13. DOJ/FTC Enforcement Practices and Merger Review

Antitrust Law

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Topics

- Thinking systematically about antitrust risk
- Merger antitrust analysis simplified
- Overview of the HSR review process
- Premerger notification
- Initial waiting period investigations
- Second request investigations
- DOJ/FTC merger review outcomes

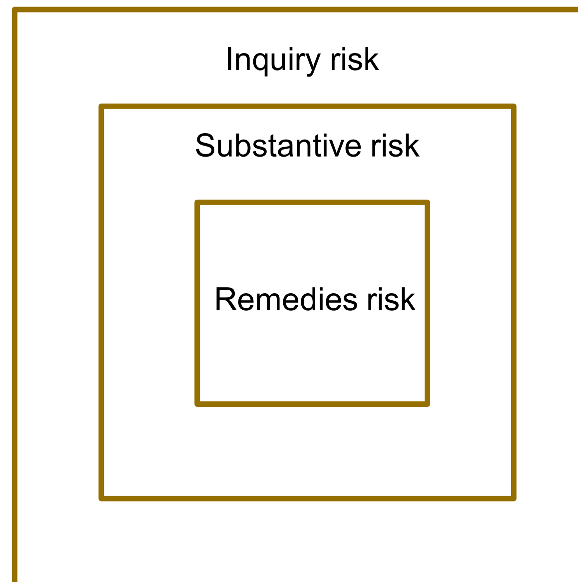
THINKING SYSTEMATICALLY ABOUT ANTITRUST RISK

Types of antitrust risks

- *Inquiry risk*: The risk that legality of the transaction will be put in issue
  - Who has standing to investigate or challenge the transaction?
  - What is the probability that one of these entities will act?
- *Substantive risk*: The risk that the transaction will be found to be anticompetitive and hence unlawful
  - When is a merger anticompetitive?
  - How can we practically assess antitrust risk?
- *Remedies risk*: The risk that the transaction will be blocked or restructured
  - What are the outcomes of an antitrust challenge?
  - Will the transaction be blocked in its entirety?
  - Can the transaction be "fixed" to alleviate the agency's concerns and if so how?

Types of antitrust risks

- The three risks are nested
  - The substantive risk does not arise unless there is an inquiry
  - The remedies risk does not arise unless the transaction is found to be anticompetitive



Costs associated with antitrust risk

- Delay/opportunity costs
  - Possible delay in the closing of the transaction and the realization of the benefits of the closing to the acquiring and acquired parties
- Management distraction costs
  - Possible diversion of management time and resources into the defense of the transaction and away from running the business
- Expense costs
  - Possible increased financial outlays for the defense of the transaction
- Outcome costs—Four possible outcomes:
  - The inquiry terminates without resolution
  - The transaction is cleared on the merits
  - The transaction is blocked and the purchase agreement is terminated
  - The parties restructure (“fix”) the deal to eliminate the substantive antitrust concern
    - “Fix-it-first”—Restructuring the deal preclosing to avoid a consent decree
    - Post-closing “fix” under a judicial consent decree (DOJ) or a FTC consent order

Substantive Risk:
Merger Antitrust Analysis Simplified

Clayton Act § 7

- Provides the U.S. antitrust standard for mergers

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

- *Simple summary*: Prohibits transactions that—
  - may substantially lessen competition or tend to create a monopoly
  - in any line of commerce (product market)
  - in any part of the country (geographic market)

"May be to substantially lessen competition"

- No operational content in the statutory language itself
  - What does in mean to "substantially lessen competition"?
  - Judicial interpretation has varied enormously over the years
- Modern view:[1] Transaction threatens—with a reasonable probability—to hurt an identifiable set of customers through:
  - Increased prices
  - Reduced market output
  - Reduced product or service quality
  - Reduced rate of technological innovation or product improvement
  - (Maybe) reduced product diversity[2]
- Forward-looking analysis
  - Compare the postmerger outcomes with and without the deal
  - Can view potential competitors today as future competitors tomorrow

[1] The modern view dates from the late 1980s or early 1990s, after the agencies and the courts had assimilated the 1982 DOJ Merger Guidelines.
[2] The idea that reduced product diversity may be a cognizable customer harm was formally introduced in the 2010 DOJ/FTC Horizontal Merger Guidelines.

Theories of anticompetitive harm

- Major theories
  - Elimination of horizontal competition among current rivals
    - Unilateral effects
      - Merger of uniquely close competitors[1]
      - Anticompetitive effect depends only on the elimination of "local" competition between the merging firms
      - Assumes other firms in the market continue to compete as they did premerger
    - Coordinated effects
      - Merger of significant competitors where customers have few realistic alternatives
      - Anticompetitive effects depends on an anticompetitive oligopolistic response by other firms in the market
    - Elimination of a "maverick"
      - A maverick is a firm that is disruptive in the marketplace and tends to drive market prices down, even through it may have a small market share
      - This is a very ill-defined concept, and may be entirely dependent on the business strategy of the current management
  - Vertical harm—Major in EU/gaining traction in U.S
    - Foreclosure of competitors (upstream or downstream)/Raising costs to rivals
    - Anticompetitive information access

    NB: In the U.S., to be actionable vertical theories require some likely demonstrable anticompetitive market-wide effect on customers

[1] This requirement, which was part of the 1992 DOJ/FTC Horizontal Merger Guidelines, was dropped in the 2010 revision.

