CLASS 4 SLIDES

Unit 3. Presumptions and Merger Guidelines

Merger Antitrust Law

Fall 2018 Georgetown University Law Center

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1982 DOJ Merger Guidelines

1982 DOJ Merger Guidelines

- Origins
  - Issued by AAG William F. Baxter, a former Stanford law professor
  - FTC refused to sign—wanted more flexibility
- Animating concerns
  - Merger antitrust law still structurally oriented and very restrictive
  - 1968 Guidelines and *General Dynamics* did not move the needle much
  - DOJ and FTC had resisted a more efficiency-oriented approach and were aggressively prosecuting mergers under the *Von's* and *Pabst* standards
  - U.S. businesses needed to become more efficient to compete with non-U.S. firms at home and abroad
  - Supreme Court implicitly recognized the need for antitrust law to protect and promote economic efficiency in *GTE Sylvania*

1982 DOJ Merger Guidelines

- *Innovation 1*: New explicit focus on market power as the competitive harm

> "The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance 'market power' or to facilitate its exercise."

  - Primarily through theories of oligopolistic interdependence
  - Echoes *PNB* approach → Increasing concentration implies greater likelihood of higher prices through oligopolistic interdependence

1982 DOJ Merger Guidelines

- *Innovation 2*: Introduced new "hypothetical monopolist" market definition paradigm
  - Rigorous, economics-based standard that linked the market definition test to oligopolistic interdependence
  - *Basic idea*: A merger can threaten to create or facilitate the exercise of market power only with respect to a product/geographic grouping where a hypothetical monopolist could raise prices
  - *Test*: Can the hypothetical monopolist in the provisional (candidate) market raise prices profitably by a "small but significant nontransitory increase in price" (SSNIP) above prevailing levels?
    - Usual SSNIP to be used is a 5% increase over prevailing market prices
  - Intended to solve the "Potter Stewart problem"

1982 DOJ Merger Guidelines

- *Innovation 3*. Increased market share thresholds for the *PNB* presumption

Postmerger HHI	ΔHHI	Guidelines
< 1000		"Because implicit coordination among firms is likely to be difficult and because the prohibitions of section 1 of the Sherman Act are usually an adequate response to any explicit collusion that might occur, the Department is unlikely to challenge mergers falling in this region."
Between 1000 and 1800	< 100	"unlikely to challenge"
	≥ 100	"more likely than not to challenge"
> 1800	< 50	"unlikely to challenge"
	50-100	Could be problematic
	≥ 100	"likely to challenge"

1982 DOJ Merger Guidelines

- *Innovation 4*. Recognized ease of entry as a market power-constraining force

> "If entry into a market is so easy that existing competitors could not succeed in raising price for any significant period of time, the Department is unlikely to challenge mergers in that market."

  - Look at likelihood and probable magnitude of entry in response to a SSNIP (5%)
  - Entry to be assessed over a 2-year time period

- *Innovation 5*. Recognized the efficiency-enhancing aspect of many mergers
  - Implied by the change of objective—
    - from preventing increased concentration and preserving small businesses
    - to preventing the creation of market power or the facilitation in its exercise
  - But still rejected efficiencies as a defense in most cases

- *Innovation 6*. Created an algorithmic approach to merger analysis

1992 DOJ/FTC
Horizontal Merger Guidelines

1992 DOJ/FTC Horizontal Merger Guidelines

- Some initial observations
  - Jointly promulgated with the Federal Trade Commission
    - AAG James Rill, with major input from economics DAAG Robert D. Willig
    - FTC Chairwoman Janet Steiger

      NB: Recall that the FTC did not join in the prior 1982 DOJ Merger Guidelines
  - Addressed only horizontal mergers
    - DOJ and FTC could not agree on guidelines for nonhorizontal mergers
  - Much more economically rigorous document than the 1982 DOJ Merger Guidelines
  - Retained the focus of the 1982 guidelines on market power:

> The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise. Market power to a seller is the ability profitably to maintain prices above competitive levels for a significant period of time.[1]

1992 DOJ/FTC Horizontal Merger Guidelines

- Five-step analytical approach
  1. *Market concentration*: Will the merger would significantly increase concentration and result in a concentrated market?
  2. *Potential adverse effects*: Will the merger, in light of market concentration and other factors that characterize the market, raises concern about potential adverse competitive effects?
  3. *Entry*: Will entry would be timely, likely and sufficient either to deter or to counteract the competitive effects of concern?
  4. *Efficiencies*: Will any efficiency gains that reasonably cannot be achieved by the parties through other means?
  5. *Failure*: Will, but for the merger, either party to the transaction would be likely to fail, causing its assets to exit the market.

