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## Unit 3.

# The DOJ/FTC Merger Review Process

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Merger Antitrust Law

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# Topics

- Review: The institutional setting
- Overview of the HSR review process
- Premerger notification
- Initial waiting period investigations
- Second request investigations
- DOJ/FTC merger review outcomes

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# Review: The Institutional Setting

# Clayton Act § 7

- Provides the U.S. antitrust standard for mergers

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.<sup>1</sup>

- *Simple summary*: Prohibits—

- acquisitions of stock or assets that
- “may substantially lessen competition or tend to create a monopoly”
- “in any line of commerce” (product market)
- “in any part of the country” (geographic market)

Called the *anticompetitive effects test*

Collectively called the *relevant market*

- This summary assumes that the jurisdictional prerequisites are satisfied.
  - Since the reach of Section 7 today is coextensive with that of the Commerce Clause, the jurisdictional prerequisites are almost always satisfied

<sup>1</sup> 15 U.S.C. § 18 (remainder of section omitted)

# Other antitrust statutes

- The other major provisions that can apply to business combinations
  - Sherman Act § 1
    - Prohibits “contracts, combinations . . . and conspiracies in restraint of trade”
  - Sherman Act § 2
    - Prohibits monopolization, attempted monopolization, and conspiracies to monopolize
  - Federal Trade Commission Act
    - Section 5 prohibits “unfair methods of competition”
    - NB: Unlike other provisions, not included in the definition of “antitrust law” in Clayton Act § 1
      - This will be important when it comes to private actions

These statutes are either coextensive or less restrictive than Clayton Act § 7, so Section 7 provides the antitrust test for all mergers. Consequently, invocation of the Sherman Act or the FTC Act is usually superfluous and plaintiffs rarely allege violations of these statutes.

# Five types of enforcement agents

- Department of Justice (DOJ) Antitrust Division
- Federal Trade Commission (FTC)
- State Attorneys General
  - Injunctive relief actions
  - Parens patriae actions
    - Class actions for damages sustained by citizens of the state brought by the state attorney general
- Individual private parties
  - Customers (and sometimes suppliers)
  - Competitors
  - Possibly others
- Private class actions

For reasons that we will discuss, the DOJ and FTC are by far the most active enforcers of the merger antitrust laws. The State AGs and private parties rarely bring merger antitrust actions.

# Four types of sanctions/relief

## 1. Criminal fines/imprisonment

- In practice, not applicable to mergers
  - Available only for violations of Sherman Act §§ 1-2
  - Clayton Act § 7 can be enforced only through civil actions
  - Only the DOJ can bring a criminal antitrust prosecution and the DOJ criminally prosecutes only “hard core” antitrust violations (i.e., horizontal price fixing, horizontal market divisions, some horizontal group boycotts)

## 2. Injunctive relief

- Types of injunctive relief
  - Temporary restraining orders (TROs)
  - Preliminary injunctions
  - Permanent injunctions
- Can be used to—
  - Prevent the consummation of a merger that has not already been consummated
  - Unwind or force corrective divestitures or other actions of transactions that have been consummated
- Most merger challenges are preclosing, so that the most common form of adjudicated relief is a “blocking” injunction, which enjoins the consummation of the merger

# Four types of sanctions/relief

## 3. Treble damages

- ❑ Only available to parties injured as a result of antitrust violation
- ❑ Mergers are usually challenged preconsummation, and therefore before they can cause any injuries that could predicate treble damages relief

## 4. Other equitable relief

- ❑ Most notably disgorgement of ill-gotten gains from an unlawful merger
- ❑ Again, mergers are usually challenged preconsummation, and therefore before the merging parties could obtain any ill-gotten gains that could predicate disgorgement



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# Four types of proceedings

- Criminal prosecutions in federal district court
  - Only used for “hard core” antitrust violations (e.g., horizontal price fixing)
  - Not used in challenging mergers (as a matter of prosecutorial discretion)
- Civil judicial adjudications in federal district court
- FTC administrative adjudications
- Agency administrative resolutions (consent decrees)

# Summary

	Forum	Criminal*	Injunctive Relief	Damages
DOJ	Federal court	X (under federal law) Sherman Act §§ 1-2	X Sherman Act § 4 Clayton Act § 15	X Clayton Act § 4A
FTC	Administrative court		X Clayton Act § 11 FTC Act §§ 5, 13	
State AGs**	Federal court for federal and state claims	X (under state law)	X Clayton Act § 16	X (on behalf of resident natural persons) Clayton Act § 4C
Private**	Federal court for federal and state claims		X Clayton Act § 16	X Clayton Act § 4

\* As a matter of prosecutorial discretion, not used in merger antitrust enforcement

\*\* Are considered “private persons” under Clayton Act § 16. Can bring state antitrust claims (but not federal antitrust claims) in state court.