Theories of anticompetitive harm

- Other possible theories
  - Elimination of actual potential competition
    - Strict requirements
      - Oligopolistically performing market in which one of the merging parties is an incumbent firm
      - Entry is imminent and substantial by the other merging party
      - Entry by that merging party would deconcentrate the market and substantially increase its competitive performance
      - Entry by other firms is either distant/not foreseeable or would not be substantial
      - Acquisition eliminates independent entry and negates its procompetitive benefits
    - But DOJ/FTC could bring a case on this theory if the evidence is compelling
  - Elimination of perceived potential competition
    - Almost impossible to satisfy requirements
      - Oligopolistically structured market in which one of the merging parties is an incumbent firm
      - The other merging party is perceived by the incumbent firms as ready to enter the market
      - Market performing significantly more competitively than structure of suggest because incumbent firms have moderated their prices ("limit pricing") to discourage that firm from actually entering
      - No other firm is perceived by the incumbent firms as a threat that would cause them to moderate their anticompetitive behavior
      - Acquisition eliminates the threat of entry, so that incumbent firms no longer have an incentive to moderate prices
    - Not seriously used in the U.S. as a theory of anticompetitive harm for over 30 years
    - Historically has had at best limited success in the United States when it was invoked

But this is all too complicated—

- Basic distinction
  - *Discovery*: How do the agencies detect an anticompetitive merger?
  - *Explanation*: How do the agencies explain why they believe that a merger is anticompetitive?
- The formal theories go more to explanation than discovery
  - Theories in 1992 Merger Guidelines very information-intensive
    - Especially since both unilateral and coordinated effects theories require market definition as a prerequisite
  - Consequently, not overly useful for screening purposes either by agencies or parties
    - Particularly problematic for parties in assessing antitrust risks prior to signing a merger agreement
- Impetus for 2010 Merger Guidelines revisions
  1. No longer reflected current practice: The agencies had not been complying with the strict requirements of the 1992 Guidelines in assessing mergers for years
  2. Parties were using the 1992 Guidelines against the agencies: 2010 revision designed to make the guidelines less predicted and so minimize their use against the agencies by the merging parties

Assessing substantive antitrust risk

- So how do the DOJ/FTC approach merger antitrust investigations?
  - Recall that the purpose of merger antitrust law is to prevent the creation or facilitation of market power to the harm of customers in the market as a whole through—
    - Increased prices
    - Decreased product or service quality
    - Decreased rate of technological innovation or product improvement
    - [Maybe] decreased product variety

Absent compelling evidence of significant customer harm from other sources, only price increases count

  - Economic theory not well-developed in predicting—
    - Consequences of transaction for nonprice market variables
    - Consequences of changes in nonprice market variables for consumer welfare
  - *Implication*: Need strong direct evidence to proceed on a theory other than a price increase

Assessing substantive antitrust risk

- So how do the DOJ/FTC approach merger antitrust investigations?
  - They ask a simple, basic question:

Is the merger likely to result in a price increase or other competitive harm to any identifiable customer group?

  - If the answer is YES, the investigating agency will find a way to package it into a cognizable theory of anticompetitive merger harm and pursue enforcement action
  - If the answer is NO, the investigating agency will close the investigation without taking enforcement action

Assessing substantive antitrust risk

- Harm can be to *any identifiable group* of customers
  - Does not have to affect all customers
  - Sufficient if some identifiable group of customers
    - That is, some group that can be characterized systematically
  - Some common groups
    - Customers in a particular geography
    - Customers of a particular type of product
    - Customers of a particular type of product in a particular geography

The agencies believe that no customer group is too small to deserve antitrust protection

- If a relevant market is necessary, the agencies will seek to define the market to be the customer group threatened with harm
  - Success in court has been mixed
  - Not always consistent with the market definition paradigms in the case law and 1992 Horizontal Merger Guidelines
  - 2010 Horizontal Merger Guidelines drafted in part to provide more flexibility

Assessing substantive antitrust risk

- Interesting factoids in agency prosecutorial decision making
  - Key evidence in the decision to challenge horizontal mergers:
    - The existence of incriminating documents (or occasionally incriminating public statements)
    - Closeness and uniqueness of competition between the merging parties
    - The number of other close competitors
    - Customer complaints
  - The 2010 DOJ/FTC Horizontal Merger Guidelines are rarely invoked by the agencies or the parties in the assessment of a transaction
    - However, the agencies do invoke the 2010 guidelines retroactively when explaining an enforcement decision
    - The 2010 guidelines are sufficiently unpredictive that they can be used to support any enforcement decision
  - Formal market definition and HHIs play essentially no role and are rarely addressed in the investigation
    - Very information-intensive approach of questionable probative value
    - Consequently, not particularly useful for screening by either agencies or parties
  - Measures of upward pricing pressure (UPP) are rarely cited

Another basic distinction

- Truth v. evidence
  - Knowing that truth on their side of the deal gets the parties about 60% of the way to a successful outcome before the agencies
  - The remaining 40% comes from being able to prove the truth with evidence
    - Having the truth but being unable to prove it will not win the day
  - The investigating staff also needs to be able to prove its case to the agency decision makers and, if necessary, in litigation

So what are the sources of evidence?