> The process of assessing market concentration, potential adverse competitive effects, entry, efficiency and failure is a tool that allows the Agency to answer the ultimate inquiry in merger analysis: whether the merger is likely to create or enhance market power or to facilitate its exercise.[1]

1992 DOJ/FTC Horizontal Merger Guidelines

- Innovations
  - Retained market definition as the starting point of analysis
    - But introduced the notion of *price discrimination markets*
  - Changed market share thresholds to "safe harbors"
    - Did not change the numbers—just the interpretation
    - No longer a predictor of prosecutorial decision-making
  - Required explicit explanation of how the merger is anticompetitive

> [M]arket share and concentration data provide only the starting point for analyzing the competitive impact of a merger. Before determining whether to challenge a merger, the Agency also will assess the other market factors that pertain to competitive effects, as well as entry, efficiencies and failure.[2]

    - Oligopolistic interdependence ("coordinated interaction" or "coordinated effects")
    - Introduced new "unilateral effects" theory of anticompetitive harm:
      - Products of merging firms must be the first and second choice of customers in the relevant market
      - Combined market share must be at least 35%
  - Retained entry defense (with original 2-year time frame)
  - Retained a rigid algorithmic approach to prosecutorial decision-making

1997 Efficiency Revisions

1997 Efficiency Revisions

- Amended the efficiency section of the 1992 Merger Guidelines
  - Issued under—
    - AAG Joel Klein
    - FTC Chairman Robert Pitofsky (former Dean, Georgetown University Law Center)
  - Recognized that efficiencies can have offsetting procompetitive effects and result in—
    - Lower prices
    - Improved quality
    - Enhanced service
    - New products

1997 Efficiency Revisions

- *Innovation*: Imposed demanding proof requirements for efficiencies to be considered ("cognizable efficiencies")
  1. *Merger specific*, so that they cannot be achievable without the merger
  2. *Verifiable* as to likelihood and magnitude
  3. *Sufficient* to negate the otherwise anticompetitive effect of the merger
  4. *Not anticompetitive*, so that they cannot arise from an anticompetitive reduction in output or service
- Negative defense
- Practical consequences
  - Essentially limited cognizable efficiencies to—
    - marginal cost reductions
    - that are passed on to customers
  - Implicitly rejected fixed cost reduction as cognizable efficiencies
  - Burden of proof elements can be interpreted very differently by different administrations

2010 DOJ/FTC
Horizontal Merger Guidelines

2010 DOJ/FTC Horizontal Merger Guidelines

- *Animating concerns*: DOJ/FTC believed that the 1992 Guidelines were—
  - No longer reflected how the agencies analyzed mergers (true)
  - Too rigid and missed too many anticompetitive transactions (not very true)
  - Being used effectively against agencies in court (true)

2010 DOJ/FTC Horizontal Merger Guidelines

- *Solution*: Completely rewrite the Guidelines
  1. Create a new, flexible (nonpredictive) approach to analyzing mergers
  2. Adopt a new emphasis on non-price dimensions of anticompetitive harm
  3. Deemphasize market definition but increase *PNB* thresholds
  4. Increase emphasis on unilateral effects and on targeted customers
  5. Eliminate the unilateral effects structural requirements in the 1992 Guidelines
     - The overlapping products of the merging firms need not be each other's closest demand-side substitutes
     - Combined share need not be greater than 35% in the relevant market
  6. Increase emphasis on "direct" evidence
  7. Raise the bar on entry and repositioning defenses
     - Eliminated the two-year period for evaluating entry and repositioning
     - Now must be "rapid enough" to ensure no anticompetitive effect ever arises
  8. Maintain a high bar on efficiency defenses

