CLASS 4 SLIDES

Unit 4. The DOJ/FTC Merger Review Process

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September 7, 2022

Topics

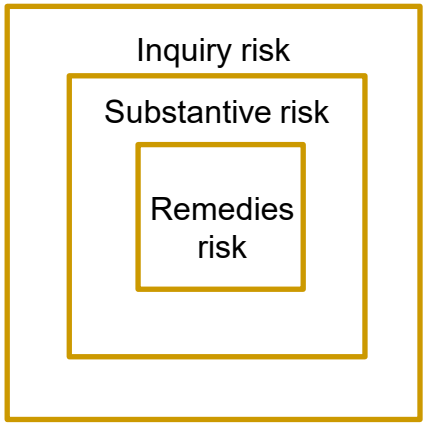
- Inquiry risk: HSR Act merger reviews
- Premerger notification
- Preparing for an investigation
- Initial waiting period investigations
- Second request investigations
- DOJ/FTC merger review outcomes

Inquiry Risk: HSR Merger Reviews

Recall the three types of antitrust risks

1. Inquiry risk
   - The risk that legality of the transaction will be put in issue
2. Substantive risk
   - The risk that the transaction is anticompetitive and hence unlawful
3. Remedies risk
   - The risk that the transaction will be blocked or restructured

Risks are nested



Inquiry risk

- There are two fundamental types of inquiry risk
  1. The risk of an HSR merger review
  2. The risk of a merger antitrust litigation

In this unit, we will examine HSR merger review risk
In Unit 6, we will examine merger litigation risk

Framing inquiry risk

- There are two factors to consider in assessing incentive risk—
  1. Does the putative challenger have the *means* to initiate an inquiry?
  2. Does the putative challenger have the incentive to initiate an inquiry?

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1. The means: Two potential means—
   a. The ability to initiate a precomplaint investigation
   b. The ability to initiate litigation
2. The incentive calculus: Three questions—
   a. What is the reward/payoff to success?
   b. What is the probability of success?
   c. What is the cost of raising the issue?

Federal enforcement agencies

- *Ability*: Causes of action and forums
  - DOJ
    - Injunctive relief under Clayton Act § 15 in federal district court
    - Treble damages under Clayton Act § 4A in federal district court for injuries (overcharges) to federal agencies
  - FTC
    - Permanent injunctive relief under Clayton Act § 11 in an FTC administrative adjudicative proceeding
    - Preliminary and permanent injunctive relief under FTC Act § 13(b) in federal district court
      - Only a federal court may issue a preliminary injunction
- *Incentive*: The DOJ/FTC are by far the most likely challengers
  - Both charged with enforcing Section 7 of the Clayton Act
  - Are large, experienced in merger antitrust enforcement, and well-funded
  - Have the benefit of the HSR Act—
    - Premerger reporting
    - Waiting period before merger an be consummated
    - Precomplaint investigation tools
  - Have successful litigation experience
  - Do not have to show threatened or actual injury to obtain injunctive relief

The Premerger Notification Process

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
    1. *Preclosing reporting* to both DOJ and FTC by each transacting party
    2. *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, *or*
    - "Cleared" in a HSR merger review—no immunity attaches to a transaction that has successfully gone through a HSR merger review

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

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 . . . .

- A reportable transaction is one that—
  1. Involves the ***acquisition*** of ***voting securities*** or ***assets***
  2. Satisfies the ***dollar thresholds*** for prima facie reportability
  3. Does not fall into one of the ***exemptions*** provided by the HSR Act or implemented by the HSR Rules
- Dollar values are adjusted annually for inflation

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 for HSR Act purposes
  - An exclusive license is regarded as an asset
- "Acquisition"
  - Does not require a formal transfer of legal title
  - Sufficient to obtain a "beneficial interest" in the underlying voting securities or assets
    - What is "beneficial interest"?
    - How can we tell if it has been transferred prior to the transfer of legal title?

[1] 16 C.F.R. § 801.1(f)(1)(i).

Prima facie reportability[1]

Size of transaction*	Prima Facie Reportability		
Up to and including $101.0 million	Not reportable		
Above $101.0 million up to and including $403.9 million	Reportable if : (1) satisfies the "size of person" test, and (2) no exemption applies		
	Size of person test		
	Acquiring person		*Acquired person*
	$202.0 million (in total assets or annual net sales)	and	$20.2 million (in total assets or annual net sales of a person engaged in manufacturing)
	Or		
	$202.0 million (in total assets or annual net sales)	and	$20.2 million (in total assets of a person not engaged in manufacturing)
	Or		
	$20.2 million (in total assets or annual net sales)	and	$202.0 million (in total assets or annual net sales)
In excess of $403.9 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, 87 Fed. Reg. 3541 (Jan. 24, 2022) (effective Feb. 23, 2022).