Major sources of evidence

- Ordinary course of business documents of the merging firms
- Company responses to second request interrogatories
- Interviews/testimony of merging firm representatives
- Interviews with knowledgeable customers
- Interviews with competitors
- Customer and competitor responses to DOJ Civil Investigative Demands (CIDs) or FTC subpoenas
- Analysis of bidding or “win-loss” data
  - Including the ability of customers to play the merging firms off one another
- “Natural” experiments
- Expert economics analysis

Defense menu in horizontal transactions

- In decreasing order of strength—
  - Parties do not compete with one another
  - Parties compete only tangentially
  - Parties compete but have significant other close and effective competitors
  - Parties do compete, have few existing competitors, but movement into market
    - is easy (no barriers to entry or repositioning), and
    - would occur quickly if merged company acted anticompetitively
  - Some other reason deal is not likely to harm customers

Basic test for horizontal mergers

Reduction in Bidders/Competitors*

5 → 4	Usually clears if no bad documents and no material customer complaints
4 → 3	Usually challenged unless there are no bad documents and there is a strong procompetitive business rationale, customer support, *and* minimal customer complaints
3 → 2	Almost always challenged unless there are no bad documents, and there is a compelling business rational that is strongly supported by customers and no material customer complaints
2 → 1	Always challenged

* Critically, these must be meaningful and effective alternatives from the perspective of the customer; "fringe" firms that customers do not regard as feasible alternatives do not count

- Future competitors
  - Can increase the number of competitors on a going forward basis and so reduce antitrust concern
  - If the merger involves a potential competitor, will decrease the number of competitors in the future and so increase antitrust concern
- The chances of success
  - *improve* if there are demonstrable powerful forces that constrain price increases beyond the mere number of players (e.g., powerful customers, low barriers to entry or repositioning)
  - *decrease* if there are factors that facilitate the exercise of market power in the wake of the transaction (e.g., close and unique competition between the merging parties; merging parties are the largest firms)

Recent tightening in enforcement standards

- Chart reflects current enforcement tendencies at both the DOJ and FTC
- Four years ago, 5 → 4 deals almost always cleared and the chart would be compressed to begin at 4 → 3
- *Query*: In the Trump administration will the agencies go back to the more lenient pre-2015 standards?
  - Answer in 2019: There is no apparent movement in this direction

Exacerbating factors

- Incriminating (“hot”) company documents
  - Suggest that a strategy of the merged firm will be to raise prices, reduce production or capacity, or reduce the rate of innovation or product improvement
  - Suggest the merging companies are close competitors of one another in some overlapping product
  - Suggest that customers have few realistic alternatives to merging firm
  - Suggest that the competitors pay attention to each other’s prices and are careful not to destabilize high prices
  - Suggest that the target company is a “maverick” that does not go along with the higher prices that other companies want to charge
  - Expect these to be cited in any complaint challenging the transaction
- Incriminating public statements
  - Occasionally, a senior executive of one of the merging parties (typically the buyer) will make an incriminating statement in a public forum, in the press, or on a blog
  - Expect these to be cited in any complaint challenging the transaction

Exacerbating factors

- Customer complaints
  - The merging companies are close competitors of one another in one or more overlapping products
  - Customer "plays" the companies off one another to get better prices
  - Insufficient number of realistic alternatives to preserve price competition post-merger
  - *Customer conclusion*: Customer will pay higher prices as a result of the merger

Customer complaints are second only to incriminating company documents in their probative value to the DOJ and FTC

- High barriers to entry, expansion, and repositioning
  - Apparent barriers (e.g., high cost, required scale, time, reputation)
  - High gross margins of the merging parties
    - *Idea*: If high premerger gross margins did not precipitate entry, expansion, or repositioning, then a slightly higher margin due to a postmerger anticompetitive price increase is not likely to precipitate this type of market correction either.

Other considerations

- High market shares
  - Not helpful
  - BUT not decisive if sufficient alternatives exist
- Effect on competitors
  - In U.S., irrelevant unless it hurts customers
  - BUT one of the best predictors of enforcement action in the EU
- Efficiencies
  - Heavily discounted by enforcement agencies
  - BUT important to provide a procompetitive deal motivation
- High visibility deals that threaten significant job loss
  - Explains some Obama administration enforcement decisions (e.g., NASDAQ/NYSE)
- DOJ/FTC Merger Guidelines
  - NOT a good predictor of enforcement outcomes
  - *PNB* presumption likely to the key in litigation

Synergies

- Synergies play two roles in an antitrust merger analysis
  - They provide an explanation why the acquiring firm is pursuing the deal (and probably paying a significant premium) that does not depend on price increases to customers or other anticompetitive effects
  - In close cases, large synergies can tip the agencies into not challenging the deal
- Types of synergies enabled by the deal
  - Customer value-enhancing synergies
    - Make existing product better or cheaper, or
    - Create new products or product improvement better, cheaper, or faster
  - Cost-saving synergies
    - Reductions in duplicative costs
    - Increases in the productive efficiency of the combined operation (e.g., through best practices, transfer of more efficient production technology)
- Overall
  - Synergies are very helpful in fashioning a procompetitive narrative
  - But agencies are (irrationally) skeptical about the existence of synergies
  - Synergies will almost never outweigh evidence of anticompetitive effect

Synergies

- Examples of customer benefits
  - Lower costs of production, distribution, or marketing make merged firm more competitive
    - Elimination of redundant facilities and personnel
    - Economies of scale or scope
  - Complementary product lines
    - Broader product offering desired by customers
    - Better integration between merging products further enhances customer value
  - Accelerated R&D and product improvement
    - Greater combined R&D assets (researchers, patents, know-how)
    - Complementaries in R&D assets
    - Greater sales base over which to spread R&D costs
  - Better service and product support
    - More sales representatives
    - More technical service support

Delivering the defense

- The best way to assess the substantive risk is to develop the defense with the supporting evidence
- Canonical structure of the initial presentation of a complete defense
  - The parties and the deal
    - Brief overview of the merging parties
    - Brief overview of the deal (including terms, timing, and conditions precedent)
  - The deal rationale
    - Ideally, a rationale that both makes the deal in the profit-maximizing interest of the acquiring company's shareholders and in the interest of customers ("win-win")
    - Include any cost, cross-marketing, or product development deal synergies
  - The market will not allow the deal to be anticompetitive
    - This is equivalent to saying that customers can protect themselves from harm if the merged firm sought to act anticompetitively

