MERGER ANTITRUST LAW

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Tuesdays and Thursdays, 3:00-5:00 pm
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Class 3 (September 8): The DOJ/FTC Merger Review Process (Unit 3)

On Tuesday, we will turn to Unit 3 and inquiry risk by examining the DOJ/FTC merger review process under the HSR Act.

For reasons we will discuss, state and private merger antitrust challenges are rare, so the vast bulk of challenges result from DOJ and FTC merger reviews. The upshot is that, in most situations, only the DOJ and FTC present significant inquiry risk. The Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act") requires that the parties to large mergers, consolidations, tender offers, private or open-market purchases, asset acquisitions, joint ventures in corporate form, and certain other types of ownership integrations or transfers must:

(1) file a *notification report form* with the Antitrust Division of the United States Department of Justice and the Federal Trade Commission prior to closing their transaction, and

(2) observe a statutory-prescribed postnotification *waiting period* before the transaction can be consummated (normally 30 calendar days for a preliminary reviews and months for an in-depth review).

This is the institutional context in which the DOJ and FTC conduct the vast bulk of merger investigations. The class notes (slides 3-5) give a basic summary of the HSR Act. I could ask you to read the text of the Act, but it is long, complicated, and boring. For our purposes, the reading materials and the slides will do just fine, but if you want to read it, I have posted a copy in the Unit 3 supplemental materials.

The class notes provide a more detailed schematic of the DOJ/FTC merger review process under the HSR Act (slides 6-8), which is explained more fully in the reading materials (pp. 5-24). I think about the merger review process in three stages:

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

   After the prefiling work is completed, it is time to make the merger control filing. First, it is necessary to ascertain whether the transaction is *reportable*, that is, whether a merger control filing is required under the HSR Act. This involves two steps: (a) determining whether the transaction meets the statutory threshold size tests and so is *prima facie reportable*, and (b) determining whether an exemption applies. The rules here are quite involved, but I have summarized the most important ones in the class notes (slides 9-16). If

a transaction is prima facie reportable and no exemption applies, the transaction is *reportable* if it crosses a notification threshold (slide 16). The thresholds in the HSR Act for prima facie reportability and the statutory exemptions are adjusted annually in the Federal Register. In 2020, the most important number is $94.0 million, which is the value of voting securities and assets of the acquired person that the acquiring person must *hold* as a result of the acquisition (existing holdings plus the value of the voting securities or assets to be acquired) as the first prerequisite of reportability.[1]

If the transaction is reportable, then each party must make its own filing on a prescribed form. Technically, this is the Notification and Report Form, but everyone simply calls it the "HSR filing," "HSR report," or "HSR form." I have included the form in the reading materials (pp. 15-37), which you will find surprisingly uninformative. You only need to skim it. I also have described the form in the class notes (slide 18), which is worth somewhat more attention. In most cases, the most important part of the form are the documents submitted in repose to Items 4(c) and 4(d) and you should pay careful attention to the note on these documents (pp. 38-42) and the class notes (slide 19). The class notes also have the current schedule of filing fees, payable by the acquiring party (slide 20), as well as a graph on the number of filings the DOJ and FTC receive each year (slide 27).

In addition to filing the required HSR reports, the parties to a reportable transaction must observe a specified statutory waiting period before they can close their transaction (slide 22). The *initial waiting period* is usually 30 calendar days (15 calendar days for all-cash tender offers) after all required HSR reports have been filed. In negotiated transactions, where the buyer will acquire stock of a subsidiary or assets directly from the seller, both the buyer and the seller must file their respective HSR reports before the waiting period begins to run. In open market transactions, where the buyer acquires the stock of the target on the open market (including through a tender offer), the waiting period starts to run after the buyer has filed its HSR form. (This prevents the target in a hostile transaction from defeating the acquisition simply by not filing its HSR form.) The initial waiting period may be extended, as discussed below, by the issuance of a second request. The investigating agency may grant early termination of a waiting period at any time.

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

(a) the parties can simply fail to file;

(b) the parties can invoke an inapplicable exemption (usually in the investment exemption) and not file;

(c) the parties file, but one of their filings can be incomplete (usually because the party failed to include all of its 4(c) and 4(d) documents); or

(d) the parties make their proper filings but, during the waiting period, the acquiring firm exercises control or influence over the acquired firm in a manner that indicates that it

[1] The 2020 Federal Register notice with the current inflation-adjusted numbers for the HSR Act and implementing regulations is posted in the Unit 3 supplemental materials. *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 85 Fed. Reg. 4984 (Jan. 28, 2020) (effective Feb. 27, 2020).

has already "acquired" the target (often by influencing the target firm's bidding or contracting during the waiting period).

