

MERGER ANTITRUST LAW

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Georgetown University Law Center
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Tuesdays and Thursdays, 3:30-4:55 pm
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Class 4 (September 6): The DOJ/FTC Merger Review Process (Unit 4)

On Thursday, we will complete Unit 3 on presumptions and merger guidelines. Review the class notes from the 1982 DOJ Merger Guidelines through the 2010 DOJ/FTC Horizontal Merger Guidelines (slides 29-73). I expect to spend about half the class on this.

Next, we will turn to Unit 4 and inquiry risk by examining the DOJ/FTC merger review process under the HSR Act. I have cut down on the reading in this unit for Thursday's class and we will pick up the remainder next week.

Recall that *inquiry risk* is the risk that the merits of the transaction will be seriously examined. Antitrust questions do not materialize out of thin air. Someone has to have the incentive and the institutional means of raising the question. Inquiry risk can be easily analyzed from this perspective. The class notes identify the various entities that may have the incentive and a cause of action to bring a merger antitrust enforcement action (slides 1-6). You should also review the statutory causes of action in the Unit 1 reading materials (Unit 1 pp. 5-8).

For reasons we will discuss, state and private merger antitrust challenges are very rare, so the vast bulk of challenges result from DOJ and FTC merger reviews. The upshot is that, in most situations, only the DOJ and FTC present significant inquiry risk. The Hart-Scott-Rodino Antitrust Improvements Act requires that the parties to large mergers, consolidations, tender offers, private or open-market purchases, asset acquisitions, joint ventures in corporate form, and certain other types of ownership integrations or transfers must (1) file a notification report form with the Antitrust Division of the United States Department of Justice and the Federal Trade Commission prior to closing their transaction, and (2) observe a statutory-prescribed postnotification waiting period (normally 30 calendar days) before the transaction can be consummated. This is the institutional context in which the DOJ and FTC conduct the vast bulk of merger investigations. The class notes (slides 7-11) and reading materials (pp. 5-26) give a basic summary of the HSR Act. I could ask you to read the text of the Act, but it is long, complicated, and boring. For our purposes, the reading materials and the slides will do just fine.

The class notes provide a more detailed schematic of the DOJ/FTC merger review process under the HSR Act (slides 12-13), which I think about in three stages.

1. *Prefiling/filing*. Prefiling work includes the preliminary antitrust risk analysis for the client, negotiation of the merger agreement with the other side (in friendly deals), and the prefiling preparation of the defense. Because this work requires anticipating what will happen not only in the merger review process but also in possible litigation or settlement, we will postpone our discussion of the prefiling work until Unit 6.

After the prefiling work is completed, it is time to make the merger control filing. First, it is necessary to ascertain whether the transaction is *reportable*, that is, whether a merger control filing is required under the HSR Act. This involves two steps: (a) determining

whether the transaction meets the statutory threshold size tests and so is *prima facie reportable*, and (b) determining whether an exemption applies. The rules here are quite involved, but I have summarized the most important ones in the class notes (slides 14-20). If a transaction is *prima facie* reportable and no exemption applies, the transaction is *reportable*.

If the transaction is reportable, then each party must make its own filing on a prescribed form. Technically, this is the Notification and Report Form, but everyone simply calls it the “HSR filing,” “HSR report,” or “HSR form.” The form is in the reading materials (pp. 27-38) and is described in the class notes (slides 21-22), which you will find surprisingly uninformative. In most cases, the most important part of the form are the documents submitted in repose to Items 4(c) and 4(d) of the form and you should pay careful attention to the note on these documents (pp. 39-43) and the class notes (slide 22). The class notes also have the current schedule of filing fees, payable by the acquiring party (slide 23), as well as a graph on the number of filings the DOJ and FTC receive each year (slide 24).

In addition to filing the required HSR reports, the parties to a reportable transaction must observe a specified statutory waiting period before they can close their transaction (slide 25). The *initial waiting period* is usually 30 calendar days (15 calendar days for all-cash tender offers) after all required HSR reports have been filed. In negotiated transactions, where the buyer will acquire stock of a subsidiary or assets directly from the seller, both the buyer and the seller must file their respective HSR reports before the waiting period begins to run. In open market transactions, where the buyer acquires the stock of the target on the open market (including through a tender offer), the waiting period starts to run after the buyer has filed its HSR form. (This prevents the target in a hostile transaction from defeating the acquisition simply by not filing its HSR form.) The initial waiting period may be extended, as discussed below, by the issuance of a second request. The investigating agency may grant early termination of a waiting period at any time.

For HSR-reportable transactions, the HSR Act prohibits the acquiring firm from acquiring a beneficial interest in the acquiring firm until the required HSR reports have been filed and the applicable HSR waiting period has ended. This requirement can be violated in several ways:

- (a) the parties can simply fail to file;
- (b) the parties can invoke an inapplicable exemption (usually in the investment exemption) and not file;
- (c) the parties file, but one of their filings can be incomplete (usually because the party failed to include all of its 4(c) and 4(d) documents); or
- (d) the parties make their proper filings, but during the waiting period the acquiring firm exercises control or influence over the acquired firm in a manner that indicates that it has already “acquired” the target (often by influencing the target firm’s bidding or contracting during the waiting period).