The best defense is a good offense:
The transaction is affirmatively procompetitive and the market would not allow the deal to be anticompetitive even if the combined firm tried

Putting it together: Some key questions

- All transactions
  - Why are the companies doing the deal? Is the business model behind the combination procompetitive or anticompetitive? How does the buyer expect to recoup any premium paid for the target?
  - Whatever the mechanism, will the combination likely result in increased prices to any identifiable group of customers? (The business people will know.)
  - What cost savings or other synergies are expected from the deal? Can persuasive evidence of likelihood, magnitude, and timing be presented to the agency?
  - Will the deal enhance the ability of the combined company to create better products or services faster or otherwise improve consumer welfare in the long run?
  - What will the customers in the industry say about the deal if asked by the investigating agency?
  - Are there customers that will support the deal? If so, what is the reason for the support?
  - For customers that might complain, is there a way to neutralize their concerns (e.g., extend the term of their premerger contracts to provide additional protection against price increases)

Putting it together: Some key questions

- All transactions (con't)
  - What do the company documents say?
    - About the reason for the deal?
    - About competition between the merging parties (e.g., win-loss data)?
    - About the likely competitive effect of the deal?
    - About the premerger competitive landscape?
  - Does the company have good witnesses?
    - On the strategic rationale and synergies?
    - On each of the business lines likely to be investigated?
  - Same questions on documents and witnesses for the other merging party
  - If the investigating agency wants to challenge the deal, will it have customers that will testify against the deal?
  - Are their competitors or other parties that have the inventive and the wherewithal to work with the investigating agency to develop theories and evidence to challenge the deal?[1]

[1] The U.S. antitrust agencies give little credit to competitor testimony that a deal is anticompetitive. The idea is that an anticompetitive deal is likely to increase market prices and benefit competitors and that the real concern behind most competitor complaints is that the merged firm will become more efficient and procompetitively win business away from the complaining competitor. That said, the agencies are always willing to enlist competitors to help them better understand the market, gain access to industry customers, and generally develop evidence.

Putting it together: Some key questions

- Horizontal transactions
  - Are the merging companies strong and close competitors with one another?
  - How many other effective competitors does each merging party have?
  - Do customers play the merging parties off of one another to get better prices or other deal terms?
  - In bidding situations, do the merging firms frequently bid against one another? How many other bids do they usually face? Do they frequently find themselves competing against one another in the "best and final" round of bidding?
  - Are the conditions in the marketplace conducive to direct oligopolistic coordination on price?
    - If not, is there another mechanism for oligopolistic coordination (e.g., coordinated capacity reductions)?
  - Is the target firm a "maverick" and engage in disruptive market conduct (such as aggressive discounting)?

Putting it together: Some key questions

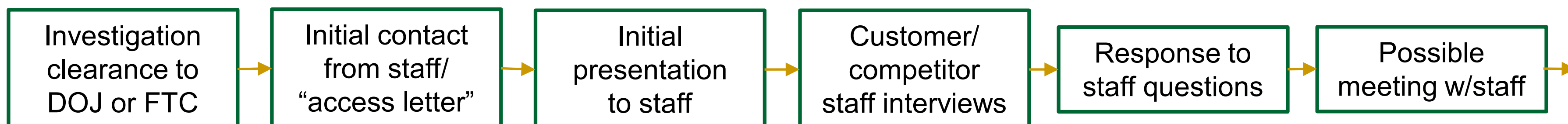
- Nonhorizontal transactions
  - Potential competition
    - Is either of the merging parties a potential entrant into a market in which the other company is an actual competitor?
    - If so,
      - Is the target market highly concentrated?
      - Is the target market performing more or less competitively or is it performing noncompetitively? (The merging party that is the actual competitor will know)
      - How likely is it that in the absence of the transaction the potential entrant merging party would in fact enter the market and in what scale and in what time frame?
      - Are their other firms equally likely to enter into the market on the same or greater scale and in the same or less time as the potential entrant merging party?
      - What would the effect of this entry be on the performance of the target market?
  - Vertical foreclosure
    - Does one of the merging firms supply an important input or distribution/retail channel to the other merging firm?
    - If so,
      - Could competitors in practice protect themselves from harm in the event of foreclosure or higher input prices (or lower downstream prices) from the combined firm by either (a) dealing with other firms in the market, or (b)vertically integrating into the input or downstream market?
  - Vertical information conduits
    - As a result of the transaction, will one merging party gain greater access to competitively sensitive information of its competitors?

