

Class 6 slides

Unit 4: The DOJ/FTC Merger Review Process

Merger Antitrust Law

Fall 2018 Georgetown University Law Center

Dale Collins

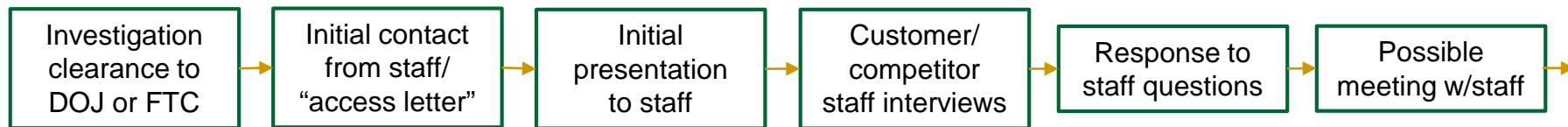
September 13, 2018

Overview of HSR review process

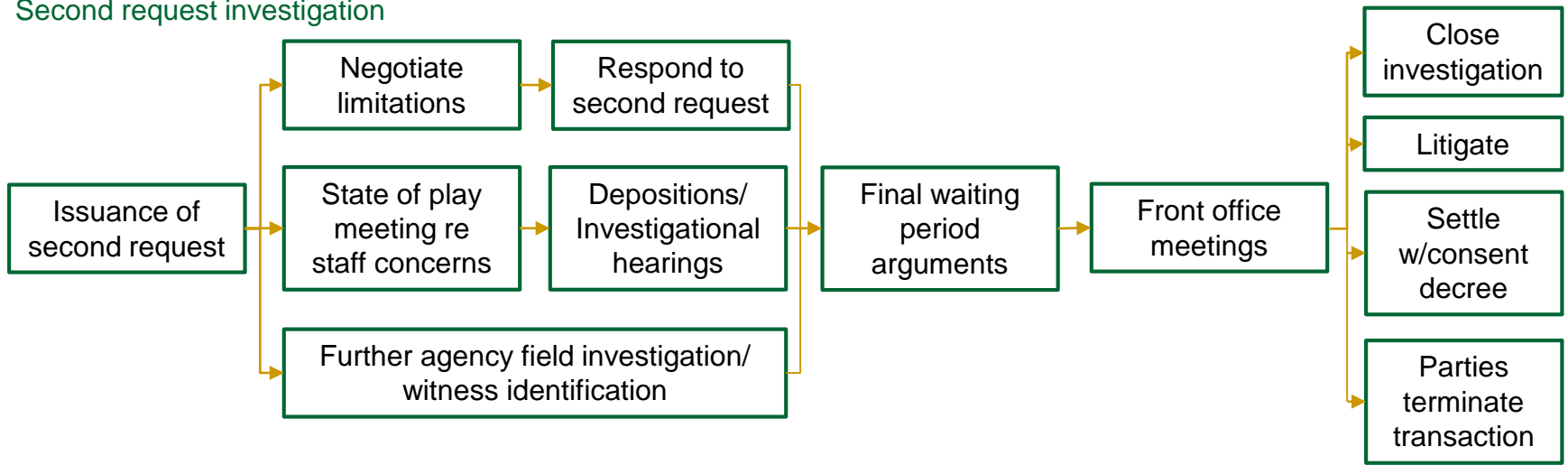
Prefiling/filing



Initial investigation

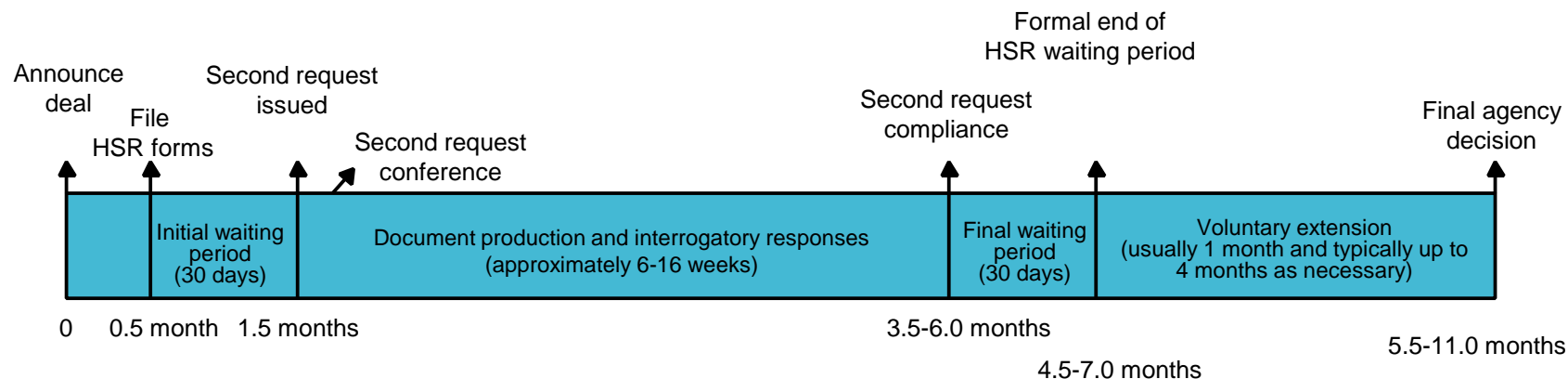


Second request investigation



HSR Act review process

■ Typical domestic transaction (without litigation)



- | | | | |
|------------------|--|--|---|
| Customer rollout | <ul style="list-style-type: none"> - First telephone call (voluntary request) - First presentation - Follow-up meetings - First DOJ/FTC customer interviews - First DOJ/FTC competitor interviews - Filings in other jurisdictions | <ul style="list-style-type: none"> - 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 | <ul style="list-style-type: none"> - Final meetings with staff - Meetings with senior staff - Negotiate consent decree (if necessary) - Find and sign acceptable divestiture buyer (if necessary) |
|------------------|--|--|---|

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

Homework Assignment for Class 4

Instructor's answer

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Project Ceres: Initial Information Request

1. The Company's national strategic plan (and, if one is prepared, its national advertising plan) for each of the last three years. If regional plans exist and are readily available, please provide those as well.
2. Any internal or external market research report on supermarket competition prepared within the last three years.

Instructor's answer

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3. Any “Item 4(c) documents”, that is, any studies, surveys, analyses, or reports prepared by or for the Company’s officers or directors that evaluate or analyze the proposed transaction with respect to markets, market shares, competition, competitors, potential for sales growth, or expansion into product or geographic markets.
4. Any “Item 4(d) documents” that is, any Confidential Information Memoranda (“CIM”) (if one was prepared in connection with the sale of the company), third-party advisor documents, or documents analyzing synergies or efficiencies that might arise out of the transaction.