The first three types of violations are *failures to file*; the last type of violation is commonly called *gun-jumping*. The HSR Act provides for civil penalties of up to \$41,484 per day for every day of the violation, or about \$15.1 million per year, as well as injunctive relief. The

class notes cover HSR Act violations (slides 26-30). The *ValueAct*, *Flakeboard*, and *Nautilus* materials in the reading materials (pp. 66-113) provide examples of HSR Act violations. You should read the complaints in each case for that you can see how the parties allegedly violated the HSR Act, and then skim the rest of the materials.

This is as far as I reasonably think we will get on Thursday, so there is no need to read further. We will cover initial waiting period investigations through the end of the merger review process next week in Class 5.

2. *Initial waiting period investigation.* The next stage in the merger process after filing the HSR form is the initial waiting period investigation. As noted above, the initial waiting period under the HSR Act is 30 calendar days (15 calendar days for all-cash tender offers), which provides the agencies the opportunity to decide whether one or both of them would like to review the transaction, allocate the investigation responsibility to one of the agencies (so that both of them will not be investigating simultaneously—this is called the clearance process (see slide 32)), and permit a preliminary substantive review. If one of the agencies opens an initial waiting period investigation, the investigating staff will contact the merging parties to introduce themselves, ask the parties to voluntarily submit some additional information, and invite them to give the investigating staff a presentation on why the transaction does not present an antitrust problem. During the initial waiting period investigation, the staff will also conduct interviews (usually by telephone) of customers and competitors in the industry. The slides give some more detail (slides 33-36).

The investigating agency has three options at the end of the initial waiting period: (1) close the investigation, terminate the waiting period or allow it to expire, and permit the parties to close their transaction without further interference; (2) begin a “second request investigation” by issuing a “second request”; or (3) convince the merging parties to “pull and refile” their HSR forms to restart a new initial waiting period (slide 37). It is important to note that the FTC Premerger Notification Office (which is responsible for the administration of the HSR Act) takes the position that the waiting periods are prescribed by statute and cannot be modified by agreement, so that the parties cannot “extend” the initial waiting period to give the agency more time to investigate even if they so desired (although they can commit by agreement outside of the HSR Act not to close the transaction until sometime after the HSR waiting period has expired).

3. *Second request investigations.* Before the end of the initial waiting period, if the reviewing agency decides that an in-depth investigation is warranted it will issue a Request for Additional Information and Documentary Material (more fondly known as a “second request”). Second requests are somewhat like precomplaint subpoenas, although they are not compulsory process. The parties do not have to respond to a second request as they would a subpoena or a CID, but as explained below the HSR waiting period is extended upon the issuance of a second request until a statutorily prescribed time after all parties have properly responded to their respective second requests. The upshot is that if the parties do not respond to their second requests, they cannot close their deal.

The slides give a brief overview (slides 39-42), and the model second request for the DOJ may be found in the reading materials (pp. 47-64). As painful as it might be, read with the DOJ model second request with some care.¹

If the reviewing agency issues a second request before the end of the initial waiting period, the waiting period is extended for the period of time that it takes for the merging parties to comply with their respective second requests plus an additional 30 calendar days (10 days for an all-cash tender offer) (see slide 43). The agencies, with some justification, believe that this is too little time for the staff to complete a review of the second request submissions and prepare its recommendation as to the outcome of the review and for the ultimate decision-makers within the agency to make a decision. As a result, the investigating agency almost always asks the parties to enter into a “timing agreement” that commits the parties not to close their transaction until sometime—usually two months, but it can be much longer—after the statutory waiting period expires. If the parties do not agree to an extension, the agencies typically go into “litigation mode” and threaten to cease talking to the parties about the merits or possible settlement. So unless the parties believe that further interaction with the investigating agency is likely to be futile, the parties almost always give the agency a timing agreement for some period of time. See the class notes for the statutory waiting periods, timing agreements, and front office meetings at the reviewing agency (slides 44-46).²

Merger review outcomes. There are four possible outcomes of a full investigation: (1) the agency closes the investigation without taking enforcement action, (2) the parties settle the investigation through a consent decree (which typically will require the divestiture of assets or businesses), (3) the agency commences litigation to block the transaction, or (4) the parties terminate the transaction. The class notes summarize these outcomes (slide 48).

Interestingly, unlike the European Commission, neither the DOJ nor the FTC has the authority on its own to block a pending transaction (although the FTC can challenge a consummated transaction and order appropriate relief, including divestiture). Rather, to block a pending transaction both the DOJ and the FTC must obtain a preliminary injunction from a federal district court. We will examine this procedure next week in Unit 5.

If you have any questions or comments, send me an e-mail. See you in class.

Dale

¹ The FTC also has a model second request. *See* Fed. Trade Comm’n, Premerger Notification Office, Model Request for Additional Information and Documentary Material (Second Request) (rev. Aug. 2015).

² As noted above, the FTC Premerger Notification Office takes the position that the waiting periods are prescribed by statute and cannot be modified by agreement, so technically a timing agreement does not extend the HSR Act’s statutory bar to closing. This is actually beneficial to the parties, since an HSR Act gun-jumping violation cannot occur after the end of the waiting period.