

- Determine whether a Clean Team Agreement (CTA) is needed, what kind, and customize if/as needed
- Review documents before sharing with the other side – should there be a clean team / clean room?
 - Competitively Sensitive Information (CSI) is any non-public information that may allow one party to predict the other party's pricing or output strategies or influence its own competitive decisions.
 - CSI is current or future prices, fee schedules, pricing policies, pricing formulas, plans or other competitive terms of sale (e.g., financing) regarding a company's products.
- Not just a process. This really matters.
 - <https://www.ftc.gov/news-events/blogs/competition-matters/2018/03/avoiding-antitrustpitfalls-during-pre-merger>
 - Penalty for inappropriate sharing of information same as for gun jumping: up to \$50,120 per day
 - Reputational risk with agencies and delay of transaction as agency may be sidetracked by investigating information sharing
 - Improper information sharing can also violate Sherman 1 and FTC Section 5

DILIGENCE: TRADE

- Examine company's trade control documentation and training.
- Learn all product, technology, and services classifications and export licenses.
- Investigate all customers, end users, and end uses.
- Review if sales/service in sanctioned locations and high risk countries.
- Review all government and military customers (direct and indirect).
- Learn supply chain and agent/distributor relationships.
- Check restricted party screening process.
- Review anti-boycott compliance.
- Consider foreign employee IT access.
- Learn about compliance with UFLPA (China).
- Any import violations or risk factors?
- Check beneficial ownership.



REGULATORY FILINGS/CLEARANCES



ANTITRUST: A PRIMER FOR THE GENERALIST



- Whether or not antitrust filings will be required in connection with a deal will impact both deal timing and certainty of deal closing (as well as what happens after a deal) – these are key issues to get ahead of early and to socialize internally to properly set expectations.
- If a deal is over a certain threshold size in the US, or if a target has significant ex-US revenue, pre-merger notification filings may be required and should be discussed early with counsel.
- Regardless of whether a filing will be required, if a deal is competitively sensitive antitrust counsel should be consulted regarding sensitives around information sharing.
- Care should be taken in creating deal-related documents, especially for deals that are competitively sensitive or with respect to which a filing may be required.

M&A-RELATED ANTITRUST FRAMEWORK



- Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR”)
 - Requires filing a notification with the DOJ and the FTC if certain thresholds are met.
- Foreign premerger notification requirements.
- Section 7 of the Clayton Act, 15 U.S.C. § 18
 - Prohibits certain mergers and acquisitions and interlocking directorates.
 - Allows private rights of action.
- Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45
 - Prohibits certain mergers and acquisitions.

RECENT M&A-RELATED ANTITRUST DEVELOPMENTS



- Suspension of Early Termination and “Close at Own Risk” Letters.
 - In February 2021, citing the change in administration and high volume of filings, FTC, with DOJ’s support, announced a temporary suspension of granting early terminations of the HSR waiting period while FTC reviewed its procedures for granting early termination
 - FTC subsequently announced that for transactions where it had not been able to fully investigate during the HSR waiting period, FTC would issue letters warning the parties that FTC had an ongoing investigation and that the parties may close “at their own risk.”
- In February 2023, DOJ withdrew its nearly 30-year-old guidance on information exchanges in the healthcare industry, including the “safety zone” for benchmarking that the antitrust agencies had suggested also applied to participants in other industries.

M&A-RELATED ENFORCEMENT TRENDS & DEVELOPMENTS



- In July 2023, FTC and DOJ proposed an overhaul of merger review process with proposed major changes to HSR filing requirements and their Merger Guidelines.
- The proposed revisions to the HSR filing process would require parties to submit drastically more information, and different types of information, than parties are currently required to submit with an HSR filing.
 - If these proposed changes go into effect through the requisite notice and comment rulemaking process, companies should expect to expend significantly more resources on HSR filings, even for deals with no overlap.
- The proposed Merger Guidelines reflect this Administration's aggressive view of mergers generally and provides a roadmap for how the Antitrust Agencies will analyze a proposed transaction involving actual or potential competitors.

KEY INTERNATIONAL TRADE REGULATIONS' RISKS

- Buyer buys the risk!
- Most trade requirements are strict liability.
- Can't be fixed with language qualifiers in the agreement (“knowledge”, “material”)
- Enforcement increasing.
- Significant penalties.
- Reputational risk.
- Disclosure required?
- WILL IT DELAY CLOSING?



| NEW CFIUS DEAL CONCERNS

- Increased CFIUS post deal review.
- Reminder- not the entity location- it is the beneficially ownership.
- Filings take longer than the actual timeline.
- CFIUS is looking at how the U.S. business's technology may be used in the future.
- CFIUS can also look into an organization's security and if the data asset is properly managed.
- Review of real estate locations in U.S.
- Outbound CFIUS review – will prohibit investment in some technology and data companies in China and U.S. gvt. notification for other investments in China.
- Increasing CFIUS penalties, enforcement and non-notified requirements.
- Department of Defense expanding its review of FOCI to include unclassified contracts in excess of \$5 million.