The first three types of violations are *failures to file*; the last type of violation is commonly called *gun-jumping*. In 2020, the HSR Act provides for civil penalties of up to $43,280 per day for every day of the violation, or about $15.8 million per year, as well as injunctive relief. The class notes cover HSR Act violations (slides 23-27). The *ValueAct*, *Flakeboard*, and *Nautilis* materials in the reading materials (pp. 64-111) provide examples of HSR Act violations. You should read the complaints in each case so that you can see the types of conduct that the reviewing agencies believe violate the HSR Act and then skim the rest of the materials.

2. *Initial waiting period investigation*. The next stage in the merger process after filing the HSR form is the *initial waiting period investigation* (slides 23-35). As noted above, the initial waiting period under the HSR Act is 30 calendar days (15 calendar days for all-cash tender offers), which provides the agencies the opportunity to decide whether one or both of them would like to review the transaction, allocate the investigation responsibility to one of the agencies (so that both of them will not be investigating simultaneously—this is called the clearance process (see slide 36)) and permit a preliminary substantive review.

   If one of the agencies opens an initial waiting period investigation, the investigating staff will contact the merging parties to introduce themselves, ask the parties to voluntarily submit some additional information (slide 37). This request is likely to be memorialized in a so-called "voluntary access letter." I have included the DOJ model form in the reading materials (pp. 93-95). The FTC has not released a model letter, but its web site gives some guidance of what the request will be (p. 96). In the initial telephone call, the staff also will invite the parties to give a presentation, if they would like to do so, on why the transaction does not present an antitrust problem. For reasons we will discuss in class, the parties should always take advantage of this invitation (see slides 32-33).

   During the initial waiting period investigation, the staff will also conduct interviews (usually by telephone) of customers and competitors in the industry. The slides give some more detail (slide 34).

   The investigating agency has three options at the end of the initial waiting period:

   (a) close the investigation, terminate the waiting period, or allow it to expire, and permit the parties to close their transaction without further interference;

   (b) begin a "second request investigation" by issuing a "second request"; or

   (c) convince the merging parties to "pull and refile" their HSR forms to restart a new initial waiting period (slide 35).

   It is important to note that the FTC Premerger Notification Office (which is responsible for the administration of the HSR Act) takes the position that the waiting periods are prescribed by statute and cannot be modified by agreement, so that the parties cannot "extend" the initial waiting period to give the agency more time to investigate even if they so desired (although they can commit by agreement outside of the HSR Act not to close the transaction until sometime after the HSR waiting period has expired).

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

   The slides give a brief overview (slides 36-40), and I have included the model second request for the DOJ in the reading materials (pp. 97-114). As painful as it might be, read the DOJ model second request with some care.[2]

If the reviewing agency issues a second request before the end of the initial waiting period, the waiting period is extended for the period of time that it takes for the merging parties to comply with their respective second requests plus an additional 30 calendar days (10 days for an all-cash tender offer) (see slide 42).

Timing agreements. The agencies, with some justification, believe that the statutory time periods provide too little time for the staff to complete a review of the second request submissions and prepare its recommendation as to the outcome of the review and for the ultimate decision-makers within the agency to make a decision. As a result, the investigating agency almost always asks the parties to enter into a "timing agreement" that commits the parties not to close their transaction until sometime—usually two months, but it can be much longer—after the statutory waiting period expires. If the parties do not agree to an extension, the agencies typically go into "litigation mode" and threaten to cease talking to the parties about the merits or possible settlement. So unless the parties believe that further interaction with the investigating agency is likely to be futile, the parties almost always give the agency a timing agreement for some period of time (slides 43-44).[3] The reading materials include a blog post from the FTC's Director of the Bureau of Competition on timing agreements as well as the FTC model timing agreement form (pp. 115-124). The DOJ has a somewhat different model form (pp. 125-136). We can talk in class about the wisdom of using the model forms in class. The forms also reveal the types of information in which the agencies are most interested, so they are worth a careful look. The DOJ also has released some frequency asked questions about voluntary request and timing agreements that are worth a read (pp. 137-142).

Merger review outcomes. After the evidence is gathered, the parties will have the opportunity to make a presentation—actually, a series of presentations—to various levels of the agency as to why the transaction should not be challenged (slide 41). After that, the agency will make its decision.

There are four possible outcomes of a full investigation: (1) the agency closes the investigation without taking enforcement action, (2) the parties settle the investigation through a consent decree

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

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

(which typically will require the divestiture of assets or businesses), (3) the agency commences litigation to block the transaction, or (4) the parties terminate the transaction. The class notes summarize these outcomes (slide 46).

Interestingly, unlike the European Commission, neither the DOJ nor the FTC has the authority on its own to block a pending transaction (although the FTC can challenge a consummated transaction administratively and order appropriate relief, including divestiture). Rather, to block a pending transaction, both the DOJ and the FTC must obtain a preliminary injunction from a federal district court. We will examine this procedure in Unit 4.

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