Prima facie reportability

- Simple rule

> If the acquiring person will hold ***$101.0 million*** or more of the voting securities or assets of the acquired person, then the acquisition is likely reportable absent an exemption

  - A transaction that satisfies the dollar thresholds is called ***prima facie reportable***
  - Every year the dollar threshold will be adjusted for inflation

Selected exemptions

- Intraperson
  - Acquired and acquired person are the same
- Investment
  1. Hold no more than 10% of target's outstanding voting securities
     - 15% for certain institutional Investors
  2. 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 $101.0 million
- Acquisitions of non-U.S. voting securities by non-U.S. persons that either—
  1. Do not confer control over the target, or
  2. Do not involve assets in the U.S., or sales in or into the U.S., over $101.0 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]
$101.0 million
$202.0 million
$1.0098 billion
25% of the voting securities if their value exceeds $2.0196 billion
50% of the voting securities if their value exceeds $101.0 million

[1] *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 87 Fed. Reg. 3541 (Jan. 24, 2022) (effective Feb. 23, 2022).

HSR Act filing

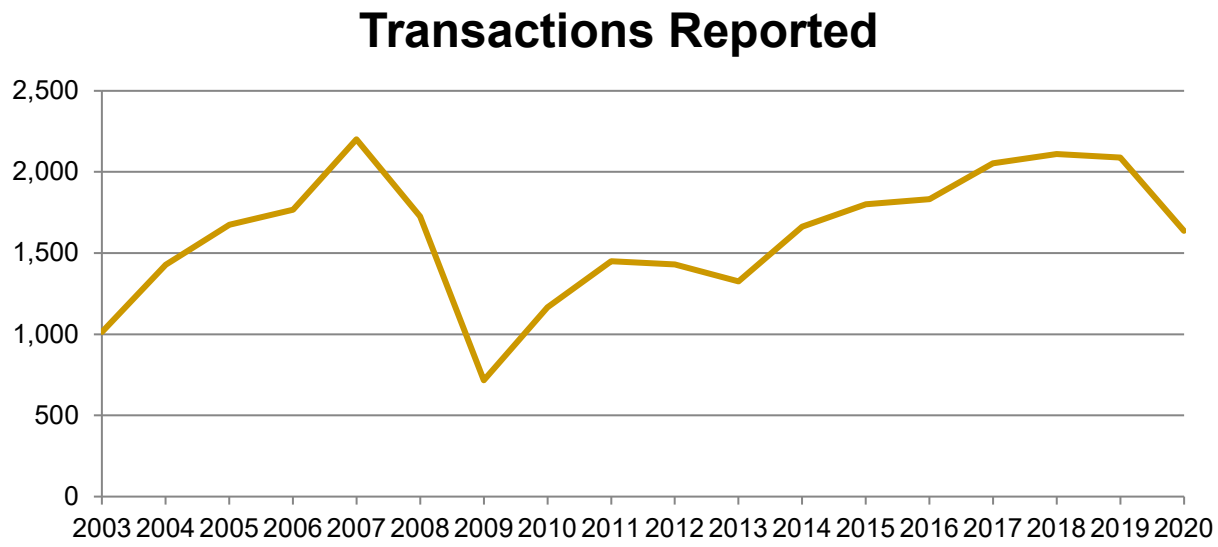
- Uses a prescribed form: Requires no—
  - Market definition
  - Calculation of market shares or market concentration statistics
  - Presentation of any antitrust analysis or defense
- Both the acquiring and acquired persons must submit their own filing
- Key information required:
  1. Transaction documents (e.g., stock purchase agreement)
  2. Annual reports and financial statements
  3. Revenues by North American Industry Classification System (NAICS) codes
  4. Corporate structure information
     - Majority-owned subsidiaries
     - Significant minority shareholders
     - Significant minority shareholdings
  5. "4(c)" and "4(d)" documents

These are the only parts of the filing that really matter

HSR Act filing

- 4(c) and 4(d) documents
  - 4(c) documents: four requirements—
    1. Studies, surveys, analyses or reports
    2. Prepared by or for officers or directors of the company (or any entities it controls)
    3. That analyze the transaction
    4. With respect to markets, market shares, competition, competitors, potential for sales growth, or expansion into product or geographic markets
  - 4(d) documents: three types—
    1. Confidential Information Memoranda ("CIM")
    2. Third party advisor documents
    3. 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)
    - Subjects the parties to civil penalties (fines) if they close their transaction without making a corrective filing and observing the required waiting period

HSR Act notifications



Source: Fed. Trade Comm'n & U.S. Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2020, at App. A.

