

DAAG Rinner Says Merger Enforcement to Combine ‘Fairness and Robust Enforcement’

WRITTEN BY

Barbara T. Sicalides | Daniel N. Anziska | Joseph A. Farside, Jr. | Julian Weiss

Deputy Assistant Attorney General (DAAG) Bill Rinner’s stated goal for his June 4 speech was to provide insight into how the Department of Justice, Antitrust Division, will “handle merger review to ensure procedural fairness and robust enforcement.” The promised guiding principle will be that a healthy dealmaking market is important to competition and economic growth, but robust antitrust enforcement is critical to vigorous competition.

DAAG Rinner suggested that this administration will take a different approach than the prior administration, noting that the Antitrust Division will not view all deals as inherently suspicious and describing the Antitrust Division’s mission as “enforcement against the handful of mergers that are problematic, not civil merger deterrence generally.”

After addressing some of the overarching questions dealmakers and practitioners have about the administration’s position on the roles of mergers and antitrust in the economy, DAAG Rinner turned to the impact that this modified pro-enforcement philosophy will have on the review process itself.

From both an economic and legal perspective, procedural predictability is critical to good government and economic dynamism. It promotes fairness and facilitates dealmaking that can benefit American companies and consumers. Procedural predictability also complements — in fact, promotes — vigorous enforcement.

The administration is not making any changes to which transactions are reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 or the size of the filing fees, but it is suggesting that its process will be fair and predictable. DAAG Rinner laid out how the agency expects to handle mergers and the related process:

- The Antitrust Division has a strong preference for structural remedies or divestitures, not behavioral remedies, and it will “welcome” parties’ proposals to divest to third-party buyers – fix-it-first proposals.
 - Where structural remedies are more complicated and involve ongoing commercial entanglements inherent to the industry, the agency would consider use of strong monitoring and enforcement mechanisms.
 - Divestiture buyers will be rigorously reviewed to ensure that they have the incentive and ability to replace lost competition in every way, including product or service quality.
- It will not use its merger enforcement authority as leverage to get relief from the parties not related to the harm to competition that allegedly flows from the transaction itself.
- Second requests will only be issued where the Antitrust Division has merger-related concerns, not to build a civil or criminal conduct investigation.
- The agency will be transparent with parties about where it has concerns so that the parties can focus their advocacy on addressing those concerns.

- The Antitrust Division will not send letters to parties suggesting that an investigation is ongoing and if the parties proceed with the transaction, they will “close at their own risk.”
- The agency will seek judicial sanctions where parties systematically abuse legal privilege or withhold or alter documents required by the HSR Act.

DAAG Rinner’s remarks touch on many of the topics discussed during the prior administration and provide useful initial information for businesses, dealmakers, and legal professionals.

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