HSR Review Process

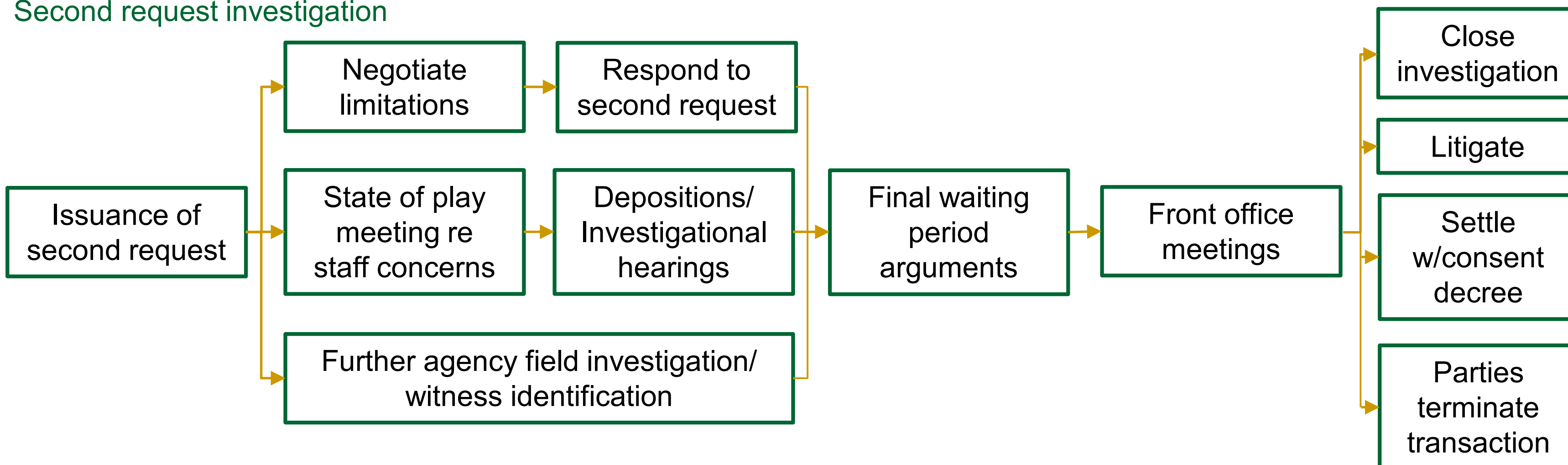
Overview of HSR review process

Prefiling/filing

Initial investigation

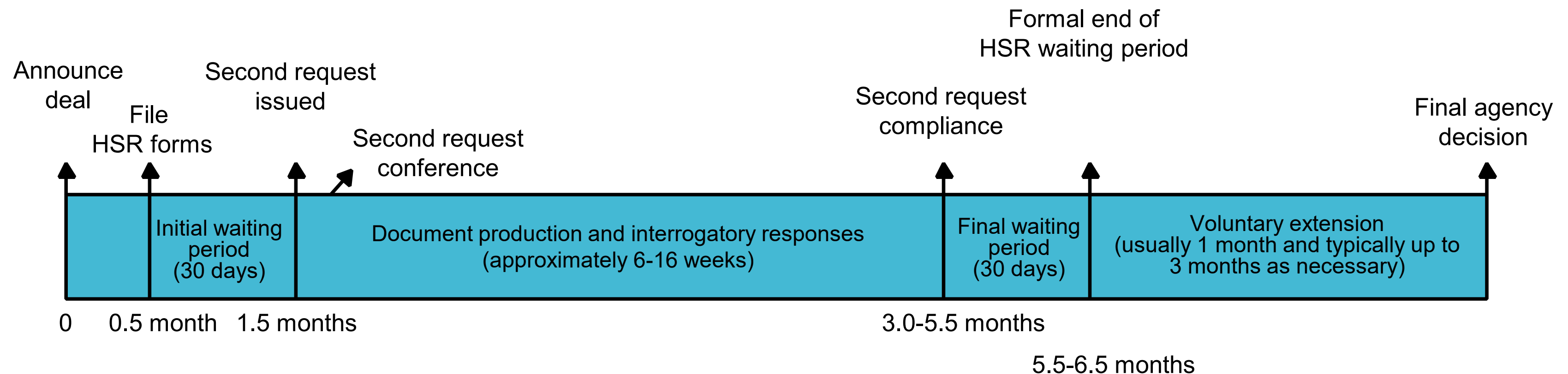


Second request investigation



HSR Act review process

- Typical domestic transaction



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)

Premerger Notification

HSR Act

- Hart-Scott-Rodino Act[1]
  - Enacted in 1976 and implemented in 1978
  - Applies to large mergers, acquisitions and joint ventures
  - Imposes reporting and waiting period requirements
    - Preclosing reporting to both DOJ and FTC by each transacting party
    - Post-filing waiting period before parties can consummate transaction
  - Authorizes investigating agency to obtain additional information and documents from parties during waiting period through a "second request"
  - Designed to alert DOJ/FTC to pending transactions to permit them to investigate—and, if necessary, challenge—a transaction prior to closing
    - *Idea*: Much more effective and efficient to block or fix anticompetitive deal prior to closing than to try to remediate it after closing
  - Not jurisdictional: Agencies can review and challenge transactions—
    - Falling below reporting thresholds
    - Exempt from HSR reporting requirements
    - "Cleared" in a HSR merger review—no immunity attaches to a transaction that has successsfully gone through a HSR merger review

[1] Clayton Act § 7A, 15 U.S.C. § 18a.

HSR Act

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

[1] 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).
[2] Discussed below.

Basic prohibition

- Section 7A(a)

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

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

[1] 15 U.S.C.18a(a).
[2] Beginning in FY 2005, the reporting thresholds are adjusted annual by the percentage changes in the gross national product during the prior fiscal year compared to the gross national product for the fiscal year ending September 30, 2003. Pub. L. No. 106-553, 114 Stat. 2762 , 2762A-109 (effective February 1, 2001).

Acquisition of voting securities or assets

- The HSR Act applies only to acquisitions of voting securities or assets
- Voting securities
  - "[S]ecurities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer"[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

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

[1] 16 C.F.R. § 801.1(f)(1)(i).