Instructor's answer

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5. Any documents that analyze or otherwise assess competitors (especially any documents that discuss the counterparty in this transaction).
6. Any documents prepared in the regular course of business that provide market shares.
7. Any documents discussing competition by supermarkets with other types of stores that sell groceries.

Instructor's answer

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8. Any document that addresses how the Company sets its prices.
9. Any planning documents that discuss the methodology for deciding to open or close stores, including any programs or models used to analyze new store locations, expansions, remodeling and closures.
10. Any documents that discuss the effects of actual or projected opening of any competitive store.

Instructor's answer

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11. Any maps showing (a) the location of each Company store and competitor stores, (b) trade/draw areas (the areas from which each store draws customers), or (c) price zones.
12. A list of each store owned, operated or planned by the Company, including (a) the full address, zip code, and square footage of the store, (b) the revenues of the store in the last three fiscal years, and (c) the month/year the store opened.
13. To the extent available, a list of each store the Company regards as competitor, including (a) the full address, zip code, and square footage, and (b) the month/year the store opened.

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14. Any other documents that address the rationale for the transaction (including the most recent financial model).
15. Any documents that address likely present or future changes to business strategies as a result of the transaction.

If you specifically prepare any materials in response to this request, as opposed to simply collecting pre-existing documents, please mark the prepared materials as “PRIVILEGED & CONFIDENTIAL—PREPARED AT THE REQUEST OF COUNSEL.” Thank you for your assistance.

