



Twitter v. Musk: Where Are the Arbs?

By John C. Coffee, Jr.



Asset Managers as Regulators

1 By Dorothy S. Lund



Reforming the Macroprudential Regulatory Architecture in the United States

By Kathryn Judge and Anil Kasi

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Skadden Discusses Boards, M&A, and Regulatory Risk

By Brandon Van Dyke, Clifford H. Aronson, David P. Wales, Frederic Depoortere and Kyle J. Hatton October 4, 2022

Comment

Boards are regularly called upon to guide management teams in answering the age-old strategic question: build or buy? But the already complex business calculus has become increasingly complicated in the past several years because of stepped up scrutiny of mergers by regulators that has made outcomes less predictable.

One need look no further than the front page to find news of transactions abandoned after governmental challenges. Meanwhile, leaders at the Department of Justice and Federal Trade Commission and other competition authorities have spoken of the need to reconceive antitrust law and have voiced support for aggressive new theories about protecting even potential competition.

Against this backdrop, boards and management teams planning an M&A transaction face increased risks that a deal may not be completed by the contractual deadline, or will fail altogether. Regulators may insist on novel and unacceptable remedies, and the value of a deal may be eroded by delays or harsh remedies.

In order to guide management, directors must be familiar with a toolkit of mitigation strategies. That includes decision-making processes, contractual provisions and tactical approaches to dealing with regulators.

In what follows, readers should bear in mind that the acquirer's perspective and priorities will often differ from the target's.

Trends We Have Observed

In the current regulatory environment, we have seen:

- a heightened interest in “fix it first” remedies, explained below;
- contractual provisions expressly addressing whether the parties are required to litigate to obtain regulatory approvals (and potential “tolling” of the drop-dead date while litigating);
- an increasing need to prepare for litigation in parallel with traditional negotiations over remedies; and
- an increased focus on whether to agree to regulators' requests for extensions of their review deadlines, given that, if the matter is going to be litigated, the parties will want to start as soon as possible.

Pre-Signing Analysis: Evaluate the Risk of a Blocked or Abandoned Transaction

To ensure that the fundamental risk of non-approval is properly assessed and mitigated, boards should focus on pre-signing preparation, careful negotiation of contractual risk-sharing provisions and a flexible post-signing strategy to obtain approvals.

First, the board must insist that management, with the help of outside advisers, conducts a probing analysis that goes well beyond traditional competition measures such as horizontal overlaps and combined market shares, which might have sufficed in the past. The analysis should consider the parties' documents and the expected reactions of customers, suppliers, employees, industry groups and competitors, because those could factor into regulators' decisions.

The parties need to fully understand the relevant authorities' current enforcement priorities, and any novel antitrust doctrines that key officials espouse. In cross-border deals, they will also need to evaluate the impact on national "industrial policy." That will include any connection to highly sensitive or favored industries and other policy goals that regulators may pursue as part of their review. Today those could include climate change, data privacy, employment and even wealth distribution.

Given the more aggressive positions that regulators are taking, thought also needs to be given at this stage to the circumstances in which it will make sense to litigate over the approval.

The analysis and its conclusions should be summarized and presented to the board, with ample opportunity for directors to raise questions and request follow-up investigation. And boards should continue to be briefed as more is learned throughout the deal process and regulatory issues are negotiated in contractual provisions.

Agreement Terms To Mitigate and Allocate Risk

A variety of established M&A terms can help manage regulatory risks and specify who bears them.

Efforts Covenants

The most familiar of these is the "efforts" covenant, which requires both acquirer and target to work together to obtain regulatory approvals, including by agreeing to divestitures and other remedies.

Sometimes these are "hell or high water" covenants that require the parties to accept all divestitures or remedies that regulators demand, but, in today's market, those account for less than 10% of these clauses in strategic deals. More often, they are limited by quantitative or materiality thresholds, or sometimes a commitment to divest a specific business or segment. The key is to negotiate a level of commitment that matches the most likely outcomes. This provision will be framed based on the initial analysis of possible scenarios. It's important to keep in mind, too, that even a "hell or high water" commitment does not guarantee consummation of a deal in the face of regulatory opposition.

Reverse Termination Fees

In some situations, the target may agree to a deal even though there is a significant risk that the transaction will not be approved, even with remedies. In these cases, the target may negotiate for a reverse termination fee payable by the acquirer in the event regulatory approvals are not obtained and the transaction fails to close. These fees are intended to mitigate the potential harm the target's business may suffer if the deal fails, and, often more importantly, they provide additional incentive to the acquirer to obtain approvals.