2010 DOJ/FTC Horizontal Merger Guidelines

- The *PNB* presumption
  - Increase the thresholds, but use presumption as one more type of evidence that the reviewing agency will consider

Postmerger HHI	ΔHHI	Guidelines
	< 100	"unlikely to have adverse competitive consequences and ordinarily require no further analysis"
< 1500	--	"unlikely to have adverse competitive consequences and ordinarily require no further analysis"
Between 1500 and 2500	≥ 100	"potentially raise significant competitive concerns and often warrant scrutiny"
> 2500	100-200	"potentially raise significant competitive concerns and often warrant scrutiny"
	≥ 200	"will be presumed to be likely to enhance market power. The presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power."

  - Practical consequence
    - Very little prosecutorially, since the 1992 thresholds were never close to binding
    - Some courts appear to have accepted a 2500 point postmerger HHI and a 200 point Δ as sufficient to trigger the *Philadelphia National Bank* presumption

Unit 4:
The DOJ/FTC Merger Review Process

Merger Antitrust Law

Fall 2018 Georgetown University Law Center

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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

- Incentives and means

Challenger	Preclosing	Postclosing
DOJ/FTC		
State AGs		
Customers		
Competitors		
Anyone else?		

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 . . . .[1]

- 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

[1] 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
  - 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

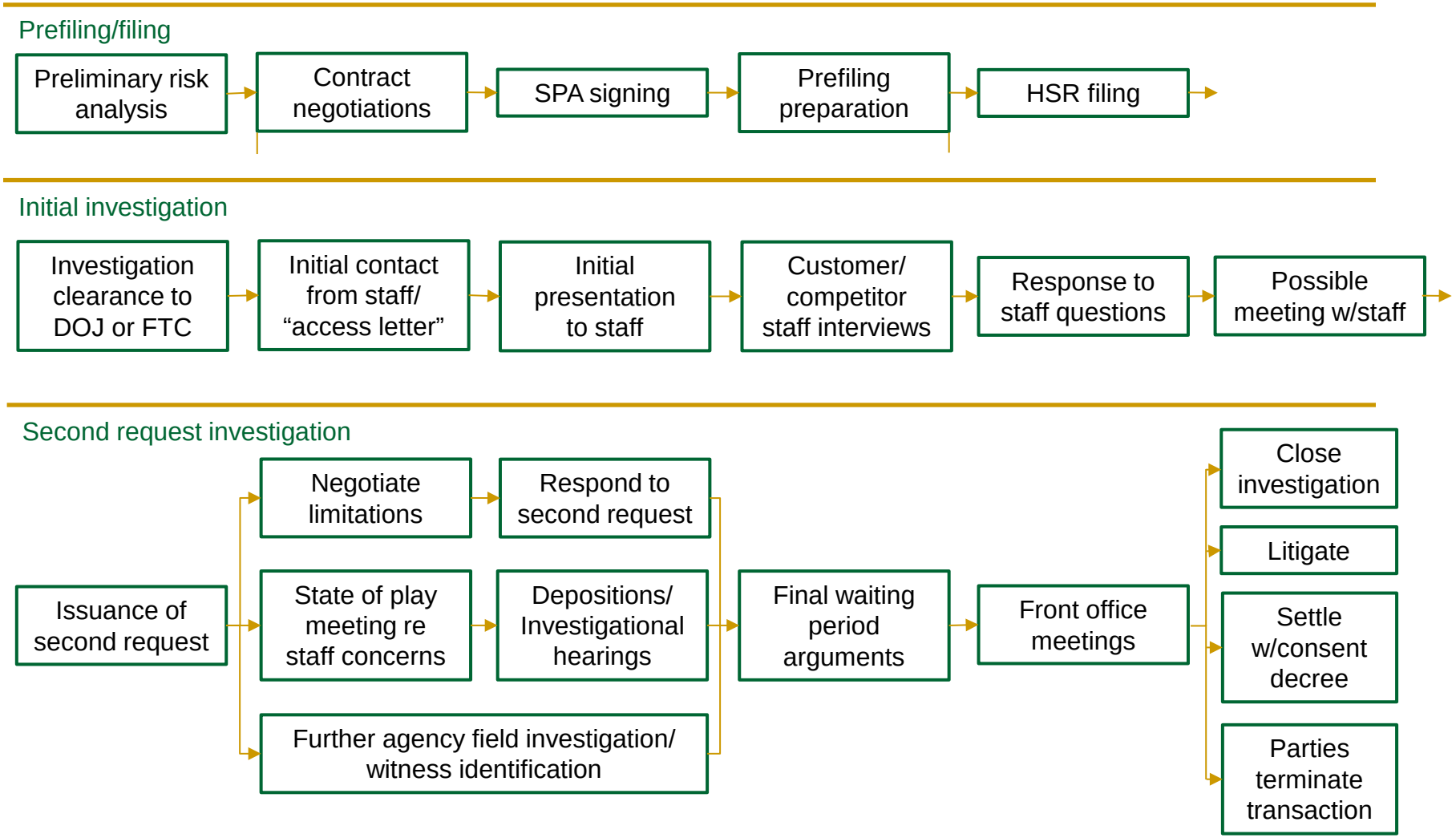
- The basics
  - A *reportable transaction* is one that—
    1. Involves the acquisition of voting securities or assets
    2. Satisfies the thresholds for prima facie reportablility
       - In 2018, mergers and acquisitions resulting in the acquiring person holding more than $84.4 million of the voting stock or assets of the acquired person will be subject to the Act[1]
    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