Dale Collins
Able & Baker LLP

Unit 5. Merger Antitrust Litigation

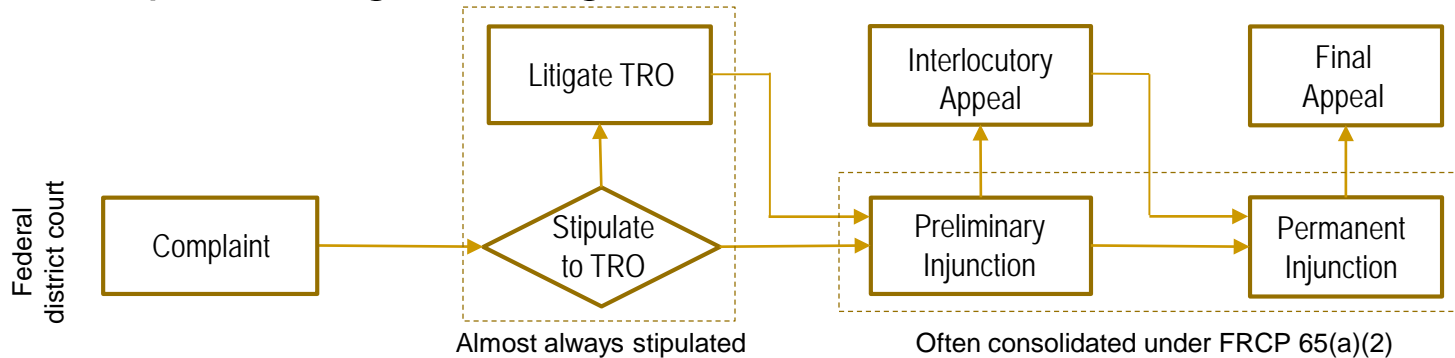
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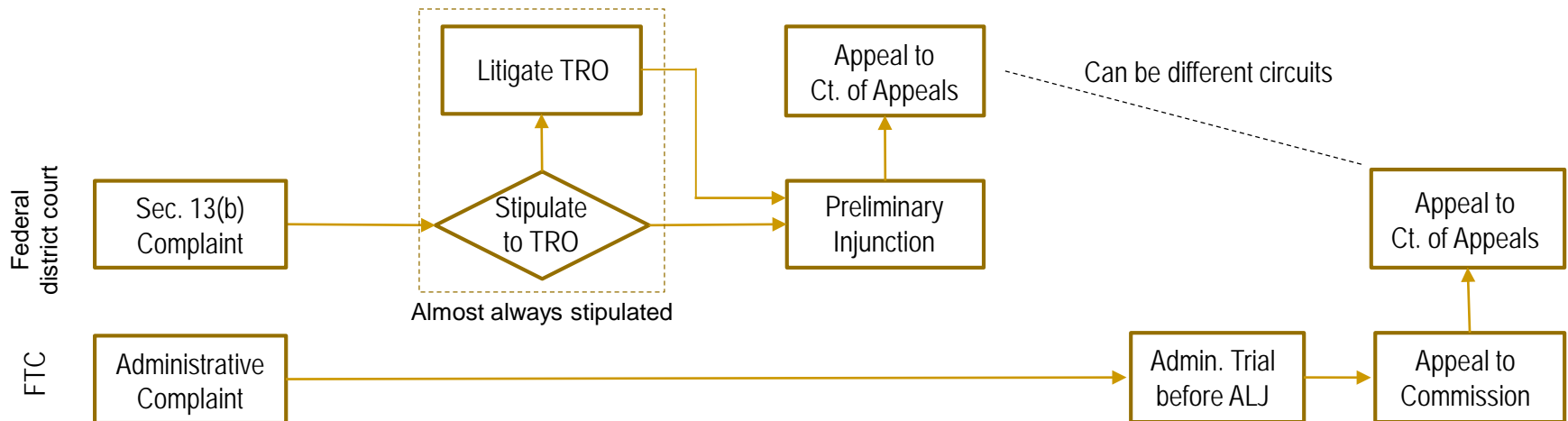
Dale Collins

Typical litigation paradigms

DOJ preclosing challenge



FTC preclosing challenge



Typical litigation paradigms

DOJ postclosing challenge



FTC postclosing challenge



Preliminary injunctions

- The enabling statutes

DOJ: Clayton Act § 15

“The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute **proceedings in equity** to prevent and restrain such violations.”