However, while reverse termination fees have ticked up, at a typical 4% to 6% of transaction value (occasionally much more), they may be a poor substitute for completion of the intended transaction. Therefore, even if such a fee is in place, during the review process, target boards will need to keep management focused on protecting against possible harm should the deal fail.

One cautionary note: There is a tendency to go right to the size of the reverse termination fee at the start of M&A discussions. This is not typically the best approach for either the acquirer or target. While important, the size of the reverse termination fee is not the only issue to be negotiated, and often not even the most important one, and issues can be traded off against each other. The best course in any particular deal should be informed by a clear-eyed view at the outset of the potential regulatory risks, and how they might be addressed. Often this requires a preliminary exchange of sensitive, confidential information at the early stages of the talks, which can of course be in tension with other tactical and strategic considerations.

Preemptive Divestitures

To head off problems with regulators, the parties can agree to exclude assets that raise competition issues for the transaction. For instance, where something less than a whole company is being purchased, the seller might agree to retain the problematic asset. In transactions involving a whole company, the parties may agree to a "fix it first" strategy, divesting a business or asset to a third party at or near the time they sign the main agreement. These can resolve regulators' concerns early and shorten the time it takes to obtain approvals.

Timing Provisions

With extended reviews, companies need to provide for the possibility that approval may take longer than hoped for. Boards should therefore guide management to set longer deadlines and ensure that there are mechanisms in place to deal with the possibility of extended delays. They should also query management about the impact of delays on the value of the deal.

In recent deals, these issues have been addressed with mechanisms such as:

- longer outside dates for completion and provisions for extensions;
- "ticking fees" paid by the acquirer in exchange for extending the initial outside date for the primary transaction (these function like interest payments);

- an increase in the reverse termination fee if the acquirer elects to extend the outside date or requires the target to agree to a divestiture in order to secure regulatory approval (similar to a ticking fee, but not a “pay as you go” cost to acquirer, and only paid if the deal terminates);
- if legally permissible, loans from acquirer to the target that are forgiven if the primary transaction does not close;
- expanded reimbursement for the target’s costs to negotiate and consummate a divestiture; and
- additional employee retention funds for the target if the deal does not close within certain time periods, typically shouldered by the target but sometimes reimbursed by the acquirer.

Providing for delays in the merger agreement can help avoid a situation where party seeks to renegotiate terms if the deal drags out longer than expected.

Express Covenants to Litigate

Increasingly, antitrust authorities across jurisdictions have turned to litigation to challenge transactions, even where remedies have been offered by the parties. Therefore, both parties’ boards are well served to guide management to seek provisions that clearly spell out when the parties are obligated to pursue litigation if regulators refuse to approve a transaction. Without these clear provisions, the parties may find themselves disputing the meaning of the more general efforts covenants as it relates to litigation.

Protecting the Benefit of the Deal

Differing Viewpoints on Safeguarding Value

Both parties and their boards should be focused on protecting the benefit of the deal, but they will benefit in different ways, and hence their approaches to obtaining approval may differ.

Acquirers will likely be most concerned about (a) being forced to make divestitures at valuation multiples lower than that of the primary transaction, (b) maximizing synergy opportunities, and (c) protecting the acquirer’s existing platform — for example, by resisting consent decrees that would require it to seek prior approval for all future transactions in the sector, regardless of transaction size. (FTC officials have said they will routinely seek to impose such conditions.) Acquirer boards should help guide management to address these.

For a target, however, obtaining payment of the full negotiated deal price will be paramount, and with as little delay as possible. The target board should help to keep management focused on that end.

As a result, acquirers typically are more willing to take time to convince regulators that minimal or no remedies should be required, while the target often will want the acquirer to offer as much as possible as soon as possible. This inherent tension makes it particularly important to negotiate provisions covering who ultimately controls the regulatory process.

Managing the Divestiture Process

When a party is forced to divest assets, or that becomes likely, it may find itself in a weak bargaining position. Perceived bargaining power generally declines as the review process advances and potential bidders become aware of each other’s identities and credibility.

As we mentioned above, one way to address that is through a “fix it first,” or preemptive, sale arranged before a remedy package has been formalized. That allows an auction to be run with more secrecy and perceived competition.

Of course, the regulators’ requirements cannot always be anticipated, and different jurisdictions may ultimately require different concessions, so there is a significant risk of a mismatch between the package marketed and what merger authorities ultimately require. That can sometimes be addressed with “accordion” options, which give the divestiture seller the right to add additional assets into the package at an agreed price.