Prima facie reportability[1]

Size of transaction*	Prima Facie Reportability		
Up to and including $90.04 million	Not reportable		
Above $90.0 million up to and including $359.9 million	Reportable if : (1) satisfies the "size of person" test, and (2) no exemption applies		
		Size of person test	
	Acquiring person		*Acquired person*
	$180.0 million (in total assets or annual net sales)	and	$18.0 million (in total assets or annual net sales of a person engaged in manufacturing)
	Or		
	$180.0 million (in total assets or annual net sales)	and	$18.0 million (in total assets of a person not engaged in manufacturing)
	Or		
	$18.0 million (in total assets or annual net sales)	and	$180.0 million (in total assets or annual net sales)
In excess of $359.9 million	Reportable absent an exemption		

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

[1] *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 84 Fed. Reg. 7370 (Mar. 4, 2019) (effective Apr. 3, 2019).

Prima facie reportability

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

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]
$90.0 million
$180.0 million
$899.8 million
25% of the voting securities if their value exceeds $1,687.80 million
50% of the voting securities if their value exceeds $84.4 million

[1] *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 84 Fed. Reg. 7370 (Mar. 4, 2019) (effective Apr. 3, 2019).

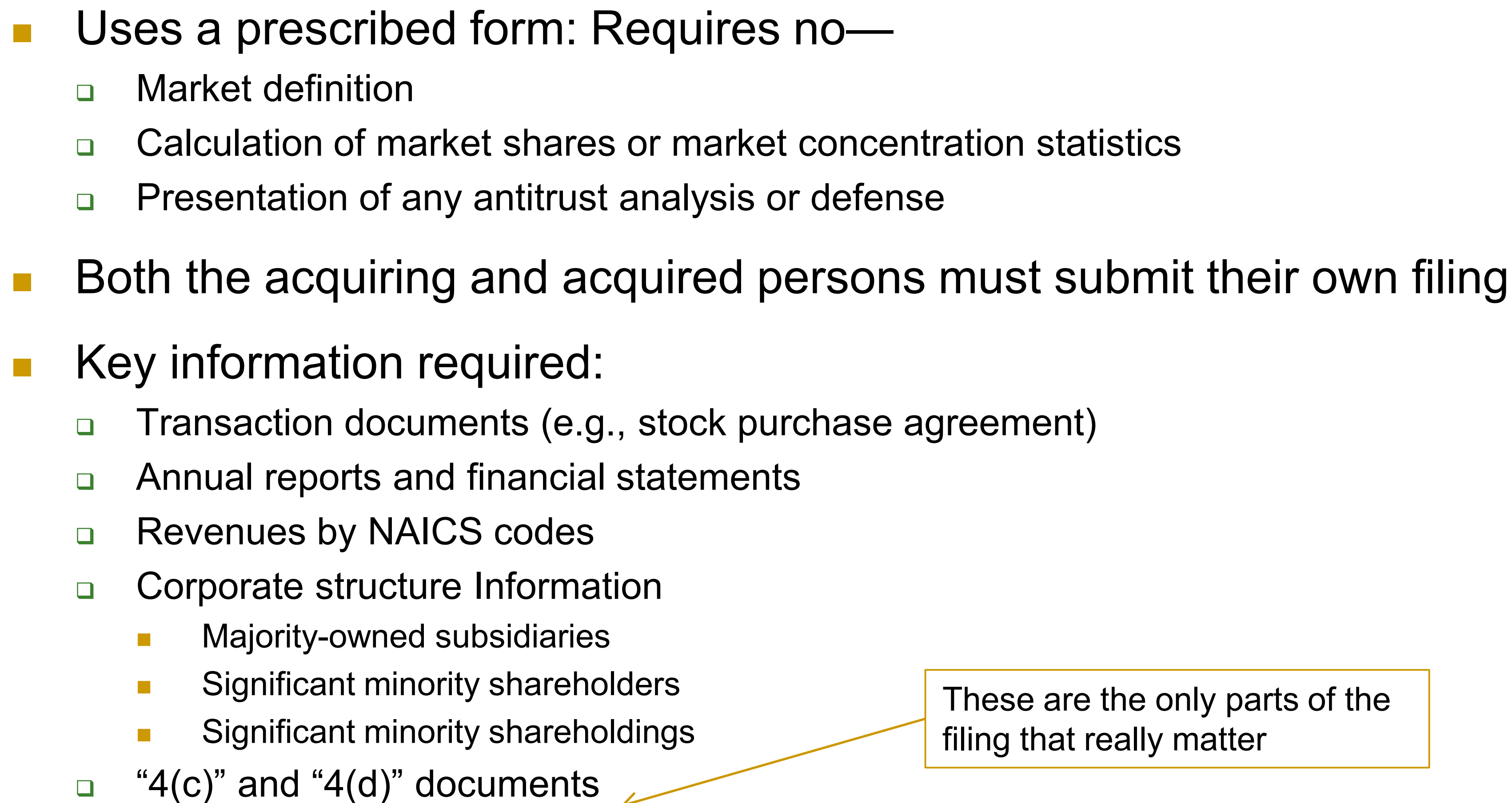
Filing fees

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

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

[1] *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 84 Fed. Reg. 7370 (Mar. 4, 2019) (effective Apr. 3, 2019).