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# Overview: The HSR Review Process

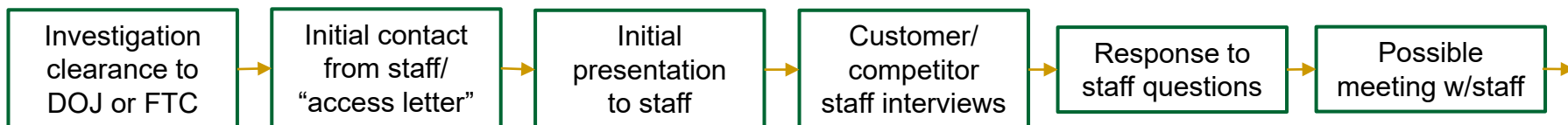
# The HSR review process

## Prefiling/filing

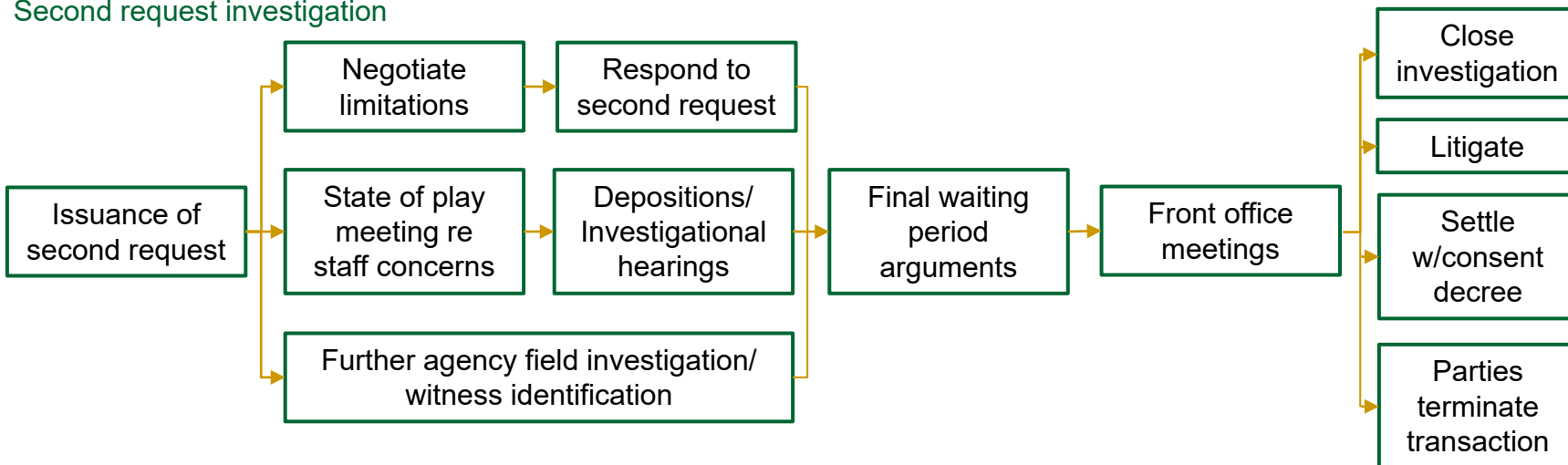


Addressed in the last week of class

## Initial investigation

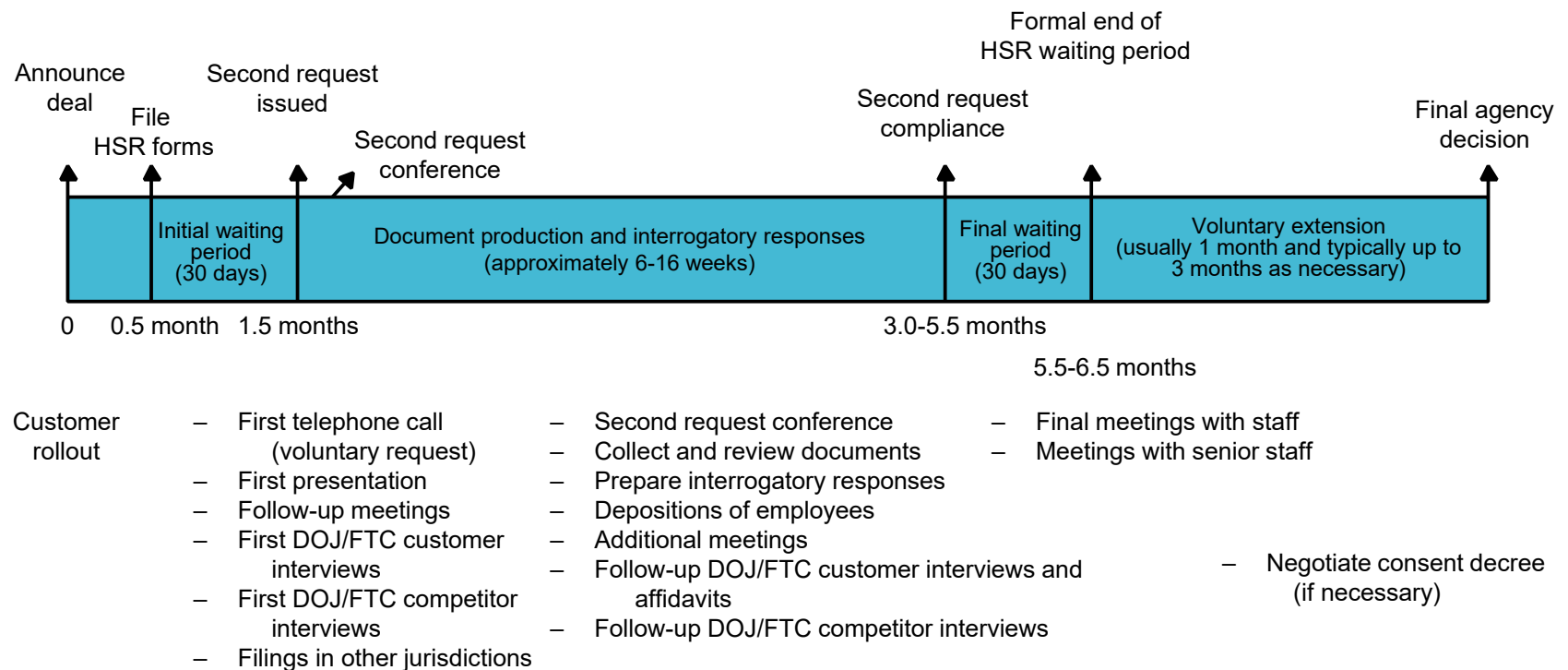


## Second request investigation



# The HSR Act review process

## ■ Typical domestic transaction



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# Premerger Notification

# HSR Act

## ■ Hart-Scott-Rodino Act<sup>1</sup>

- Enacted in 1976 and implemented in 1978
- Applies to large mergers, acquisitions and joint ventures
- Imposes reporting and waiting period requirements
  - Preclosing reporting to both DOJ and FTC by each transacting party
  - Post-filing waiting period before parties can consummate transaction
- Authorizes investigating agency to obtain additional information and documents from parties during waiting period through a “second request”
- Designed to alert DOJ/FTC to pending transactions to permit them to investigate—and, if necessary, challenge—a transaction prior to closing
  - *Idea*: Much more effective and efficient to block or fix anticompetitive deal prior to closing than to try to remediate it after closing
- Not jurisdictional: Agencies can review and challenge transactions—
  - Falling below reporting thresholds
  - Exempt from HSR reporting requirements
  - “Cleared” in a HSR merger review—no immunity attaches to a transaction that has successfully gone through a HSR merger review

<sup>1</sup> Clayton Act § 7A, 15 U.S.C. § 18a.

# HSR Act

## ■ Basic materials

- The HSR Act, 15 U.S.C. § 18a (also known as Section 7A of the Clayton Act)
- The HSR Act implementing regulations, 16 C.F.R. pts 801-803<sup>1</sup>
- Formal FTC interpretations of the implementing regulations
- Informal staff interpretations of the implementing regulations
- The HSR reporting form and instructions

## ■ Administration

- The FTC Premerger Notification Office (PNO) is responsible for the procedural administration of the premerger notification program under the HSR Act
- There is a “clearance process” to allocate HSR filings to the DOJ and FTC for substantive review<sup>2</sup>
- Once a filing has been “cleared” to an agency for review, the filing is sent to the appropriate investigating section for review, investigation, and possible challenge

<sup>1</sup> The C.F.R. is the Code of Federal Regulations. It is an annually updated codification of the general and permanent rules published in the Federal Register by the departments and agencies of the Federal Government. The departments and agencies usually promulgate these rules and regulations pursuant a congressional delegation of power and have the force of law. The rulemaking process is governed by the Administrative Procedure Act (APA).

<sup>2</sup> Discussed below.



# Basic prohibition

- Section 7A(a)

[N]o person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification . . . and the waiting period . . . has expired . . . .<sup>1</sup>

- A reportable transaction is one that—
  - Involves the acquisition of voting securities or assets
  - Satisfies the thresholds for prima facie reportability<sup>2</sup>
  - Does not fall into one of the exemptions provided by the HSR Act or implemented by the HSR Rules

<sup>1</sup> 15 U.S.C.18a(a).

<sup>2</sup> Beginning in FY 2005, the reporting thresholds are adjusted annual by the percentage changes in the gross national product during the prior fiscal year compared to the gross national product for the fiscal year ending September 30, 2003. Pub. L. No. 106-553, 114 Stat. 2762 , 2762A-109 (effective February 1, 2001).