[1] 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

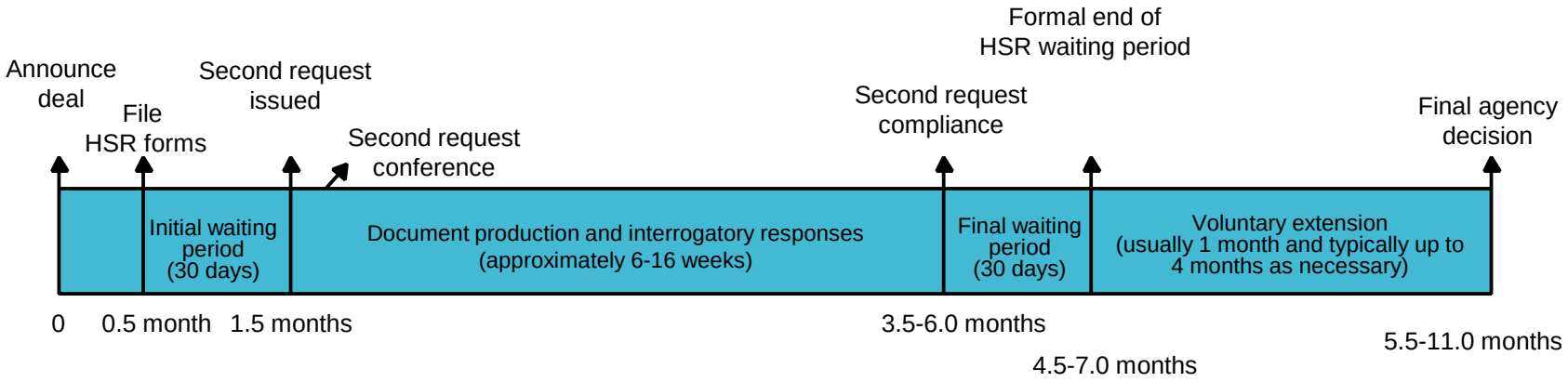
- Basic materials
  - The HSR Act, 15 U.S.C. § 18a (also known as Section 7A of the Clayton Act)
  - The HSR Act implementing regulations, 16 C.F.R. pts 801-803[1]
  - Formal FTC interpretations of the implementing regulations
  - Informal staff interpretations of the implementing regulations
  - The 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[2]
  - 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

Overview of HSR review process



HSR Act review process

- Typical domestic transaction (without litigation)



Customer rollout

- First telephone call (voluntary request)
- First presentation
- Follow-up meetings
- First DOJ/FTC customer interviews
- First DOJ/FTC competitor interviews
- Filings in other jurisdictions
- Second request conference
- Collect and review documents
- Prepare interrogatory responses
- Depositions of employees
- Additional meetings
- Follow-up DOJ/FTC customer interviews and affidavits
- Follow-up DOJ/FTC competitor interviews
- Final meetings with staff
- Meetings with senior staff
- Negotiate consent decree (if necessary)
- Find and sign acceptable divestiture buyer (if necessary)

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 . . . .[1]

- A reportable transaction is one that—
  - Involves the acquisition of voting securities or assets
  - Satisfies the thresholds for prima facie reportablility
  - Does not fall into one of the exemptions

[1] 15 U.S.C.18a(a).