FTC: FTC Act § 13(b)

“Upon a proper showing that,
[1] **weighing the equities** and
[2] **considering the Commission’s likelihood of ultimate success**,
[3] such action would be in the **public interest**,
and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond”

Preliminary injunctions

- DOJ

Clayton Act § 15	Judicial standard (modified <i>Winter</i> ¹)
“The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.”	“A [private] plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits , [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest. ”

¹ *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Preliminary injunctions

■ FTC

FTC: FTC Act § 13(b)	Judicial standard
<p>“Upon a proper showing that, [1] weighing the equities and [2] considering the Commission’s likelihood of ultimate success, [3] such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond.”</p>	<p>“[1] The issue is whether the Commission has demonstrated a likelihood of ultimate success. The Commission meets its burden if it ‘raise[s] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals.”</p> <p style="text-align: center;">+</p> <p>[2] Balance of the equities</p> <p style="text-align: center;">+</p> <p>[3] Public interest</p>

Litigation timing

- WDC views on timing for preclosing challenges

Proceeding	Plaintiff	Formum	Likely timing
Preliminary injunction	DOJ or FTC	Federal district court	6.5 months from filing of the complaint
Appeal from the grant or denial of a PI	DOJ or FTC	Federal court of appeals	Likely to be granted expedited treatment, in which case 6 months
Full trial on the merits	DOJ	Federal district court	Typically consolidated with PI hearing under Rule 65(a)(2)
Decision of ALF on the merits	FTC	FTC administrative law judge (ALJ)	Within 1 year from issuance of administrative complaint ¹
Appeal from the administrative trial	FTC	Full FTC	
Appeal from an FTC decision on the merits	FTC	Federal court of appeal	One year or more

¹ By FTC rule, the administrative trial must begin no less than 5 months after the filing of the administrative complaint if the FTC has sought preliminary injunctive relief under Section 13(b). 16 C.F.R. § 3.11(b)(4). The evidentiary hearing may last no more than 30 trial days (about 1.5 calendar months). *Id.* § 3.41(b). The parties must file their proposed findings of fact, conclusions of law, and order within 21 days of the close of the evidentiary hearing. *Id.* § 3.46(a). The ALJ must issue a decision with 70 days of the filing of the proposed findings of fact and conclusions of law. *Id.* § 3.51(a).

Litigation timing—Preclosing challenges

	DOJ			FTC		
	Energy Solutions	Anthem	Aetna	Advocate Health Care	Penn State Hershey	Staples
Complaint	11/16/2016	7/21/2016	7/21/2016	12/22/2015	12/9/2015	12/8/2015
PI hearing	Consolidated	Consolidated	Consolidated	4/11/2016 (6 days)	4/11/2016 (4 days)	3/21/2016 (10 days)
PI				6/14/2016 ¹	5/9/2016 ²	3/21/2016 ³
PI appeal				10/31/2016	9/27/2016	None
Merits hearing (trial days)	4/24/2017 (10 days)	11/21/2016 (20 days)	12/5/2016 (13 days)	Transaction abandoned after PI entered and administrative complaint dismissed on 3/20/2017	Transaction abandoned after PI entered and administrative complaint dismissed on 10/23/2016	Transaction abandoned after PI entered
Live witnesses	6-8 fact 3 experts	29 fact 5 experts	>30 fact 7 experts			
Initial merits decision (FTC)	--	--	--			
Final decision	6/21/2017	2/8/2017	1/23/2017			
Merits appeal	None	4/28/2017	None			
Total time to conclusion	7 months	6.5 months (tr) 2.5 months (a)	6 months	6 months (PI) 4.5 months (A)	5 months 4 months	3.5 months

¹ PI: Witness count not reported

² PI: 14 fact witnesses; 2 experts.

³ PI: 10 fact witnesses; 5 experts

Appeals: Jurisdiction

- Statutorily prescribed
 - Courts of appeal must be assigned jurisdiction by statute in order to hear an appeal
- Jurisdiction in three types of appeal
 - Appeals of final judgments (28 U.S.C. § 1291)
 - Appeals of the grant or denial of injunctive relief (28 U.S.C. § 1291(a))
 - Interlocutory appeals (28 U.S.C. § 1291(b))

Appeals: Standards of review

- Interpretation of the law—De novo
 - Query: Is the FTC accorded *Chevron* deference?
- Finding of facts
 - In a bench trial—Clearly erroneous rule
 - By a jury—Substantial evidence rule
 - By the FTC—Substantial evidence rule
- Others matters
 - In federal court—Abuse of discretion
 - FTC—[No articulated rule?]