

---

# Unit 4:

# The DOJ/FTC Merger Review Process

---

Merger Antitrust Law

Fall 2018 Georgetown University Law Center

Dale Collins

---

# Inquiry Risk

---

# Inquiry risk—Two questions

- *Ability*: Who has standing to investigate or challenge the transaction?
- *Incentives*: What is the probability that one or more of these entities will act?

# Inquiry risk

## ■ Preclosing

Potential plaintiff	Considerations	Risk assessment
DOJ/FTC	<p>HSR Act suspensory period and second request powers</p> <p>Substantial congressional funding for merger enforcement</p> <p>Large experienced staff dedicated to merger antitrust enforcement</p> <p>Courts will enter preliminary and permanent injunctions upon proper showing</p>	<p>High <i>if</i>—</p> <ol style="list-style-type: none"> <li>1. there is any indication that the transaction may be anticompetitive, or</li> <li>2. the transaction has a high public profile and has attracted political interest</li> </ol>
State attorneys general (NAAG)	<p>Very expensive to litigate, and AGs have constrained enforcement resources</p> <p>No damages to recover</p> <p>But can obtain injunctions</p>	<p>Very low, <i>unless transaction</i>—</p> <ol style="list-style-type: none"> <li>1. threatens employment, or</li> <li>2. threatens widespread price increases to voters (so focus is on consumer-facing products such as supermarkets, hospitals, gas stations)</li> </ol>
Injured private parties	<p>No damages to recover</p> <p>Courts historically very reluctant to grant preliminary or permanent injunctions</p>	<p>Very low—usually no payoff <i>unless</i>—</p> <ol style="list-style-type: none"> <li>1. a competitor or customer will fund the suit, or</li> <li>2. a hostile target will challenge the transaction to buy time to find a more suitable acquirer</li> </ol>

# Inquiry risk

## ■ Postclosing

Potential plaintiff	Considerations	Risk assessment
DOJ/FTC	<p>Courts will enter preliminary divestiture permanent injunctions upon proper showing</p> <p>But</p> <p>No HSR Act leverage</p> <p>Substantial disincentive to find that a “cleared” transaction is anticompetitive and should have been challenged</p> <p>“Eggs may be scrambled” with no effective relief</p>	<p>Extremely low, <i>unless</i>—</p> <ol style="list-style-type: none"> <li>1. the transaction was not HSR reportable and hence not reviewed, but customers complain about anticompetitive effects (especially price increases), or</li> <li>2. the transaction was reviewed but customers complain and the actual anticompetitive effects are apparent and significant</li> </ol>
State attorneys general (NAAG)	<p>Can recover damages (<i>parens patriae</i>) and obtain injunctions</p> <p>But constrained enforcement resources</p> <p>Even in state actions courts historically very reluctant to find mergers anticompetitive after DOJ/FTC clearance</p>	<p>Extremely low</p> <p>Actions on the merits are likely to be very lengthy and costly to prosecute, with a negligible chance of success</p>
Injured private parties	<p>Can recover damages and in principle can obtain a permanent injunction of divestiture</p> <p>Courts historically very reluctant to find mergers anticompetitive after DOJ/FTC clearance</p>	<p>Extremely low</p> <p>Actions on the merits are likely to be very lengthy and costly to prosecute, with a negligible chance of success</p>

# Inquiry risk

- Bottom line on challengers
  - Absent special circumstances, competitors, customers, targets, and state attorney attorneys general can usually be ignored in the risk analysis
  - If the state attorneys general are interested, they usually piggyback on the DOJ/FTC investigation
  - In the vast majority of cases all of the action is with the federal antitrust agencies
    - No significant difference in the inquiry risk between the DOJ and FTC

*The principal inquiry risk is the merger review process under the HSR Act*

---

# The HSR Act

# HSR Act: 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>

- Applies to acquisitions of voting securities or assets by any “person”
  - A merger under state law is deemed to be an acquisition of voting securities
- 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
- Creates a new precomplaint discovery tool: The “second request”
  - Authorizes investigating agency to obtain additional information and documents from the merging parties during the waiting period through a “second request”
  - Can only be issued once to each party
  - Can only be issued in the “initial waiting period” (usually first thirty days after filing)
  - No limitations on breadth or scope