# Acquisition of voting securities or assets

- The HSR Act applies only to acquisitions of voting securities or assets
- Voting securities
  - “[S]ecurities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer”<sup>1</sup>
- Assets
  - No special definition
  - The acquisition of a 50% or greater ownership interest in a non-corporate entity (such as a partnership or LLC) is regarded as an acquisition of the entity’s underlying assets
  - An exclusive license is regarded as an asset

<sup>1</sup> 16 C.F.R. § 801.1(f)(1)(i).

# Acquisition of voting securities or assets

## ■ Acquisition

- Obtaining the “beneficial interest” in the underlying voting securities or assets
- Does not require a formal transfer of legal title
  - *Example:* Company A has a signed purchase agreement to acquire the voting securities of Company B from its parent company. Although the transaction has not yet closed, Company A is influencing the operational management decisions of Company B. Given this influence, the agencies will view Company A as having obtained a beneficial interest in Company B and hence to have acquired Company B for HSR Act purposes.

<sup>1</sup> 16 C.F.R. § 801.1(f)(1)(i).

# Prima facie reportability<sup>1</sup>

Size of transaction*	Prima Facie Reportability																		
Up to and including \$90.0 million	Not reportable																		
Above \$90.0 million up to and including \$359.9 million	Reportable if : (1) satisfies the “size of person” test, and (2) no exemption applies  <table style="width: 100%; border: none;"> <tr> <td style="text-align: center;"><i>Acquiring person</i></td> <td style="text-align: center;">Size of person test</td> <td style="text-align: center;"><i>Acquired person</i></td> </tr> <tr> <td style="text-align: center;">\$180.0 million (in total assets or annual net sales)</td> <td style="text-align: center;">and</td> <td style="text-align: center;">\$18.0 million (in total assets or annual net sales of a person engaged in manufacturing)</td> </tr> <tr> <td style="text-align: center;"><i>Or</i></td> <td></td> <td></td> </tr> <tr> <td style="text-align: center;">\$180.0 million (in total assets or annual net sales)</td> <td style="text-align: center;">and</td> <td style="text-align: center;">\$18.0 million (in total assets of a person not engaged in manufacturing)</td> </tr> <tr> <td style="text-align: center;"><i>Or</i></td> <td></td> <td></td> </tr> <tr> <td style="text-align: center;">\$18.0 million (in total assets or annual net sales)</td> <td style="text-align: center;">and</td> <td style="text-align: center;">\$180.0 million (in total assets or annual net sales)</td> </tr> </table>	<i>Acquiring person</i>	Size of person test	<i>Acquired person</i>	\$180.0 million (in total assets or annual net sales)	and	\$18.0 million (in total assets or annual net sales of a person engaged in manufacturing)	<i>Or</i>			\$180.0 million (in total assets or annual net sales)	and	\$18.0 million (in total assets of a person not engaged in manufacturing)	<i>Or</i>			\$18.0 million (in total assets or annual net sales)	and	\$180.0 million (in total assets or annual net sales)
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\$18.0 million (in total assets or annual net sales)	and	\$180.0 million (in total assets or annual net sales)																	
In excess of \$359.9 million	Reportable absent an exemption																		

\* Based on the value of voting securities and assets the acquiring person will hold as a result of the acquisition, including the value of any previously acquired voting securities.

