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FTI CONSULTING'S M&A AND ACTIVISM TEAM INSIGHTS

Planning for the Break-up at the Altar

Over the past year, scrutiny around proposed transactions has intensified. An unprecedented level of global regulatory inquiry has resulted in a growing number of mergers being abandoned. For corporate leaders considering pursuing a transaction, this creates a novel challenge: how can you plan for a corporate marriage with one eye on the exit?

The New Total Uncertainty of Antitrust

The risk that regulators could block a transaction is by no means a new one. However, in recent years, preparing for this possibility has evolved from a predictable and manageable aspect of a well-run merger process, to a far broader and more unpredictable variable. That is exactly how the regulators want it to be, too. The current chief of the DOJ's Antitrust Division has said that the Department of Justice is "not just bringing a few big cases, we're changing the way it's done."[1] The Chair of the FTC has said, "I think there's an opportunity here to really change and learn from the mistakes of the past."[2] The old antitrust model is very intentionally being reshaped.

This attitude shift impacts deals in a number of ways. First is in the timeline to close. In 2022, the average duration of a significant U.S. antitrust investigation had exceeded 12 months, significantly above the eight-month average held between 2011-2016.[3] Second is in the ability to close. In 2021, 27 deals were challenged, in line with prior years, but over 37% of those challenges resulted in the deal being abandoned, the highest levels since 2011.[4]

The Leadership Conundrum

The significant rise in antitrust scrutiny has left many corporate leaders dealing with a new level of uncertainty throughout the transaction process. This creates a conflicting set of pressures: any good leader must be sure

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[1] "DOJ Plans to Scrutinize Mergers." PYMNTS.com, April 3, 2022. https://www.pymnts.com/news/regulation/2022/doj-antitrust-chief-puts-end-to-laissez-faire-merger-policy/

[2] Feiner, Lauren. "FTC Chair Lina Khan Says Agency Won't Back down in the Face of Intimidation from Big Tech." CNBC. CNBC, January 19, 2022. https://www.cnbc.com/2022/01/19/ftc-chair-lina-khan-says-agency-wont-back-down-in-the-face-of-intimidation.html

[3] "DAMITT Q1 2022: Significant Merger Investigations Face Steeper Hurdles to Settlement." Dechert LLP, April 21, 2022. https://www.jdsupra.com/legalnews/damitt-q1-2022-significant-merger-9007657/

[4] "DAMITT 2021 Report: Merger Investigation Activity Sinks More Deals." Dechert LLP, January 31, 2022. https://www.dechert.com/knowledge/publication/2022/1/damitt-2021-report--merger-investigation-activity-sinks-more-dea.html?utm_source=vuture&utm_medium=email&utm_campaign=onpoint

their organization is prepared for whatever may come, but the ability to prepare will be directly inhibited by the time and effort spent attempting to complete the deal.

Too often, management will decide that if a deal fails then the company will simply return to the old status quo. That is a big mistake and, frankly, not really possible.

When a public company announces a transformative merger, it is effectively resetting how stakeholders understand the company. That news has a lasting impact. If your boss says you're moving to Paris, it's a big deal – you learn some French, say your goodbyes, find a new apartment, and get yourself excited about the move. If five weeks later you hear that the move has been cancelled, you won't simply return to normal. You likely will be unhappy as you search for a new place to live and wonder what's next. That's exactly what will happen with a merging company's investors, customers, partners and employees. The deal may be off, but the feeling of a shift in the company is in the air.

That is why corporate leaders pursuing transactions in this new antitrust era need to consider how they can best incorporate planning for "Plan B" within the legal bounds of their merger process. Here is what leaders should consider in their transaction communications planning:

- **Preserve your messaging.** Don't use phrases that are difficult to unwind or that tie you to a promise you can't keep. A deal should be positioned as a "nice to have" – something that will strategically enhance your business – but not a "must have" on which the fate of your company hinges. Investors need to know that the business has strong fundamentals and can continue to thrive absent a transaction.

- **Demonstrate continuity.** Make sure audiences can follow your train of thought in deciding to pursue or walk away from a deal. Any articulation of a deal rationale should be consistent with your previously stated vision and mission, and overall long-term view of the company. When a deal breaks, management will need to rebuild trust with stakeholders. Being able to lean on a clear, linear story will be central to regaining that trust.

- **Move fast, but create your own timeline.** Planning to "relaunch" a company following a deal break is an exceedingly difficult task. There are meaningful legal and regulatory considerations to work through. The window of time to develop a plan is inevitably short, but don't fall into the trap of thinking that the company needs to have every question answered on the day the news breaks. Instead, keep communications brief on "break day," but set a time in the future where you will have more to say to each of your audiences. This helps distance the company from the deal narrative and refocus on its new future.

- **Consider the value of "strategic silence."** During the deal process, you have to be a cheerleader and a team player. That said, there is a fine line between supporting the outcome of the transaction and establishing a public narrative that will haunt you in the future. Silence can be strategic.

- **You're not disappointed.** The biggest temptation in a deal break is to announce that you're disappointed in the outcome. There is no question that's true, but is it really true for all your stakeholders? Employees and customers may be elated by the removal of integration uncertainty. Investors might not have been fully sold on the transaction's merits in the first place. It's best to align yourself with your key stakeholders, reinforce your faith in the company, and focus on the future.

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