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



# Hart-Scott-Rodino Act

- The basics
  - Enacted in 1976 and implemented in 1978
  - Designed to alert DOJ/FTC to pending transactions to permit them to investigate—and, if necessary, challenge in court—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
  - Authorizes investigating agency to obtain additional information and documents from parties during waiting period through a “second request”
  - 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

# Hart-Scott-Rodino Act

## ■ The basics

- A *reportable transaction* is one that—
  1. Involves the acquisition of voting securities or assets
  2. Satisfies the thresholds for prima facie reportability
    - In 2018, mergers and acquisitions resulting in the acquiring person holding more than \$84.4 million of the voting stock or assets of the acquired person will be subject to the Act<sup>1</sup>
  3. Does not fall into one of the exemptions provided by the HSR Act or implemented by the HSR Rules
- Reportable transaction requirements
  1. *Reporting requirement*: File a premerger notification report on a prescribed form with the Antitrust Division and the Federal Trade Commission
  2. *Waiting period requirement*: Not close the transaction until after a period of time set by statute unless the investigation agency grants “early termination” of the waiting period

<sup>1</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).

# 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).

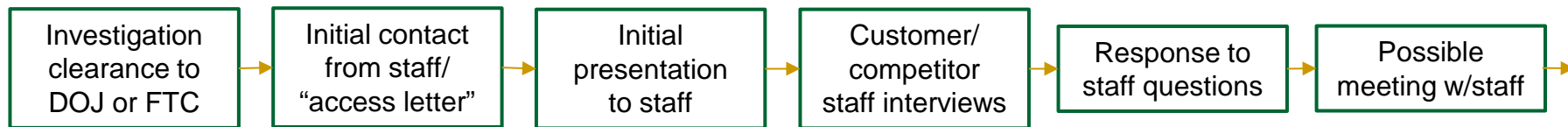
<sup>2</sup> Discussed below.