<sup>1</sup> See Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 84 Fed. Reg. 7370 (Mar. 4, 2019) (effective Apr. 3, 2019).

# Prima facie reportability

- **Thresholds**
  - Measured against everything the acquiring person will hold as a result of the pending acquisition, not just the amount to be acquired in the pending transaction
- **Asset acquisitions**
  - Acquisition price + value of assumed liabilities
- **Voting securities acquisitions**
  - Acquisition price for voting securities to be acquired + value of voting securities already held
  - Note: Acquisitions of minority interests can be reportable
- **Acquisitions of ownership interests in LLCs, partnerships and other noncorporate entities**
  - Acquisition price for non-corporate interests to be acquired + value of interests *and* acquisition confers “control” of the entity
  - For HSR Act purposes, “control” is defined as the right to 50% or more of the entity’s profits and/or 50% or more of the entity’s assets upon dissolution

# Selected exemptions

- Intraperson
  - Acquired and acquired person are the same
- Investment
  - Hold no more than 10% of target's outstanding voting securities
    - 15% for certain institutional investors
  - Acquirer must have a purely passive investment intention
    - Any membership on the board of directors or other involvement in the management of the company (other than voting shares) voids exemption
- Convertible voting securities
  - Acquired securities have no present voting rights
- Acquisitions of non-U.S. assets
  - Must not generate sales in or into the U.S. of more than \$84.4 million
- Acquisitions of non-U.S. voting securities by non-U.S. persons that either
  - Do not confer control over the target, or
  - Do not involve assets in the U.S., or sales in or into the U.S., over \$90.0 million

# Notification thresholds

- An otherwise reportable transaction is not subject to the reporting and waiting period requirements of the HSR Act if
  1. The reporting and waiting period requirements were satisfied within the last five years for a prior acquisition, *and*
  2. The pending acquisition will not cause the acquiring person to cross a notification threshold

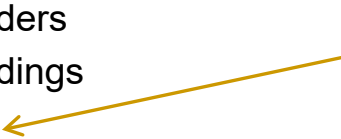
Notification thresholds <sup>1</sup>
\$90.0 million
\$180.0 million
\$899.8 million
25% of the voting securities if their value exceeds \$1,687.80 million
50% of the voting securities if their value exceeds \$84.4 million

<sup>1</sup> See Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 84 Fed. Reg. 7370 (Mar. 4, 2019) (effective Apr. 3, 2019).

# HSR Act filing

- Uses a prescribed form: Requires no—
  - Market definition
  - Calculation of market shares or market concentration statistics
  - Presentation of any antitrust analysis or defense
- Both the acquiring and acquired persons must submit their own filing
- Key information required:
  - Transaction documents (e.g., stock purchase agreement)
  - Annual reports and financial statements
  - Revenues by NAICS codes
  - Corporate structure Information
    - Majority-owned subsidiaries
    - Significant minority shareholders
    - Significant minority shareholdings
  - “4(c)” and “4(d)” documents

These are the only parts of the filing that really matter





# HSR Act filing

- 4(c) and 4(d) documents
  - 4(c) documents
    - Studies, surveys, analyses or reports
    - Prepared by or for officers or directors of the company (or any entities it controls)
    - That analyze the transaction
    - With respect to markets, market shares, competition, competitors, potential for sales growth, or expansion into product or geographic markets
  - 4(d) documents
    - Confidential Information Memoranda (“CIM”)
    - Third party advisor documents
    - Synergy and efficiency documents
  - Failure to provide all 4(c) and 4(d) documents
    - Makes the HSR filing ineffective, so that the waiting period never started
      - Usually discovered by investigating agency in the document production in a second request
      - Agencies have required parties to refile and go through the entire process (including a second second request)
    - Also, civil penalties (fines) for closing a transaction without observing the applicable waiting period