HSR Act filing



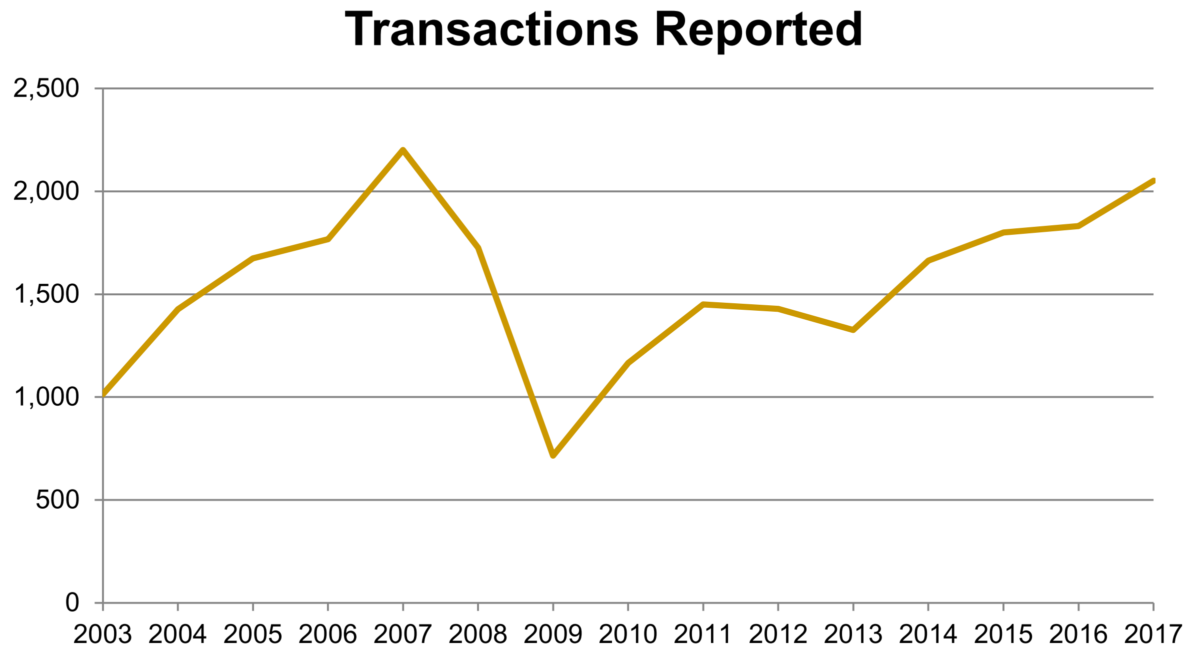
HSR Act filing

- 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

Selected exemptions

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

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

Waiting periods

- Timing agreement
  - 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, 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
    - A typical commitment is an additional 30 days beyond the end of the HSR Act waiting period
  - But a timing commitment does not technically extend the statutory waiting period
    - Enforceable through contract or detrimental reliance, not as a violation of the HSR Act
    - Typically misunderstood by the parties and the investigating staff
    - Is acknowledged by the FTC Premerger Notification Office
    - Significant because there can be no "gun jumping" after the end of the HSR Act waiting period

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[1]
  - The HSR regulations provide that a person holds (acquires) voting securities or assets when it has a “beneficial interest” in them[2]
- Two basic types of violations
  - *Failure to file*: Failing to file an HSR report and observe the waiting period requirements in a reportable transaction
  - *Gun jumping*: Filing a HSR report but exercising influence over the target’s decision making sufficient to indicate the transfer of a beneficial interest in the target before the end of the waiting period
- Can be expensive
  - $42,530 per day for every day of the violation—Equals $15.9 million per year[3]

[1] 15 U.S.C. § 18a(a).
[2] 16 C.F.R. § 801.1(c).
[3] 84 Fed. Reg. 3980 (Feb. 14, 2019) (increasing civil penalty from $41,484 per day to $42,530 per day effective February 14, 2019, purusuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114–74, § 701, 129 Stat. 599 (2015) (requiring a catch-up CPI inflation adjustment from the date of the statute‘s enactment)).

Failure to file

- Violation
  - Failing to file an HSR report and observe the waiting period requirements in a reportable transaction
- Scenarios
  - Failure to file at all
    - Intentional failure to file
    - Inadvertent failure to file
    - Improper invocation of an exemption (usually the investment exception)
  - Filing an insufficient report (e.g., a report that is incomplete because it does not contain all Item 4(c) and 4(d) documents)
- Prosecutorial discretion
  - Vigorous enforcement for intentional failures to file
  - "One-bite" rule for inadvertent failures to file
    - No enforcement action on first failure
    - Enforcement actions on subsequent failures
  - Varies with culpability in invoking exemption

“Gun jumping”

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

Recent HSR Act enforcement actions

Year	Acquirer	Target	Violation	Reason	Disposition	%
2018	James M. Dolan	Madison Square Garden	Failure to file	Inadvertent	$609,810	13.9%
2018	Duke Energy	Calpine	Gun jumping		$600,000	25.2%
2017	Ahmet H. Okumus	Web.com	Failure to file	Inadvertent	$180,000	65.3%
2017	Mitchell P. Rales	Colfax Danaher	Failure to file	Inadvertent	$720,000	1.6%
2016	Fayez Sarofim	Kinder Morgan	Failure to file	Not investment	$720,000	
2016	Caledonia Investments	Bristow Group	Failure to file	Beyond five-year period for exemption	$480,000	
2016	ValueAct	Baker Hughes Halliburton	Failure to file	Not investment	$11,000,000	
2016	Len Blavatnik	TangoMe	Failure to file	Inadvertent	$656,000	25.2%
2015	Leucadia Nat'l Corp	Goober Drilling	Failure to file	Inadvertent	$240,000	3.4%
2015	Third Point Offshore Fund	Yahoo	Failure to file	Not investment	None	
2015	Flakeboard	SierraPine	Gun jumping		$1,900,000 (each party)	53.5%
2014	Berkshire Hathaway	USG Corporation	Failure to file	Inadvertent	$896,000	100.0%
2013	Barry Diller	Coca Cola	Failure to file	Inadvertent	$480,000	5.0%
2013	MacAndrews & Forbes	Scientific Games	Failure to file	Beyond five-year period	$720,000	42.9%
2012	Biglari Holdings	Cracker Barrel	Failure to file	Not investment	$850,000	50.1%
2011	Brian L. Roberts	Comcast	Failure to file	Inadvertent	$500,000	5.7%
2010	Smithfield Food	Premium Standard	Gun jumping		$900,000	48.7%
2009	John C. Malone	Discovery	Failure to file	Inadvertent	$1,400,000	11.9%
2008	ESL Partners	AutoZone	Failure to file	Inadvertent	$800,00	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%