# Overview of HSR review process

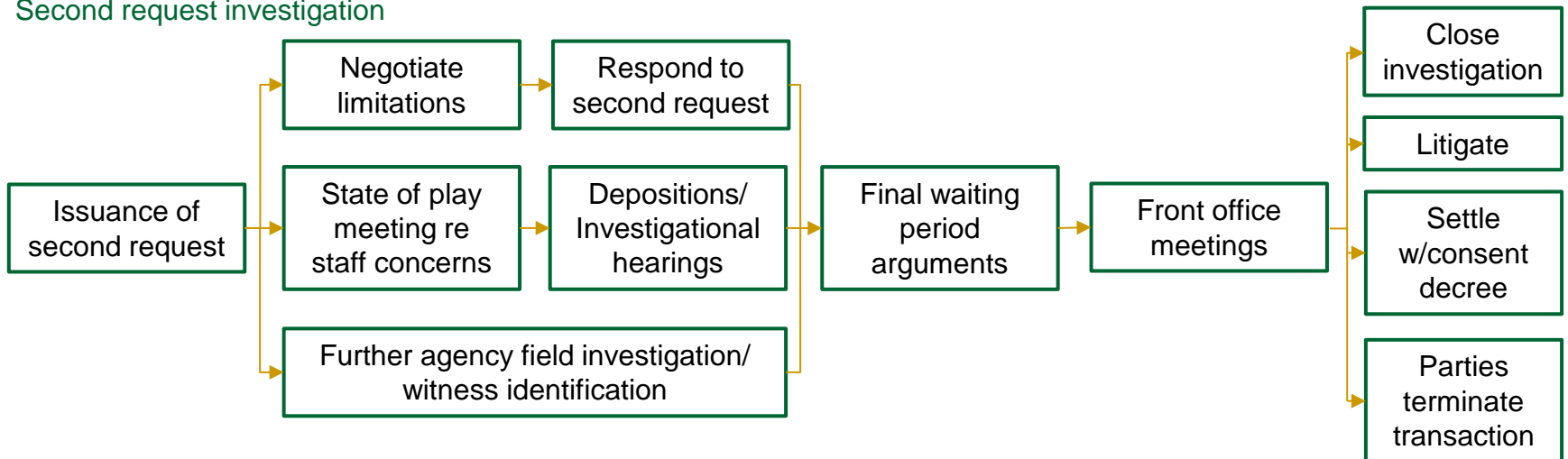
## Prefiling/filing



## Initial investigation

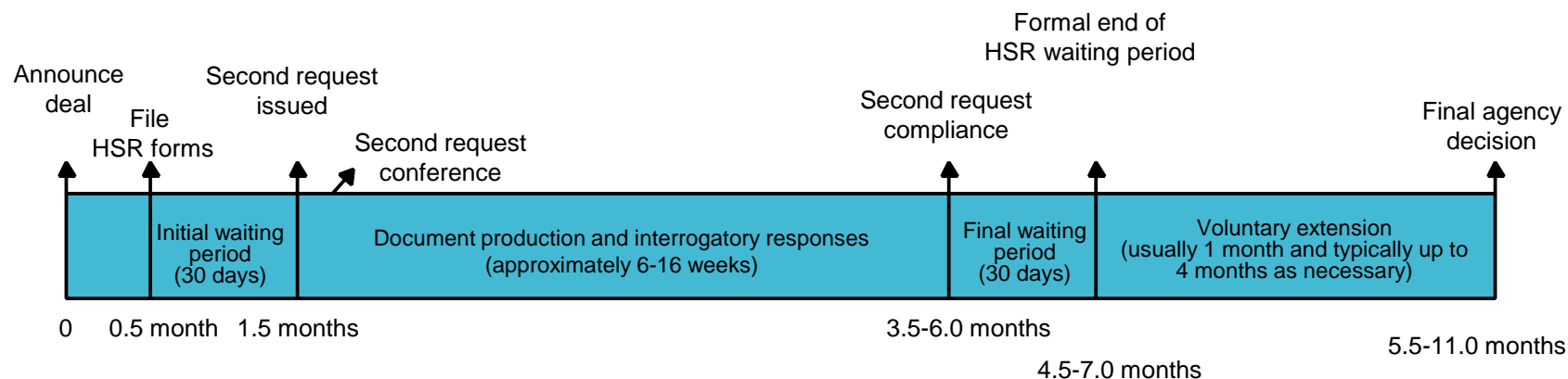


## Second request investigation



# HSR Act review process

## ■ Typical domestic transaction (without litigation)



- |                  |  |  |   |
|------------------|--|--|---|
| Customer rollout | <ul style="list-style-type: none"> <li>- First telephone call (voluntary request)</li> <li>- First presentation</li> <li>- Follow-up meetings</li> <li>- First DOJ/FTC customer interviews</li> <li>- First DOJ/FTC competitor interviews</li> <li>- Filings in other jurisdictions</li> </ul> | <ul style="list-style-type: none"> <li>- Second request conference</li> <li>- Collect and review documents</li> <li>- Prepare interrogatory responses</li> <li>- Depositions of employees</li> <li>- Additional meetings</li> <li>- Follow-up DOJ/FTC customer interviews and affidavits</li> <li>- Follow-up DOJ/FTC competitor interviews</li> </ul> | <ul style="list-style-type: none"> <li>- Final meetings with staff</li> <li>- Meetings with senior staff</li> <li>- Negotiate consent decree (if necessary)</li> <li>- Find and sign acceptable divestiture buyer (if necessary)</li> </ul> |
|------------------|--|--|---|

# Reportable transactions

- 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

<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
- Definition: “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>
- Definition: “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

- Definition: “Acquisition”
  - Obtaining the “beneficial ownership” in the underlying voting securities or assets<sup>1</sup>
  - 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> See 16 C.F.R. § 801.1(c)(1) (defining “hold” as “beneficial ownership, whether direct, or indirect through fiduciaries, agents, controlled entities or other means”).



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

Size of transaction*	Prima Facie Reportability																		
Up to and including \$84.4 million	Not reportable																		
Above \$84.4 million up to and including \$337.6 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;">\$168.8 million (in total assets or annual net sales)</td> <td style="text-align: center;">and</td> <td style="text-align: center;">\$16.9 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;">\$168.8 million (in total assets or annual net sales)</td> <td style="text-align: center;">and</td> <td style="text-align: center;">\$16.9 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;">\$16.9 million (in total assets or annual net sales)</td> <td style="text-align: center;">and</td> <td style="text-align: center;">\$168.8 million (in total assets or annual net sales)</td> </tr> </table>	<i>Acquiring person</i>	Size of person test	<i>Acquired person</i>	\$168.8 million (in total assets or annual net sales)	and	\$16.9 million (in total assets or annual net sales of a person engaged in manufacturing)	<i>Or</i>			\$168.8 million (in total assets or annual net sales)	and	\$16.9 million (in total assets of a person not engaged in manufacturing)	<i>Or</i>			\$16.9 million (in total assets or annual net sales)	and	\$168.8 million (in total assets or annual net sales)
<i>Acquiring person</i>	Size of person test	<i>Acquired person</i>																	
\$168.8 million (in total assets or annual net sales)	and	\$16.9 million (in total assets or annual net sales of a person engaged in manufacturing)																	
<i>Or</i>																			
\$168.8 million (in total assets or annual net sales)	and	\$16.9 million (in total assets of a person not engaged in manufacturing)																	
<i>Or</i>																			
\$16.9 million (in total assets or annual net sales)	and	\$168.8 million (in total assets or annual net sales)																	
In excess of \$337.6 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, 83 Fed. Reg. 4050 (Jan. 29, 2018) (effective Feb. 28, 2018) .