# Filing fees

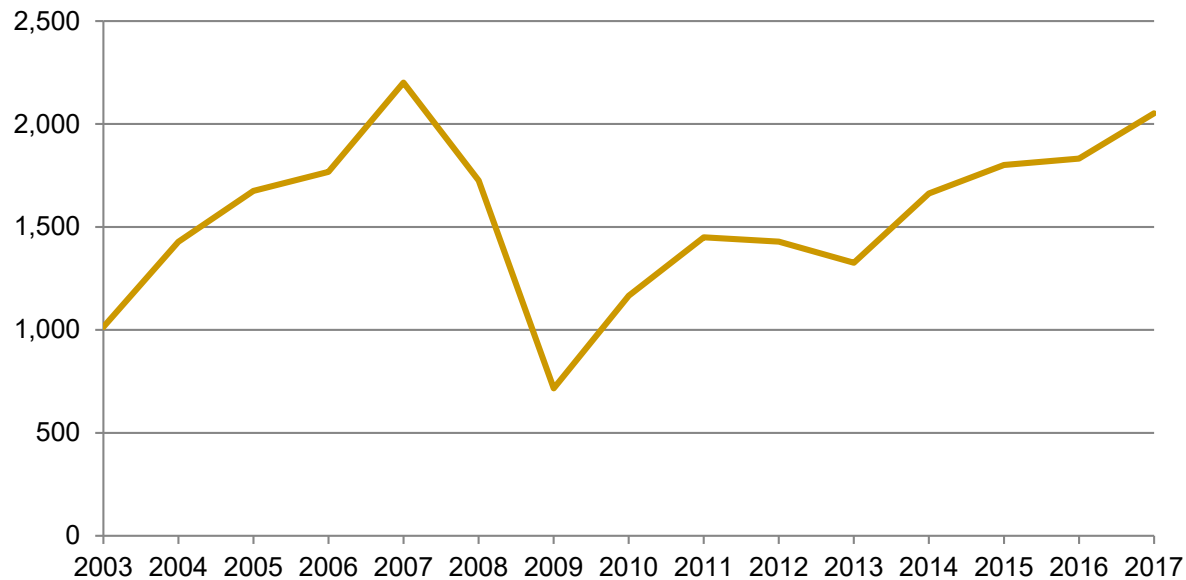
Value of Transaction <sup>1</sup>	Filing Fee
≤ \$90.0 million	No filing required
> \$90.0 million but < \$180.0 million	\$45,000
≥ \$180.0 million but < \$899.8 million	\$125,000
≥ \$899.8 million	\$280,000

- Paid by the purchaser, unless the parties agree to a different arrangement (e.g., split the fee)

<sup>1</sup> See Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 84 Fed. Reg. 7370 (Mar. 4, 2019) (effective Apr. 3, 2019).

# HSR Act Notifications

## Transactions Reported



Source: Fed. Trade Comm'n & U.S. Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2017, at App. A.

# Statutory waiting periods

- **General rule**
  - Cannot close a reportable transaction until the waiting period is over
  - The duration of the waiting period is prescribed by the HSR Act
- **Initial waiting period**
  - 30 calendar days generally
  - 15 calendar days in the case of
    - a cash tender offer, or
    - acquisitions under § 363(b) of bankruptcy code
- **Extended waiting period**
  - Waiting period extended by issuance of a second request in initial waiting period
  - Waiting period extends through
    - Compliance by all parties with their respective second requests
    - PLUS 30 calendar days (10 calendar days in case of a cash tender offer)
- **Investigating agency may grant early termination of a waiting period at any time**

# HSR Act violations

## ■ HSR Act prohibition

- The HSR Act provides that “no person shall acquire, directly or indirectly, any voting securities or assets of any other person” in a reportable transaction without observing the filing and waiting period requirements<sup>1</sup>
- The HSR regulations provide that a person holds (acquires) voting securities or assets when it has a “beneficial interest” in them<sup>2</sup>

## ■ Two basic types of violations

- *Failure to file*: Failing to file an HSR report and observe the waiting period requirements in a reportable transaction
- *Gun jumping*: Filing a HSR report but exercising influence over the target’s decision making sufficient to indicate the transfer of a beneficial interest in the target before the end of the waiting period

## ■ Can be expensive

- \$42,530 per day for every day of the violation—Equals \$15.9 million per year<sup>3</sup>

<sup>1</sup> 15 U.S.C. § 18a(a).

<sup>2</sup> 16 C.F.R. § 801.1(c).

<sup>3</sup> 84 Fed. Reg. 3980 (Feb. 14, 2019) (increasing civil penalty from \$41,484 per day to \$42,530 per day effective February 14, 2019, pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114–74, § 701, 129 Stat. 599 (2015) (requiring a catch-up CPI inflation adjustment from the date of the statute’s enactment)).

# Failure to file

## ■ Violation

- ❑ Failing to file an HSR report and observe the waiting period requirements in a reportable transaction

## ■ Scenarios

- ❑ Failure to file at all
  - Intentional failure to file
  - Inadvertent failure to file
  - Improper invocation of an exemption (usually the investment exception)
- ❑ Filing an insufficient report (e.g., a report that is incomplete because it does not contain all Item 4(c) and 4(d) documents)

## ■ Prosecutorial discretion

- ❑ Vigorous enforcement for intentional failures to file
- ❑ “One-bite” rule for inadvertent failures to file
  - No enforcement action on first failure
  - Enforcement actions on subsequent failures
- ❑ Varies with culpability in invoking exemption

# “Gun jumping”

## ■ Violation

- The FTC takes the position that a person has a beneficial interest in the voting securities or assets of the target company within the meaning of the HSR Act when the person can exercise a degree of management influence on operations of the target.
- Exercising this influence prior to the end of the waiting period is called “gun jumping”
  - Violates the HSR Act, regardless of effect on competition, because, for HSR Act purposes, the acquiring company has acquired the target without observing the waiting period—subjects the acquiring company to a civil penalty of \$42,530 per day (in 2019)
  - May also violate Section 1 of the Sherman Act if the influence creates an anticompetitive effect in the marketplace (e.g., the coordination of bids by merging competitors)
  - The acquiring person cannot violate the HSR Act after the waiting period has expired, but it can still violate the Sherman Act if the transaction has not closed

