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DOJ announces $1.1 million penalty for false second request certification

August 13, 2025 | Client Update | 8-minute read

Late last week, the Department of Justice (DOJ) announced a settlement in UnitedHealth's proposed acquisition of Amedisys that imposed broad divestitures and, notably, a $1.1 million civil penalty based on the DOJ's allegation that Amedisys falsely certified it had "substantially complied" with a second request. The unusual civil penalty is a reminder that representations of "substantial compliance" can have serious consequences, if not supported by appropriate compliance efforts.

As part of a settlement resolving a challenge by DOJ and several state Attorneys General to UnitedHealth's proposed acquisition of Amedisys, Amedisys agreed to pay $1.1 million in civil penalties and train certain senior executives (and other employees) on antitrust compliance. According to the allegations contained in the complaint, Amedisys violated the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) by falsely certifying that it had substantially complied with DOJ's request for additional information and documentary material (a "Second Request") when it knew its document production was deficient. The settlement also includes divestitures of 164 home health and hospice locations. DOJ claimed that the settlement would "secure the largest divestiture of outpatient healthcare services to resolve a merger challenge."

Below we provide a brief overview of the HSR Act merger review process as relevant to the settlement and describe the divestiture and unique conduct aspects of the settlement in more detail. This settlement serves as an important reminder for merging parties considering their obligations for complying with requests for information from the government.

Brief overview of the merger review process

Under the HSR Act, parties to mergers or acquisitions that meet certain thresholds must submit a pre-merger notification to the DOJ and the Federal Trade Commission (together, the "agencies") and observe a 30-day waiting period during which they are prohibited from closing the transaction. If the reviewing agency believes that an in-depth investigation is required, the HSR Act empowers the agency to issue a Second Request requiring, in practice, the parties to produce significant volumes of documents and data about the companies, the transaction, and the industry generally.[1] Issuance of a Second Request "stops the clock" on the waiting period and therefore delays closing of the transaction.

To restart the merger review clock, a merging party that receives a Second Request must certify "substantial compliance" and attest that the information provided by the party is "true, correct, and complete in accordance with the statute and rules."[2] If a party cannot provide all materials required by the Second Request, including if responsive documents or information have been lost or destroyed , it may provide "a statement of the reasons for such noncompliance."[3] A party that fails to comply with the HSR Act is liable for a civil penalty for each day it is in violation of the HSR Act; the current maximum civil penalty is $53,088 per day.[4]

Proposed acquisition and complaint

On June 5, 2023, UnitedHealth and Amedisys announced that they had entered into the proposed acquisition. UnitedHealth, a health insurance and health care services company, controls Optum, a health solution and care delivery company that offers home and hospice care among other services. Amedisys is a provider of home hospice, palliative, and high-acuity care services. On November 12, 2024, the DOJ, together with the Attorneys General of Maryland, Illinois, New Jersey, and New York, filed a complaint in the United States District Court for the District of Maryland seeking to block the proposed acquisition. The complaint alleged that the proposed acquisition would combine two of the largest home health and hospice providers in the United States and would harm competition in hundreds of local home health care markets, dozens of local hospice markets, and hundreds of local markets for home health and hospice nurse labor.

The complaint also alleged that Amedisys had violated the HSR Act by certifying that it had substantially complied with the Second Request and attesting that its response was "true, correct, and complete in accordance with the statute and rules" when it knew its production was deficient. According to the complaint, months before it certified substantial compliance, Amedisys became aware of deficiencies in its document preservation system but did not acknowledge these and other deficiencies until confronted by DOJ. The complaint identified the following deficiencies:

- **Failure to produce certain emails.** The complaint alleged that, at the time Amedisys certified substantial compliance, it was aware of a potential issue with its email archiving, which prevented emails from a 30-day period from being recovered. That period coincided with the time when UnitedHealth and Amedisys were negotiating the proposed acquisition. The complaint alleged that Amedisys's certification was erroneous because Amedisys failed to provide a statement of reasons for its partial compliance with the Second Request and failed to disclose the missing emails.
- **Failure to produce any hard copy documents.** The complaint alleged that Amedisys knew of, but failed to produce, any hard copy documents from any custodian, including "copious handwritten notes" that Amedisys's former CEO had kept. According to the complaint, Amedisys's former CEO publicly described these notes in a 2023 book.
- **Failure to produce certain text messages.** The complaint alleged that Amedisys knew of, but failed to produce, text messages for more than half of its custodians.