HSR Act enforcement actions

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

Initial Waiting Period Investigations

Preliminaries

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

“Clearance”

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

Initial contact by investigating staff

- Usually occurs 7-10 days after filing
- Three purposes
  - Inform parties of the investigation and introduce the investigating staff
  - Request that the parties provide certain information to the staff on a voluntary basis
    - Most recent strategic, marketing and business plans
    - Internal and external market research reports for last 3 years
    - Product lists and product descriptions
    - (Perhaps) competitor lists and estimates of market shares
    - Customer lists of the firm's top 10-20 customers (including a contact name and telephone number)[1]
  - 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
  - Often a large “first mover” advantage in being the first to give the staff a systematic way to think about the transaction
  - Well-prepared business people are the best to present
    - Agencies not impressed with “testifying” lawyers—especially outside counsel
  - Need to anticipate and answer staff questions
  - Need to clear and compelling
    - Cannot win on an argument that the staff does not understand or finds ill-supported
  - Need to anticipate and be consistent with what the staff is likely to hear from customers
    - Staff is strongly biased to accepting customer view in the event of an inconsistency
  - Need to do quickly
    - By the time of the initial call from the investigating staff, one-third of the initial waiting period will be over

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

Initial merits presentation

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

Customer/competitor staff interviews

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

End of the initial waiting period

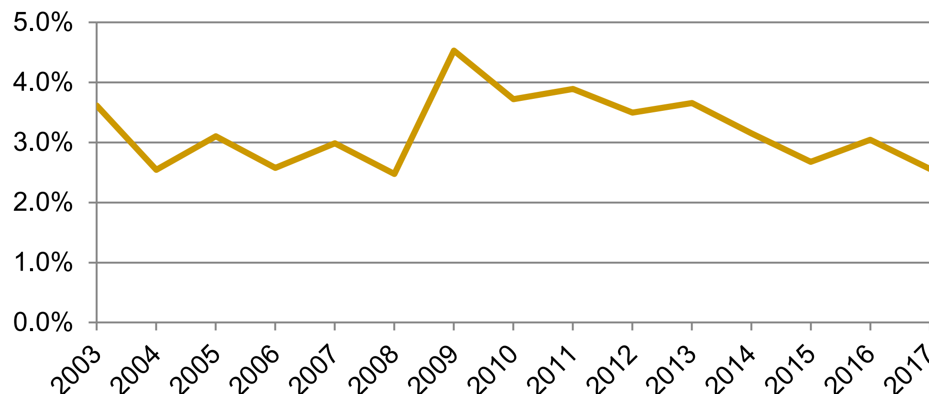
- Three options for the agency
  - Close the investigation
  - Issue a second request
    - Most important factors—
      - Incriminating company documents
      - Significant customer complaints
      - Four or less competitors postmerger for horizontal transactions (5→ 4 deals)
      - Obvious significant foreclosure possibilities (for vertical transactions)

      NB: Any one of these factors can be sufficient to trigger a second request investigation
    - A second request must be authorized—
      - By the assistant attorney general (typically delegated to a deputy assistant attorney general)
      - By the Federal Trade Commission (typically delegated to the chairman or a commissioner)
  - Convince the parties to "pull and refile" their HSR forms to restart the initial waiting period
    - Typically used when the initial investigation to date indicates no problem but requires a short additional time to complete customer interviews
    - The agency usually grants early termination in the middle of the second initial waiting period

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



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

Second request investigations

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%

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

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

Second request investigations

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

Second request investigations

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

Final waiting period

- Timing
  - Begins when all parties have submitted proper second request responses
  - Ends 30 calendar days later
    - 10 days in a cash tender offer
  - Parties often voluntarily "extend" the final period[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
- "Timing agreements"
  - Agencies like to negotiate "extensions" early in a second request investigations so that they know how much time they have before the deal can close
  - Typically will accept 60 days beyond the normal expiration of the waiting period
    - 30 days for the staff (making a total of 60 for the staff after second request compliance)
    - 30 days for the front office
  - Technically a contract, but real effect is more of an estoppel

[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. This has significant implications for "gun-jumping" violations, which cannot occur after the waiting period has ended.

The final arguments

- Formal meetings at the end of the investigation

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

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

Merger Review Outcomes

Possible outcomes in DOJ/FTC reviews

Outcome	Description
Close investigation	• Waiting period terminates at the end of the investigation with the agency taking no enforcement action, or • Agency grants early termination prior to normal expiration
Litigate	• DOJ: Seeks preliminary and permanent injunctive relief in federal district court • FTC: Seeks preliminary injunctive relief in federal district court Seeks permanent injunctive relief in administrative trial
Settle w/consent decree	• Typical resolution for problematic mergers • DOJ: Consent decree entered by federal district court • FTC: Consent order entered by FTC in administrative proceeding
Parties terminate transaction	• Parties will not settle at the agency's ask and will not litigate, or • Agency concludes that no settlement will resolve the agency's concerns and the parties will not litigate • Examples: AT&T/T-Mobile, NASDAQ/NYSE Euronext