

Client Alert

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ABA Merger Practice Workshop Provides Key Takeaways for Businesses

On September 28, 2017, **Amanda Wait**, head of Hunton & Williams LLP's competition and consumer protection practice group, acted as buyer's counsel in the ABA Merger Practice Workshop. The day-long event simulated a hypothetical merger transaction from initial counseling through the government's investigation. At the end of the program, over 150 audience members voted 65 percent in favor of clearing the transaction.

The workshop provided a behind-the-scenes look at how some of the most accomplished private practitioners, corporate counsel and government enforcers engage in the review of a complex hypothetical merger of two competing high-tech companies.

Some of the key themes and lessons learned from the program include:

- **Be prepared to tell a procompetitive story of the deal (and back it up with evidence).** The Federal Trade Commission (FTC) and Department of Justice (DOJ) are receptive to explanations as to why the deal either preserves or enhances competition. But blanket statements about increasing innovation or other procompetitive arguments will be met with skepticism if not backed up with concrete plans or examples. In other words, merging parties must be prepared to describe what the combination of the two companies will enable them to do that neither company could have done on its own.
- **The government will have economic experts early in the process; the merging parties should consider having them, too.** The FTC and DOJ will assign an economic expert, usually one of the agencies' internal Ph.D. economists, to almost every matter. Those economists will start developing their economic analyses early in the review. Merging parties often will want to have their own economic experts to assist in their own advocacy.
- **Transaction review can be impacted by other jurisdictions.** Many foreign jurisdictions have robust merger control regimes. When preparing a transaction timeline, keep in mind that foreign enforcers work on their own schedule—and it may not be quick. Merging parties also should not ignore likely involvement from state attorneys general who may conduct their own investigations and seek their own remedies.
- **Business considerations do not always mesh with antitrust considerations.** What is good for business is not always good for the antitrust review. Business documents discussing “revenue synergies” or explaining how the deal will remove a competitor likely will garner scrutiny by a reviewing agency.
- **Documents can be the deciding factor in whether a deal is challenged.** The agencies carefully consider documents produced by the parties in making decisions about whether to clear the deal. Documents that support the procompetitive story of the transaction can help your case. Conversely, questionable statements can create challenges to getting your deal through.

Hunton & Williams' competition and consumer protection practice is prepared to help global organizations navigate the ever-changing antitrust landscape through the challenges of merger clearance. Our former government enforcers provide an insider perspective to clients considering transactions subject to federal and state antitrust review in the United States.

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