If the target is making the divestiture, it may want to condition the sale on completion of the primary deal so it retains the asset if the larger transaction fails. But bidders may offer less if the sale is conditional, and if the sale involves an operating business and not just an asset, an extended period of uncertainty could cost the business customers or employees. That could exacerbate the damage to the target if the primary transaction falls through.

If the divestiture is not conditioned on the primary deal closing, the price may improve, but it still may fall short of what the seller would have required absent the overarching benefit of the primary transaction.

Given the impact the divestiture process can have on the value of an overall transaction, boards on both sides should request frequent updates from management as the process unfolds. These updates should include quantitative analysis of the impact of a contemplated divestiture, including the effect on synergies in the overall transaction.

Interim Operating Covenants

Target boards will also need to ask if there should be some flexibility in the target’s interim operating covenants, which regulate the target’s business while the deal is pending. Restrictions that may be tolerable for nine to 12 months may be untenable over 15 or 24 months. Targets should not be forced to

choose between complying with the covenants and harming their business. In addition, targets will be wary of potentially committing a “foot fault” under interim operating covenant at the very time when the deal may be in jeopardy and in extended regulatory review.

Acquirer’s boards, meanwhile, should guide management to consider which interim operating covenants are truly critical to protecting the value of the target business regardless of timing.

Control of Strategy and Documenting Disagreements

Where the acquirer agrees to accept all or some of the antitrust risk, most merger agreements give the acquirer express control over strategy decisions. Often there is an escalation process involving senior management if the target disagrees with the acquirer’s approach.

Target boards, in particular, should strongly consider overseeing management closely to ensure it is following the escalation process and documenting any objections to the acquirer’s strategy. This may lead to awkward interactions between the two companies’ senior executives (the acquirer representative may ultimately “overrule” the target representative), but if target management remains silent or acquiesces to the acquirer’s strategy without objecting through the formal process, it may compromise the target’s ability to argue later that the acquirer’s decisions violated its efforts covenant. Failing to document objections may, in some cases, affect the availability of termination rights and reverse termination fees.

Conclusion

With challenging new dimensions to the merger approval process and amplified risks, directors need to take an active role in overseeing the negotiation and progress of mergers. They should (a) insist at the outset on penetrating assessments of the regulatory risks, (b) help guide management in formulating regulatory strategy and risk mitigation, (c) monitor progress with the deal’s outside date in mind; and (d) be prepared for litigation with regulators.

In Their Own Words: Regulators’ New Focuses and Priorities

Federal Trade Commission Chair Lina M. Khan articulated the new priorities of her agency in January 2022 when it solicited comments regarding changes to its merger guidelines:

- “While the current merger boom has delivered massive fees for investment banks, evidence suggests that many Americans historically have lost out, with diminished opportunity, higher prices, lower wages, and lagging innovation....”
- “[A]re the guidelines adequately attentive to the range of business strategies and incentives that might drive acquisitions, be it moat-building or data-aggregation strategies by digital platforms, or roll-up plays by private equity firms? More broadly, how should the guidelines analyze whether a merger may ‘tend to create a monopoly,’ including in its incipiency....”
- “[D]o the guidelines adequately assess whether mergers may lessen competition in labor markets, thereby harming workers? Are there factors beyond wages, salaries, and financial compensation that the guidelines should consider when determining anticompetitive effects? And when a merger is expected to generate cost savings through layoffs or reduction of capacity, should the guidelines treat this elimination of jobs or capacity as cognizable ‘efficiencies’?”

Jonathan Kanter, head of the Department of Justice’s Antitrust Division, spoke of the new, more assertive approach of his unit in remarks delivered at a conference on September 13, 2022:

- “In many sectors, just one or two powerful companies dominate. In many others, rampant oligopoly behavior deprives consumers and workers of the benefits of robust competition. We see this in higher consumer prices, lower wages and fewer new businesses being created. At the same time, we see it reflected in corporate control over the flow of information and public discourse.”
- “We are litigating more than we have in decades. Since I was confirmed in November, the Division has challenged or obtained merger abandonments in six cases. Several other transactions were abandoned after parties were informed they would receive second requests.”
- “[M]erger enforcement has become disconnected from the competitive realities of our economy. It has become a sometimes-artificial exercise. We focus too much on a small handful of models for predicting price effects, and lose sight of the competition actually at stake. We obsess in all cases about market definition, when in many situations direct evidence can help us assess the potential for harm.”

This post comes to us from Skadden, Arps, Slate, Meagher & Flom LLP. It is based on the firm’s memorandum, “Boards and M&A: Playing, and Winning, the Game of Regulatory Risk,” dated September 22, 2022.