PREVENTING BAD/UNHELPFUL DOCUMENTS



- Issue is not document management, it's document creation.
- Assume agencies will see every relevant document.
- Ensure consistency across internal and external documents.
- Control document creation by company and allies.
- Train business people.
 - How to avoid creating bad documents.
 - Some communications are better made by phone or in person.
 - How to create good documents.
 - Writing emails creates a permanent record (good and bad).
- Recent DOJ/FTC challenges highlight internal “bad” documents about the proposed deal.
 - DOJ complaint challenging Visa/Plaid (Nov. 2020) stated: “By acquiring Plaid, Visa would eliminate a nascent competitive threat”

AGREEMENT NEGOTIATION



RISK SHIFTING PROVISIONS IN MERGER AGREEMENTS



- Antitrust risk management and allocation - key negotiating point.
- Efforts Clauses
 - Hell or High Water
 - Best Efforts
 - Reasonable Best Efforts
- Litigation and Divestitures.
- Break-up and Reverse Break-Up Fees.

NEGOTIATING TRADE PROVISIONS

- Tailor trade compliance representations to address risks.
- Remember other jurisdictions have different sanctions!
- Consider indemnities if concerns remain.
- Review R&W insurance.
 - Most policies explicitly exclude anti-corruption, sanctions, and export violations.



NEGOTIATING PRIVACY AND DATA SECURITY PROVISIONS

- **Context is Key:** Understand the context of the asset, is it a full privacy risk company or is the company a data risk asset.
- **Cybersecurity / Threat Intel Products / Encryption:** These are areas of specialty sales, where we have seen deals break over theoretical risk and the right specialists are not always at the table.
- **Business Interruption and Data Security:** is the most common uninsured exception. Negotiate damages/indemnification with an understanding that you may not have RWI to fall back on.
- **A word about privacy risk for B2B companies....**



INTEGRATION & CLOSING



I INTEGRATION

- Consider the approach to contract assignment and assumption.
- Redundancies (common customers / vendors) / how to streamline.
- What pain points are you inheriting? – problem contracts, relationships, employees.
- Signature / decision-making authority.
- Moving over to “Buyer paper” – transitioning off of seller forms and models.
- Have a plan for what real integration looks like at various points in time.
- Integrating people can be the hardest part – lead with a culture to make people feel welcome and to avoid a talent flight post-M&A.
- Earnouts can make integration substantially harder.
- Transition services may be necessary for carve out transactions.
- Consider cyber security and IT services within the transition services agreement.

| AFTER THE DEAL IS SIGNED

- Strict rules on role of buyer between signing and closing.
- Buyer must avoid exercising control – “gun jumping”.
- Much more “shades of gray” than “black and white”.
- Strikes most business people as counter-intuitive.
- Purchase Agreement will have carve outs from “ordinary course” decisions.
 - Those need to be drafted with gun jumping in mind.
- Seek antitrust experts’ guidance for:
 - press statements
 - internal messaging
 - external/customer messaging – trade shows
 - joint sales calls?

INTEGRATION PLANNING

BEST PRACTICES: ANTITRUST



- Careful ***not to implement*** any of their integration plans until after the HSR waiting period has expired and the transaction has officially closed.
- Continue to follow information sharing / clean team safeguards until closing.
- The Parties ***cannot engage in the following activities prior to closing:***
 - Coordinate pricing or bidding;
 - Allocate customers;
 - Install Buyer's employees in Target;
 - Allow Buyer to make day-to-day decisions for Target;
 - Jointly purchase, market, or sell to customers; or
 - Engage in other joint business activities or decisions.

INTEGRATION PLANNING BEST PRACTICES: TRADE

- Ensure that legal trade with U.S. prohibited parties is terminated prior to closing.
- Compliance integration is key (training, documentation, procedures)
- Audit suppliers, customers, distributors, agents based on risk profile.
- Review import and export classifications where appropriate.
- NEW RISKS- supply chain national security and human rights.
- UPDATE your deal checklists and integration plans.



TAKEAWAYS AND PLANNING AHEAD



ANTITRUST CONSIDERATIONS: CONCLUSIONS



- Engage antitrust counsel early on in the process.
- During the diligence phase, remain mindful of sharing competitively sensitive information and implement clean rooms/clean teams, as needed.
- Consider whether the transaction would trigger higher scrutiny, and therefore will require a longer review by the Antitrust Agencies, which would impact the cut-off date and risk shifting provisions in agreements.
- Maintain internal controls that protect against improper information sharing.
- Be mindful of the interlocking directorship prohibition for minority investments.
- Start thinking about new HSR rules now

TRADE CONSIDERATIONS: CONCLUSIONS



- Review and assess trade risks for all company operations in advance of deal.
- Perform restricted party and destination screenings of all parties to all transactions.
- Update training and compliance materials routinely.
- Consider internal audits, match up documentation.
- Block online users from sanctions destinations.
- Impose trade obligations on others – SHARE THE RISK!

PRIVACY/DATA SECURITY CONCLUSIONS



- Know when to engage privacy and data security early, in certain transactions (consumer-facing businesses, highly regulated entities) privacy and data security can make or break a deal.
- Sales of cybersecurity companies, products with encryption or products that must ensure security.
- Many companies have pending regulatory investigation and breaches, specific items matter.
- The lack of RWI is being felt in this area, because parties are only one breach away from liability.



THANK YOU

NEW YORK

1251 AVENUE
OF THE AMERICAS
NEW YORK, NY 10020
212.262.6700

PALO ALTO

390 LYTTON AVENUE
PALO ALTO, CA 94301
650.433.5800

NEW JERSEY

ONE LOWENSTEIN DRIVE
ROSELAND, NJ 07068
973.597.2500

UTAH

500 NORTH MARKETPLACE
CENTERVILLE, UT 84014
650.433.5630

WASHINGTON, D.C.

2200 PENNSYLVANIA AVE NW
WASHINGTON, D.C. 20037
202.753.3800

[lowenstein.com](https://www.lowenstein.com)

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