# 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 \$84.4 million

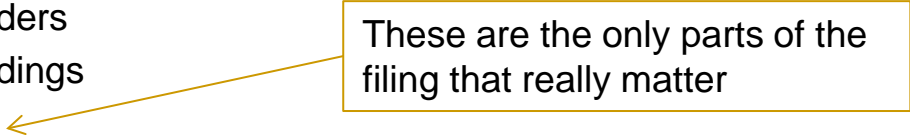
# Notification thresholds

- 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>
\$84.4 million
\$168.8 million
\$843.9 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, 83 Fed. Reg. 4050 (Jan. 29, 2018) (effective Feb. 28, 2018) .

# 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

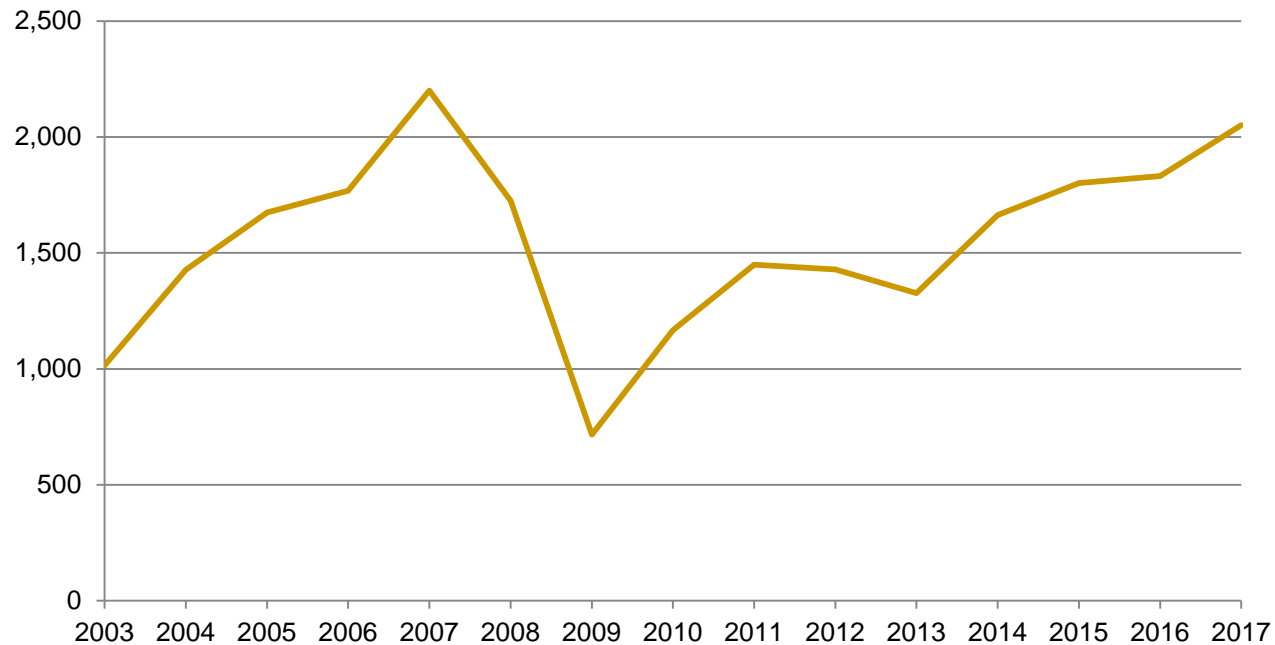
Value of Transaction <sup>1</sup>	Filing Fee
≤ \$84.4 million	No filing required
> \$84.4 million but < \$168.8 million	\$45,000
≥ \$168.8 million but < \$843.9 million	\$125,000
≥ \$843.95 million	\$280,000

- 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, 83 Fed. Reg. 4050 (Jan. 29, 2018) (effective Feb. 28, 2018) .