The complaint alleged that Amedisys later produced more than 2.5 million additional documents, including emails, hard copy documents, and text messages, and that late production represented a "greater volume of documents" than was included in Amedisys's original production. According to the complaint, the supplemental production contained material highly relevant to the DOJ's investigation, including an email from Amedisys's CEO to other senior executives assessing the risks related to the transaction and likely divestitures, and also a text message from an Amedisys executive discussing how UnitedHealth was "[l]ocking up the home health and hospice market in many locations." The complaint alleged that, because Amedisys provided its second "substantial compliance" certification more than eight months after its initial certification, Amedisys was in violation of the HSR Act for at least 252 days, exposing Amedisys to over $13 million in civil penalties under the HSR Act.

Divestiture and settlement

The case proceeded through the litigation process. In March 2025, UnitedHealth and Amedisys identified two potential buyers of proposed divested assets, private equity-backed BrightSpring Health Services and holding company The Pennant Group. Trial was set to begin in late October. On August 7, 2025, the DOJ, together with its state co-plaintiffs, announced a proposed settlement. The proposed settlement requires UnitedHealth and Amedisys to divest 164 home health and hospice locations across 19 states to BrightSpring and Pennant. The DOJ claimed that the settlement would "secure the largest divestiture of outpatient healthcare services to resolve a merger challenge." The proposed settlement also obligates UnitedHealth to divest additional locations if it fails to obtain required state regulatory approvals for the divestiture facilities without also including additional locations, and it also imposes a monitor to supervise UnitedHealth's divestitures.

In connection with the alleged violation of the HSR Act, the proposed settlement requires Amedisys to pay a $1.1 million civil penalty and train certain executives—including its chief executive officer, chief financial officer, chief operating officer, and chief legal officer, and Amedisys's field leadership for all lines of business—on antitrust compliance. Under the proposed settlement, the United States has sole discretion to approve the form and content of the training. Approximately one year after entry of a relevant court order, the chief legal officer of UnitedHealth also must submit an affidavit certifying compliance with this training requirement.

Takeaways

The proposed settlement reinforces several points to keep in mind when planning for a proposed transaction and when engaging with the agencies in investigations of the proposed transaction:

- **“Substantial compliance” means substantial.** Typically, if the reviewing agency believes a party has not provided information responsive to a Second Request that go beyond *de minimis* omissions, the agency will typically reject the certification of substantial compliance (and thus not restart the clock) unless specific additional responsive information is produced. The proposed *UnitedHealth/Amedisys* settlement is a reminder that agencies may take the position that the consequences of incomplete productions extend beyond potential delay to the merger review process and include risk of significant civil penalties. Accordingly, it is important for merging parties to work closely with antitrust counsel throughout the review process, and to be prepared to substantiate compliance with each of the numerous document requests and interrogatories a Second Request may include.
- **Thorough and complete collection of hard copy and text message documents.** The collection and production of hard copy and text message documents is often one of the most burdensome requirements of complying with a Second Request. This proposed settlement illustrates the importance of thorough and complete collection and production of these materials, and gives weight to recent statements by the agencies outlining requirements to preserve, collect, and produce messages and information relating to collaboration tools and ephemeral messaging platforms, including text messages. In a January 26, 2024 DOJ announcement, a DOJ official was quoted as saying: “The Antitrust Division and Federal Trade Commission expect that opposing counsel will preserve and produce any and all responsive documents, including data from ephemeral messaging applications designed to hide evidence. Failure to produce such documents may result in obstruction of justice charges.” The proposed settlement is also a reminder to be mindful that all forms of documents, including hard copy notes and text messages, may be reviewed by the antitrust authorities, so it is important to work with antitrust counsel on comprehensive document creation protocols.
- **Openness under second Trump administration to merger remedies.** As discussed in our previous client update, the proposed settlement is just another example of the antitrust agencies’ openness under the second Trump administration to merger remedies, an important shift from the prior administration.[5]

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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[1] 15 U.S.C. § 18a.

[2] *Certification, Model Second Request*, FTC (Jan. 10, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/Final-Rev-Model-Second-Request-01-26-2024.pdf.

[3] *Id.*

[4] 16 CFR § 1.98.

[5] *First merger settlements under Trump 2.0 signal the return of remedies*, Davis Polk & Wardwell LLP (June 3, 2025), https://www.davispolk.com/insights/client-update/first-merger-settlements-under-trump-20-signal-return-remedies.