



TUCKER ELLIS & WEST LLP
ATTORNEYS AT LAW

CLIENT ALERT

FEBRUARY 2010

**PRE-MERGER INTEGRATION PLANNING:
ACCELERATING SYNERGY CAPTURE AND IMPROVING DAY 1**

While the distress in the economy and capital markets may have reduced overall M&A activity, the drive for efficiencies has focused companies on pursuing mergers and acquisitions with competitors, potential competitors, and firms in complementary lines-of-business. These mergers typically present significant synergy opportunities. The purpose of this Client Alert is to assist our clients in considering whether pre-merger integration planning may be desirable to accelerate the capture of those synergies for a particular deal.

The Dynamics of a Synergy Deal

With synergy deals, the faster the deal closes, the faster the companies can begin to realize the synergies. However, because they often involve competitors or potential competitors, synergy deals also tend to attract the greatest scrutiny from the antitrust enforcers and other regulatory agencies. As a result, closing may be delayed – sometimes for significant periods – while agencies pursue their investigations. This delay diminishes the potential value of such mergers.

Companies in this situation have two complementary strategies they can follow to accelerate the capture of merger synergies. First, to speed-up the review process, companies can prepare for investigations in advance and respond quickly to agency requests. Second, companies can commence integration planning *during* the investigation.

Pre-Merger Integration Planning

What: Pre-merger integration planning is the process whereby two companies commence joint planning for post-closing operations prior to receiving the necessary approvals. Such planning typically involves the sharing of data necessary to facilitate closing as well as various other activities designed to shorten the time between the final regulatory sign-off and Day 1. Depending upon the companies and complexity of the integration, these activities can range from a few meetings, to scores of planning teams, pre-close contracts, and other agreements.

Why: While the primary driver of pre-merger integration planning is accelerating the capture of merger-related synergies, there also are other benefits. These include a smoother and quicker Day 1 roll-out and improving the ability to address concerns of customers and suppliers regarding the companies' post-merger operations. There also are less tangible, but equally important, benefits. Experience has taught that acquisitions can breed uncertainty, particularly among the target company's employees. The longer the period of time between the announcement of the deal and closing, the greater the risk that this angst will impact employee performance – risking the loss or diminution of the synergies driving the deal in the first place.

How: Pre-merger integration planning involves the antitrust pre-review, tracking, and active legal supervision of specific integration planning activities. To over-simplify, data to be shared,

CLEVELAND

COLUMBUS

DENVER

LOS ANGELES

SAN FRANCISCO

as well as the requests for that data, are pre-reviewed. Permissible sharing is tracked. Communications and other activities between the merging companies are likewise pre-approved, tracked, and monitored if necessary. The process not only must ensure that all planning activities are legal; it also must enable the companies to respond quickly to any inquiry from an investigating agency and to quickly allay any concerns.

What is a Clean Room: Typically, a clean room involves that part of pre-merger planning where the data to be shared (or databases to be compared or integrated) are of such a sensitive nature they simply cannot be shared with employees of the other company. Experience has taught that with some limited exceptions, clean rooms yield only marginal benefits relative to their cost. The better approach may be to engage in planning that may occur outside a clean room environment (such as formatting sensitive data for immediate post-closing input) and to reserve efforts regarding this limited category of data or activities until after closing.

Is this Legal: Yes. The real issue is whether engaging in pre-merger planning offers the potential for delaying approvals by drawing the attention of the antitrust enforcers – which would be counter-productive to the reason for the pre-merger planning in the first place. The solution to that issue is the implementation of adequate controls and tracking capabilities to prevent any violations and enable the companies to quickly dispel any concerns expressed by investigating agencies.

What laws are Implicated: Pre-merger planning must address and comply with two areas of law. First, the planning must accommodate the laws that prohibit certain activities between competitors. Prior to closing, the merging companies remain independent competitors capable of conspiring under the antitrust laws. Second, the process must also clear certain “gun-jumping” rules that prohibit the exercise of control by the acquiring company over the target company prior to DOJ or FTC approval.

TEW lawyers have successfully developed and implemented pre-merger planning processes for some of the largest mergers in U.S. history. They also can help you perform a cost benefit analysis to determine if pre-merger integration planning would benefit your company.

For more information please contact:

Patrick J. Pascarella 216.696.4936
pat.pascarella@tuckerellis.com

Dylan M. Carson 213.430.3422
dylan.carson@tuckerellis.com

1150 Huntington Building, 925 Euclid Avenue
Cleveland, OH 44115
www.tuckerellis.com

© Tucker Ellis & West LLP 2010

This Client Alert has been prepared by Tucker Ellis & West LLP for the information of our clients. Although prepared by professionals, this Client Alert should not be utilized as a substitute for legal counseling in specific situations. Readers should not act upon the information contained herein without professional guidance.