# 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.



# Waiting periods

- General rule
  - Cannot close a reportable transaction until the waiting period is over
- 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
  - \$41,484 per day for every day of the violation—Equals \$15.1 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> 83 Fed. Reg. 9302 (Jan. 22, 2018) (increasing civil penalty to \$41,484 per day effective January 22, 2018, pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114–74, § 701, 129 Stat. 599 (2015) (requiring CPI inflation adjustment)).

# 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 when it 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
  - 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	Duke Energy	Osprey (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	\$800,00	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%
2007	James D. Donder	Neighborcare	Failure to file	Inadvertent	\$250,000	25.5%
2006	QUALCOMM	Flarion	Gun jumping		\$1,800,000	54.2%

# HSR Act enforcement actions

## ■ Factoids

- 61 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 – present: \$41,484 per day

---

# Initial Waiting Period Investigations

# “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
    - 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
  1. Inform parties of the investigation and introduce the investigating staff
  2. 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 prepared over the 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>
  3. 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

## ■ Model structure

1. Provide an overview of the parties and the transaction
  - Identify other jurisdictions in which the transaction is reportable
2. Provide an overview of the industry (if the staff is not familiar with the industry)
3. 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
4. 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
5. 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
  - Customer reactions may differ depending on who the contact person is
    - The CEO may take a broader and more nuanced view of the transaction than a procurement person
- 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)

- 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

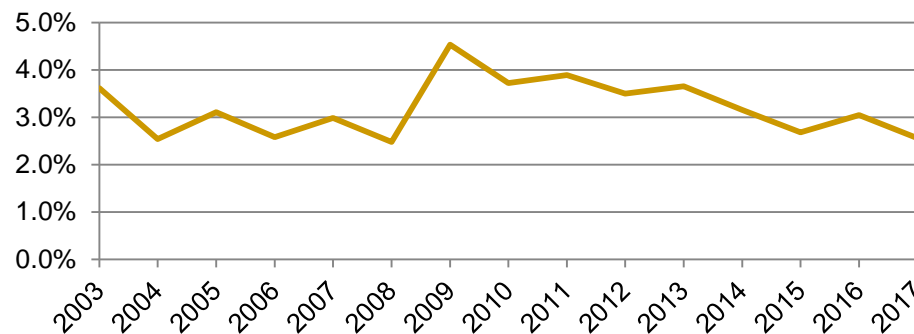
---

# 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**



# 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
Below 50M <sup>5</sup>	1	0.1%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%
50M - 100M	145	7.3%	7	4	4.8%	2.8%	7.6%	0	0	0.0%	0.0%	0.0%
100M - 150M	346	17.4%	26	6	7.5%	1.7%	9.2%	3	1	0.9%	0.3%	1.2%
150M - 200M	271	13.6%	17	3	6.3%	1.1%	7.4%	2	0	0.7%	0.0%	0.7%
200M - 300M	250	12.6%	33	14	13.2%	5.6%	18.8%	4	1	1.6%	0.4%	2.0%
300M - 500M	255	12.8%	23	5	9.0%	2.0%	11.0%	1	2	0.4%	0.8%	1.2%
500M - 1000M	469	23.5%	47	17	10.0%	3.6%	13.6%	6	5	1.3%	1.1%	2.3%
Over 1000M	255	12.8%	52	23	20.4%	9.0%	29.4%	17	9	6.7%	3.5%	10.2%
<i>ALL TRANSACTIONS</i>	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 App. B Table 1. The footnotes may be found in the report at 49.



# 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—targeted 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 parties submitted proper second requests 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

<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.

# Final waiting period

## ■ Timing agreements

### □ 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 voluntarily commit to give the agency additional time to complete the investigation

- Typically in the parties' interest to negotiate a timing agreement, 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

### □ 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

---

# Final waiting period

- Timing agreements
  - Agencies like to negotiate “extensions” early in a second request investigations so that they know how much time they have
  - Typically ask for 60 days
    - 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

# The final arguments

- Formal meetings at the end of the investigation

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

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

---

# Merger Review Outcomes

# 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
- May occur anytime in the review process

## 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

## Litigate

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

## Parties terminate transaction

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