# Recent HSR Act enforcement actions

Year	Acquirer	Target	Violation	Reason	Disposition	%
2018	James M. Dolan	Madison Square Garden	Failure to file	Inadvertent	\$609,810	13.9%
2018	Duke Energy	Calpine	Gun jumping		\$600,000	25.2%
2017	Ahmet H. Okumus	Web.com	Failure to file	Inadvertent	\$180,000	65.3%
2017	Mitchell P. Rales	Colfax Danaher	Failure to file	Inadvertent	\$720,000	1.6%
2016	Fayez Sarofim	Kinder Morgan	Failure to file	Not investment	\$720,000	
2016	Caledonia Investments	Bristow Group	Failure to file	Beyond five-year period for exemption	\$480,000	
2016	ValueAct	Baker Hughes Halliburton	Failure to file	Not investment	\$11,000,000	
2016	Len Blavatnik	TangoMe	Failure to file	Inadvertent	\$656,000	25.2%
2015	Leucadia Nat'l Corp	Goober Drilling	Failure to file	Inadvertent	\$240,000	3.4%
2015	Third Point Offshore Fund	Yahoo	Failure to file	Not investment	None	
2015	Flakeboard	SierraPine	Gun jumping		\$1,900,000 (each party)	53.5%
2014	Berkshire Hathaway	USG Corporation	Failure to file	Inadvertent	\$896,000	100.0%
2013	Barry Diller	Coca Cola	Failure to file	Inadvertent	\$480,000	5.0%
2013	MacAndrews & Forbes	Scientific Games	Failure to file	Beyond five-year period	\$720,000	42.9%
2012	Biglari Holdings	Cracker Barrel	Failure to file	Not investment	\$850,000	50.1%
2011	Brian L. Roberts	Comcast	Failure to file	Inadvertent	\$500,000	5.7%
2010	Smithfield Food	Premium Standard	Gun jumping		\$900,000	48.7%
2009	John C. Malone	Discovery	Failure to file	Inadvertent	\$1,400,000	11.9%
2008	ESL Partners	AutoZone	Failure to file	Inadvertent	\$800,000	24.7%
2008	ValueAct Capital Partners	Various	Failure to file	Inadvertent	\$1,100,000	37.3%
2007	Iconix	Rocawear	Failure to file	Incomplete filing	\$550,000	59.5%

## Merger Antitrust Law



# HSR Act enforcement actions

## ■ Factoids

- 63 total enforcement actions since the HSR Act was enacted—all settled by consent decree
- Fines
  - September 5, 1978 - November 19, 1996: \$10,000 per day
  - November 20, 1996 - February 8, 2009: \$11,000 per day
  - February 9, 2009 - July 31, 2016: \$16,000 per day
  - August 1, 2016 – January 23, 2017: \$40,000 per day
  - January 24, 2017 – January 21, 2018: \$40,654 per day
  - January 22, 2018 – February 13, 2019: \$41,584 per day
  - February 14, 2019 – present: \$42,530 per day

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# Initial Waiting Period Investigations

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# Preliminaries

- Parties must file HSR forms with both the DOJ and the FTC
- FTC Premerger Notification Office review
  - Only for technical compliance on form—no review of substance
  - Allocated to DOJ or FTC for review through agency “clearance” process
  - Responsible agency assigns to litigating section for substantive review

# “Clearance”

- DOJ and FTC decide which, if either, of the agencies will do the investigation (“clearance”)
  - “Liaison agreement” between DOJ and FTC prevents duplicative investigations
    - If neither DOJ nor FTC want to open a preliminary investigation—PNO grants early termination of the waiting period
    - If DOJ or FTC (but not both) want to open a preliminary investigation—Requesting agency gets clearance to open investigation
    - If both DOJ and FTC want to open a preliminary investigation—Agencies negotiate to allocate the investigation based on prior experience with the industry or the merging parties (and which agency got the last contested clearance)
  - Process can be fraught with strategic behavior by agencies
  - In extreme cases, “clearance battles” can last until the last day of the initial waiting period
  - Efforts to reform “clearance” process by allocating specific industries to specific agency have failed miserably
    - Neither agencies nor their respective congressional oversight committees want to relinquish jurisdiction over any type of merger

# Initial contact by investigating staff

- Usually occurs 7-10 days after filing
- Three purposes
  - Inform parties of the investigation and introduce the investigating staff
  - Request that the parties provide certain information to the staff on a voluntary basis
    - Most recent strategic, marketing and business plans
    - Internal and external market research reports for last 3 years
    - Product lists and product descriptions
    - (Perhaps) competitor lists and estimates of market shares
    - Customer lists of the firm's top 10-20 customers (including a contact name and telephone number)<sup>1</sup>
  - Invite the parties to make a presentation to the staff on the competitive merits of the transaction

<sup>1</sup> The agencies do not ask for customer lists in transactions involving consumer goods sold at retail.

# Initial merits presentation

- Critical to do completely, coherently, and quickly
  - Often a large “first mover” advantage in being the first to give the staff a systematic way to think about the transaction
  - Well-prepared business people are the best to present
    - Agencies not impressed with “testifying” lawyers—especially outside counsel
  - Need to anticipate and answer staff questions
  - Need to clear and compelling
    - Cannot win on an argument that the staff does not understand or finds ill-supported
  - Need to anticipate and be consistent with what the staff is likely to hear from customers
    - Staff is strongly biased to accepting customer view in the event of an inconsistency
  - Need to do quickly
    - By the time of the initial call from the investigating staff, one-third of the initial waiting period will be over

The best presentations anticipate all of the issues the staff will raise, provide answers that are supported by company documents and consistent with customer perceptions, and have all of the facts right. Ideally, the rest of the investigation needs to do no more than defend the analysis of the first presentation.