Statutory waiting periods

- General rules
  - Cannot close a reportable transaction until the waiting period is over
  - The duration of the waiting period is prescribed by the HSR Act
- 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
- Extension of waiting period
  - Waiting period extended by issuance of a second request in the initial waiting period
  - Waiting period extends through—
    - Compliance by all parties with their respective second requests
    - PLUS *final waiting period* of 30 calendar days
      - 10 calendar days in case of a cash tender offer
- Investigating agency may grant *early termination* of a waiting period at any time

HSR Act violations

- HSR Act prohibition

> "[N]o 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]

  - Recall that the HSR regulations provide that a person holds voting securities or assets when it has a "beneficial interest" in them[2]

- Two basic types of violations
  1. *Failure to file* a reportable transaction and nonetheless closing the transaction
  2. "*Gun jumping*": Acquiring a beneficial interest in the target's assets or voting securities prior to the expiration of the HSR Act waiting period

- Violations can be expensive
  - $46,517 per day for every day of the violation—Equals $17.0 million per year[3]
  - Also can put the violator on the radar screen of the agencies for future acquisitions

[1] 15 U.S.C. § 18a(a).
[2] 16 C.F.R. § 801.1(c).
[3] 87 Fed. Reg. 1070 (Jan. 10, 2022) (increasing civil penalty from $43,792 to $46,517 per day effective January 10, 2022, pursuant 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)).

Preparing for an Investigation

Build your complete defense

- Need to do this prior to the first contact with the investigating staff
  1. Want to make the strongest defense possible at the first substantive encounter with the investigating staff
  2. Do not want to be surprised later by a new fact that undermines the defense
  3. Need buy-in from the client
     - They will eventually have to make the defense themselves before the staff
  4. Need buy-in from the merger partner
     - They too will eventually have to make the defense themselves before the staff

Identify the "face of the deal"

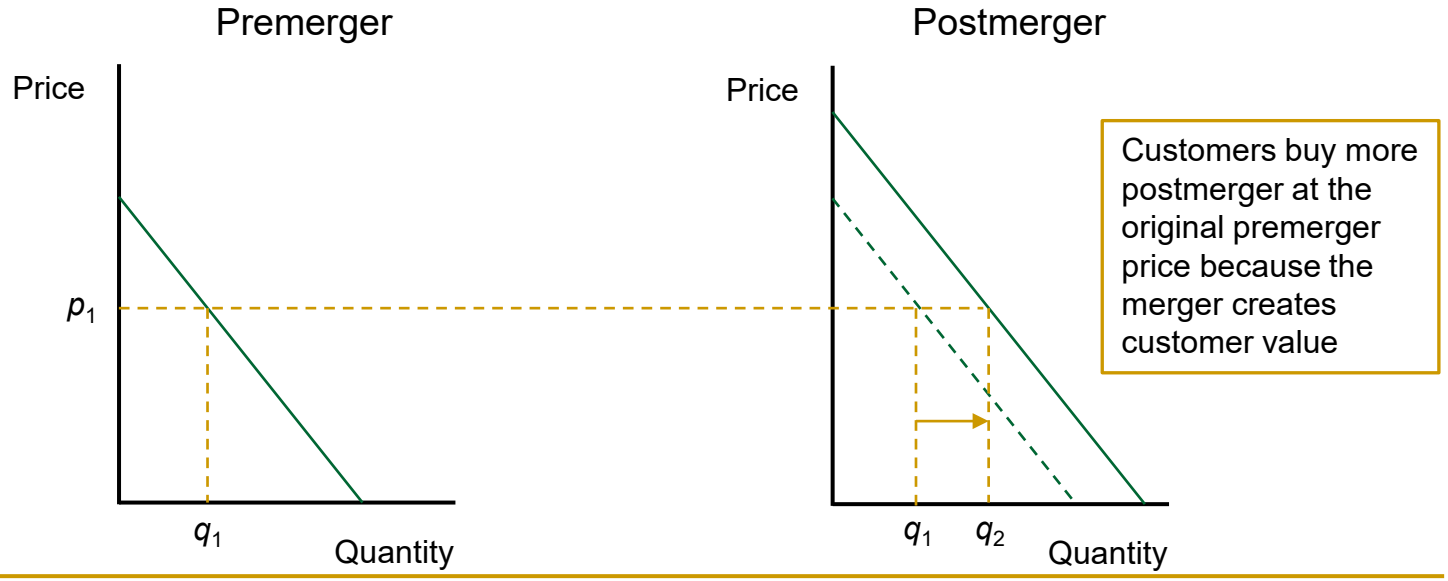
- Which business representative is going to be the most effective in—
  1. Marshalling resources—especially access within the company—to defend the deal?
  2. Leading the defense team within the client?
  3. Working with the merger partner in creating a strong, consistent defense?
  4. Advocating the defense of the deal before the agency?
- Start working with this individual as soon as possible
  - Have to teach them the operational principles of merger antitrust law
  - Need to be involved in every step of building the defense—they need to "own" the defense

