

THE LATEST: Collateral Risk in Merger Reviews

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- The [Wall Street Journal](#) has reported that the Antitrust Division of the Department of Justice (DOJ) is currently investigating whether advertising sales teams for competing television station owners engaged in anticompetitive conduct regarding communications on performance levels. Per the Journal's reporting:
- DOJ is investigating whether the purported communications led to higher rates for television commercials.
- DOJ's industry-wide investigation developed from its review of Sinclair Broadcast Group's (Sinclair) proposed acquisition of Tribune Media (Tribune).
- As part of the DOJ's merger review, Sinclair and Tribune received a "Second Request." Responding to a Second Request typically involves the production of a wide range of company documents regarding competition in the industry under investigation.
- Many times in the past, merging parties' Second Request responses have led to separate anticompetitive conduct cases. A few notable examples are provided below:
- In April 2018, DOJ brought a civil complaint alleging that three rail equipment companies had no-poaching agreements that depressed salaries and competition for their employees. The agreements were discovered during the review of an acquisition involving two of the three companies.
- In 2003, DOJ filed a civil antitrust lawsuit to block the acquisition of Morgan Adhesives Company by UPM-Kymmene and, at the same time, opened a criminal investigation into price-fixing conduct in the labelstock industry.

WHAT THIS MEANS

- Given the broad discovery of merger review, an aspect of merger diligence for transactions

should include a discussion with the corporate decision makers regarding the potential for discovery of any problematic conduct or agreements that might raise collateral risk to the company.

- At the very least, the discovery of improper conduct or agreements could delay and distract from the substantive antitrust review of a merger. Worse, it could result in civil and criminal liability from lawsuits via the government and follow-on civil lawsuits from affected parties.

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