# Initial merits presentation

- Ideal structure (when the facts fit)
  - Provide an overview of the parties and the transaction
    - Identify other jurisdictions in which the transaction is reportable
  - Provide an overview of the industry (if the staff is not familiar with the industry)
  - Explain the business model driving the transaction
    - The deal is procompetitive—a win-win for the company and the customers
    - “We make the most money by providing more value to customers, improving productive efficiency, and reducing costs without reducing product or service quality”
    - Essential to give a compelling reason for doing the deal that is not anticompetitive
  - Identify the customers benefits implied by the business model
    - Customers will be better off with the transaction than without it
    - Agencies give little credit in the competitive analysis to efficiencies or cost savings that are not passed along to customers
  - Explain why market conditions would not allow the transaction to be anticompetitive in any event
    - “We could not raise price even if we wanted. Customers have alternatives to which they can turn to protect themselves in the event we try to raise price or otherwise harm them.”
    - Alternatives can be other current suppliers, firms in related lines of business that can expand their product lines, new entrants, or customer self supply (vertical integration)

# Customer/competitor staff interviews

- Occupies the bulk of the remaining time in the initial investigation
- Customer views are given great weight
  - *Theory*: The purpose of the antitrust laws is to protect customers from competitive harm, and sophisticated customers should have a good idea of whether they will be competitively harmed by the transaction under review
  - Staff will attempt to call all of the contracts on the customer lists provided by the merging companies in response to the initial voluntary request
  - Staff often will accept customer complaints uncritically but question customer support
  - Customer reactions may differ depending on the position of the contact person
    - The CEO may take a broader and more nuanced view of the transaction than a procurement manager
- Competitor conclusions are given little weight
  - *Theory*: Anticompetitive transactions are likely to benefit competitors, so competitor complaints are more likely the result of concerns about procompetitive efficiencies than anticompetitive effect
  - But competitor interviews can be useful in understanding more about the industry
    - Complaining competitors are often willing to spend considerable time educating the staff
    - Customers usually just want the staff to go away unless they strongly oppose the deal



# End of the initial waiting period

## ■ Three options for the agency

- Close the investigation

- Issue a second request

- Most important factors—

- Incriminating company documents

- Significant customer complaints

- Four or less competitors postmerger for horizontal transactions (5→ 4 deals)

- Obvious significant foreclosure possibilities (for vertical transactions)

NB: Any one of these factors can be sufficient to trigger a second request investigation

- A second request must be authorized—

- By the assistant attorney general (typically delegated to a deputy assistant attorney general)

- By the Federal Trade Commission (typically delegated to the chairman or a commissioner)

- Convince the parties to “pull and refile” their HSR forms to restart the initial waiting period

- Typically used when the initial investigation to date indicates no problem but requires a short additional time to complete customer interviews

- The agency usually grants early termination in the middle of the second initial waiting period

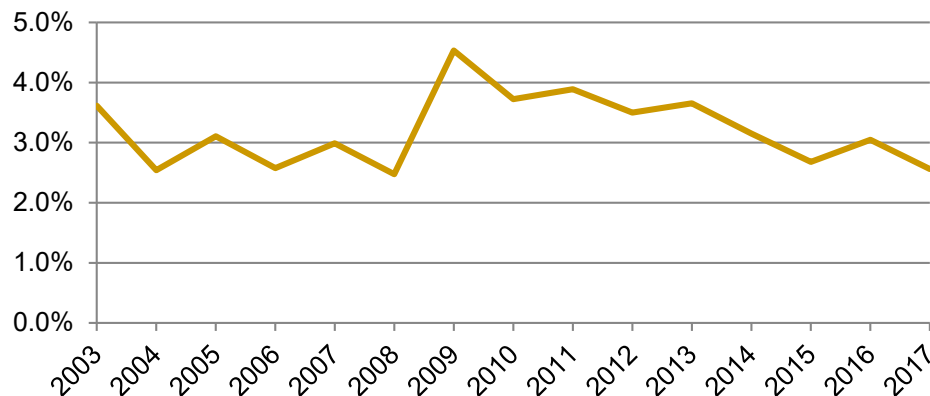
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# Second Request Investigations

# The second request

- HSR Act authorizes investigating agency to issue one request for additional information and documentary material (a “second request”) during the initial waiting period to each reporting party
- Issuance of a second request extends waiting period until—
  - All parties comply with their respective second requests, and
  - Observe a final waiting period (usually 30 days) following compliance

**Percentage of Eligible Transactions Receiving Second Requests**



Source: Fed. Trade Comm'n & U.S. Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2017, at App. A.

# Second request investigations

**TABLE I  
FISCAL YEAR 2017<sup>1</sup>  
ACQUISITIONS BY SIZE OF TRANSACTION (BY SIZE RANGE)<sup>2</sup>**

TRANSACTION RANGE (SMILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS <sup>3</sup>				
	NUMBER <sup>4</sup>	PERCENT	NUMBER		PERCENT OF TRANSACTION RANGE GROUP			NUMBER		PERCENT OF TRANSACTION RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
<b>Below 50M<sup>5</sup></b>	1	0.1%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%
<b>50M - 100M</b>	145	7.3%	7	4	4.8%	2.8%	7.6%	0	0	0.0%	0.0%	0.0%
<b>100M - 150M</b>	346	17.4%	26	6	7.5%	1.7%	9.2%	3	1	0.9%	0.3%	1.2%
<b>150M - 200M</b>	271	13.6%	17	3	6.3%	1.1%	7.4%	2	0	0.7%	0.0%	0.7%
<b>200M - 300M</b>	250	12.6%	33	14	13.2%	5.6%	18.8%	4	1	1.6%	0.4%	2.0%
<b>300M - 500M</b>	255	12.8%	23	5	9.0%	2.0%	11.0%	1	2	0.4%	0.8%	1.2%
<b>500M - 1000M</b>	469	23.5%	47	17	10.0%	3.6%	13.6%	6	5	1.3%	1.1%	2.3%
<b>Over 1000M</b>	255	12.8%	52	23	20.4%	9.0%	29.4%	17	9	6.7%	3.5%	10.2%
<b><i>ALL TRANSACTIONS</i></b>	1,992	100.0%	205	72	10.3%	3.6%	13.9%	33	18	1.7%	0.9%	2.6%

Source: Fed. Trade Comm'n & U.S. Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2017, at Ex. B, Table I.