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"[1]
- 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

[1] 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
  - Does not require a formal transfer of legal title
    - The DOJ/FTC regard influencing the target’s day-to-day operations as evidence of a transfer of a “beneficial interest”

[1] 16 C.F.R. § 801.1(f)(1)(i).

Prima facie reportability[1]

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		
	Size of person test		
	Acquiring person		*Acquired person*
	$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)
	Or		
	$168.8 million (in total assets or annual net sales)	and	$16.9 million (in total assets of a person not engaged in manufacturing)
	Or		
	$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.

[1] *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

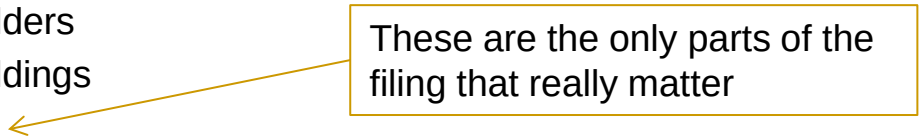
- An otherwise reportable transaction is not subject to the reporting and waiting period requirements of the HSR Act if—
  1. The reporting and waiting period requirements were satisfied within the last five years for a prior acquisition, *and*
  2. The pending acquisition will not cause the acquiring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

Notification thresholds[1]
$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

[1] *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

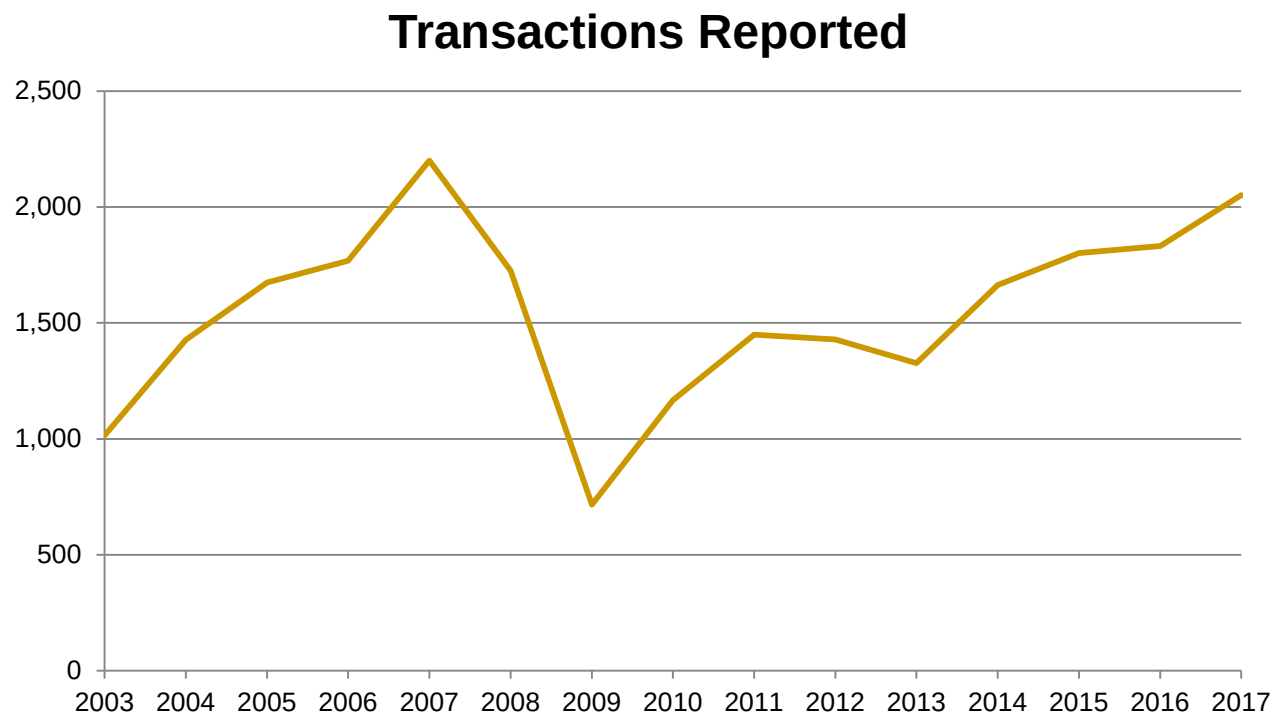
- Uses a prescribed form: Requires no—
  - Market definition
  - Calculation of market shares or market concentration statistics
  - Presentation of any antitrust analysis or defense
- Both the acquiring and acquired persons must submit their own filing
- Key information required:
  - Transaction documents (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