# Second request investigations

- **Second request**
  - **Blunderbuss request**
    - If you can only ask once, ask for everything
    - DOJ and FTC each have “model” second requests, but typically customized with additional specifications
  - **Typically takes 6-16 weeks to comply**
    - Often covers 60-120 custodians
      - Agencies are making meaningful efforts to reduce this number—target 30-35
    - Interrogatories, including:
      - Detailed sales data
      - Bid and win/loss data
      - Requirements for entry into the marketplace
      - Rationale for deal
    - Document requests, including:
      - Business, strategic and marketing plans
      - Pricing documents
      - Product and R&D plans
      - Documents addressing competition or competitors
      - Customer files and customer call reports
    - Covers e-mail and other electronic documents
    - Non-English language documents must be translated into English

# Second request investigations

- Depositions of business representatives of parties
  - Often 3-5 employees for each party
    - Often senior person knowledgeable about U.S. sales and competition for U.S. customers
    - Can include sales representatives for key accounts
    - R&D directors (if R&D is important to defense)
  - In Washington
  - Can be compelled
    - Civil Investigative Demand (CID) by the DOJ
    - Subpoena by the FTC
  - Transcribed and under oath
  - Typically each lasts 6-8 hours
- Documents and testimony from customers and competitors
  - Testimony will be memorialized in a sworn affidavit
- Expert economic analysis
  - By experts retained by the parties
  - By agency experts
    - Or, in investigations where litigation is foreseeable, by outside experts retained by agency

# Final waiting period

## ■ Timing

- Begins when all parties have submitted proper second request responses
- Ends 30 calendar days later
  - 10 days in a cash tender offer
- Parties often voluntarily “extend” the final period<sup>1</sup>
  - Provides additional time for agency to complete investigation
  - Usually better than being sued!
  - May be necessary to complete meetings
  - May be necessary if a consent decree is being negotiated

## ■ “Timing agreements”

- Agencies like to negotiate “extensions” early in a second request investigations so that they know how much time they have before the deal can close
- Typically will accept 60 days beyond the normal expiration of the waiting period
  - 30 days for the staff (making a total of 60 for the staff after second request compliance)
  - 30 days for the front office
- Technically a contract, but real effect is more of an estoppel

<sup>1</sup> Surprisingly, many members of the bar believe that you can voluntarily extend the waiting period. The FTC’s position, however, is that the waiting period is set by statute and cannot be extended by agreement, although the parties can commit by contract not to close the transaction before a certain time. This has significant implications for “gun-jumping” violations, which cannot occur after the waiting period has ended.

# Timing agreements

## ■ Timing agreements in second request investigations

### □ Given the time it takes—

- For the investigating staff to analyze information and documents submitted by the parties in response to their second requests
- For the investigating staff to finalize its analysis and recommendation, and
- For agency management to review the staff's recommendation and make a decision on the disposition of the investigation

the final waiting period provides too little time for the agency to act

### □ The merging parties can—and typically do—voluntarily commit to give the agency additional time to complete the investigation

- An agreement not to close for some period of time after the expiration of the HSR Act waiting period is usually in the parties' interest, since the agency will sue to block the transaction if it cannot complete its analysis.

- That is, all of the staff's efforts in the last month or so of the investigation will be devoted to building a case for a preliminary injunction, not to objectively analyzing the merits of the transaction

- Typical commitment: An additional 30-60 days beyond the end of the HSR Act waiting period

### □ But a timing commitment does not technically extend the statutory waiting period

- Enforceable through contract or detrimental reliance, not as a violation of the HSR Act
- Typically misunderstood by the parties and the investigating staff
- Is acknowledged by the FTC Premerger Notification Office

- Significant because there can be no “gun jumping” after the end of the HSR Act waiting period



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# Merger Review Outcomes

# The final arguments

- Formal meetings at the end of the investigation

	DOJ	FTC
1	Investigating staff	Investigating staff
2	Section Chief & staff	Assistant Director & staff
3	Deputy Assistant Attorneys General (legal and economics)	Directors meeting (Bureau of Competition/ Bureau of Economics)
4	Assistant Attorney General	Five FTC Commissioners (meet individually)

- Numerous informal meetings can occur up the chain at the end of the investigation
- *Critical question:* How much of its analysis will the investigating staff disclose to the parties?

# Possible outcomes in DOJ/FTC reviews

## Close investigation

- Waiting period terminates at the end of the investigation with the agency taking no enforcement action, or
- Agency grants early termination prior to normal expiration

## Litigate

- DOJ: Seeks preliminary and permanent injunctive relief in federal district court
- FTC: Seeks preliminary injunctive relief in federal district court  
Seeks permanent injunctive relief in administrative trial

## Settle w/consent decree

- Typical resolution for problematic mergers
- DOJ: Consent decree entered by federal district court
- FTC: Consent order entered by FTC in administrative proceeding

## Parties terminate transaction

- Parties will not settle at the agency's ask and will not litigate, or
- Agency concludes that no settlement will resolve the agency's concerns and the parties will not litigate
  - Examples: AT&T/T-Mobile, NASDAQ/NYSE Euronext