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
    - Also, civil penalties (fines) for closing a transaction without observing the applicable waiting period

HSR Act Notifications



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

- Two basic types of violations
  - Failure to file
  - Gun jumping
- Can be expensive
  - $41,484 per day for every day of the violation—Equals $15.1 million per year

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.

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
  - 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

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)[1]
  3. Invite the parties to make a presentation to the staff on the competitive merits of the transaction

[1] 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
  - Significant “first mover” advantage in many cases
  - Well-prepared business people are the best to present
  - Need to anticipate and answer staff questions
  - Need to clear and compelling
  - Need to anticipate and be consistent with what the staff is likely to hear from customers
  - Need to do quickly

Initial merits presentation

- Model structure
  1. Provide an overview of the parties and the transaction
  2. Provide an overview of the industry (if the staff is not familiar with the industry)
  3. Explain the business model driving the transaction
     - Essential to give a compelling reason for doing the deal that is not anticompetitive
  4. Identify the customers benefits implied by the business model
  5. Explain why market conditions would not allow the transaction to be anticompetitive in any event

Customer/competitor staff interviews

- Occupies the bulk of the remaining time in the initial investigation
- Customer views are given great weight
- Competitor conclusions are given little weight

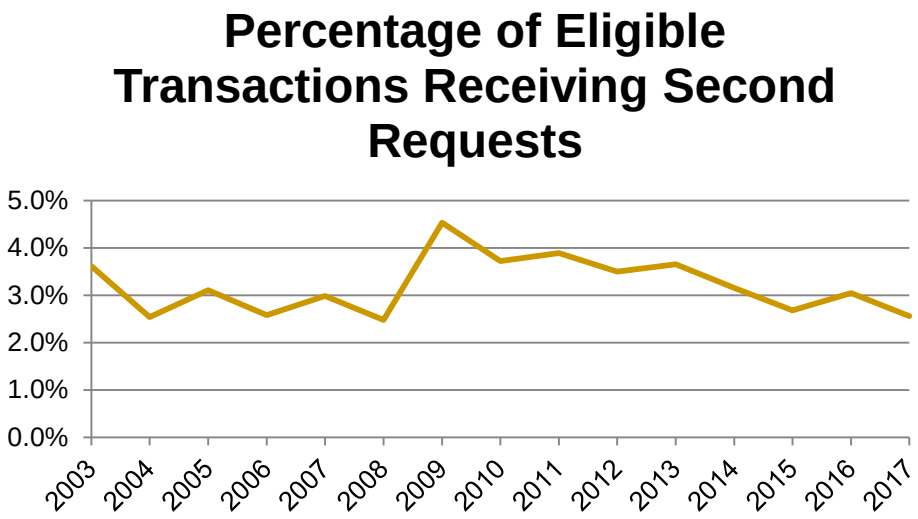
End of the initial waiting period

- Three options for the agency
  1. Close the investigation
  2. Issue a second request
  3. Convince the parties to “pull and refile” their HSR forms to restart the 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



Second Request Investigations

TABLE I
FISCAL YEAR 2017[1]
ACQUISITIONS BY SIZE OF TRANSACTION (BY SIZE RANGE)[2]

TRANSACTION RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER[4]	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 [5]	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%
ALL TRANSACTIONS	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[1]
    - 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

[1] 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