Work with the merger partner

- Critical for three reasons—
  1. Need to understand the evidence that is in the hands of the merger partner
  2. Need to ensure that both merging parties are making consistent arguments in defense of the transaction
  3. Need to work with the merger partner on the rollout of the deal to neutralize customer opposition and gain customer support
- Agree in the purchase agreement that the parties will—
  1. Cooperate in the sharing of information
     - Highly confidential information may be shared on an "outside counsel only" basis
  2. Cooperate in the defense of the transaction
     - With the buyer usually taking the lead and making all final strategic decisions
  3. Attend each other's meetings with the investigating agency
- Agencies accept that joint defense meetings between merging parties are protected under the *"common interest" privilege*
- Maneuver to get and begin to prepare the best witnesses from the merger partner

Prepare and implement a customer rollout

- Work with the merging parties to develop and implement a plan to reach out to customers to—
  - Neutralize customer complaints
  - Maximize customer support
- Create a "win-win" argument—
  1. The combined firm will make lots of money
  2. By *shifting the demand curve* to the right by creating a better *customer value proposition*:



Prepare and implement a customer rollout

- Argument must work for customers of both the buyer *and* the target
  - *Remember*: The seller's customers are usually the more difficult to convince that the deal will be good for them
    - They had the opportunity to purchase from the buyer but instead chose to purchase from the target
- Work with the client and the merger partner to find the best people within the company to make the sales pitch for the deal to customers

Prepare and implement a customer rollout

- Form of customer pitch:

> *"You probably have heard about our deal with Company X. We have very excited about it. We think that it is great for our company, great for our shareholders, and great for our customers. You are one of our most valued customers and we hope that you are as excited by benefits the deal will provide to you as we are.*
>
> *[FILL IN CUSTOMER BENEFITS]*
>
> *Do you have any questions or concerns about the deal? We would really like to know what they are so that we can address them.*

Initial Waiting Period Investigations

Preliminaries

- Parties must file their respective HSR forms with both the DOJ and the FTC
  - Separate forms are required for each reporting person
- FTC Premerger Notification Office (PNO) review
  - Only for technical compliance on form—no review of substance
    - NB: The PNO is also responsible for providing informal interpretations of the HSR Act and implementing regulations
- Allocated to DOJ or FTC for review through the 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 an investigation
  - This is called the clearance process
- "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 [Temporarily suspended as of February 4, 2021]
  - 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
  - *Extreme case*: "Clearance battle" can last until the last day of the initial waiting period
  - Efforts to reform "clearance" process by allocating specific industries to specific agency have failed miserably
    - Neither agencies nor their respective congressional oversight committees want to relinquish jurisdiction over any type of merger

Initial contact by investigating staff

- Usually occurs 7-10 days after filing
- Three purposes
  1. Inform parties of the investigation and introduce the investigating staff
  2. Request that the parties provide certain information to the staff on a voluntary basis—
     a. Most recent strategic, marketing and business plans
     b. Internal and external market research reports for last 3 years
     c. Product lists and product descriptions
     d. (Perhaps) competitor lists and estimates of market shares
     e. Customer lists of the firm's top 10-20 customers (including a contact name and telephone number)
        - The agencies do not ask for customer lists in transactions involving consumer goods sold at retail, since retail customers are not considered sufficiently sophisticated and reliable in predicting the effect of a merger on them
  3. Invite the parties to make a presentation to the staff on the competitive merits of the transaction

Strategic pointer

Make the presentation to the staff before providing the customer lists in order to—

1. *Provide a framework for the competitive analysis,* and
2. *Frame the questions that you want the staff to be asking customers*

Initial merits presentation

- Critical to do completely, coherently, and quickly
  1. Often a large “first mover” advantage in being the first to give the staff a systematic way to think about the transaction
  2. Well-prepared business people are the best to present
     - Agencies not impressed with “testifying” lawyers—especially outside counsel
  3. Need to anticipate and answer staff questions
     - Avoiding answers causes the staff to be more skeptical about the transaction and increases the probability of an in-depth investigation
  4. Need to clear and compelling
     - Cannot win on an argument that the staff does not understand or finds ill-supported
  5. Need to anticipate and be consistent with what the staff is likely to what the staff is likely to see in the company documents and hear from customers
     - Staff will almost always accept the customer view in the event of an inconsistency
  6. Need to do the presentation quickly
     - By the time you get the initial call from the staff, one-third of the initial waiting period will be over
     - Accordingly, must have the presentation “in the can” by the end of the first week of the initial waiting period

Initial merits presentation

- The best presentations—
  1. anticipate all of the issues the staff will raise,
  2. provide answers that are supported by company documents and consistent with customer perceptions, and
  3. have all of the facts right

Ideally, the rest of the investigation needs to do no more than defend the analysis in the first presentation

Initial merits presentation

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

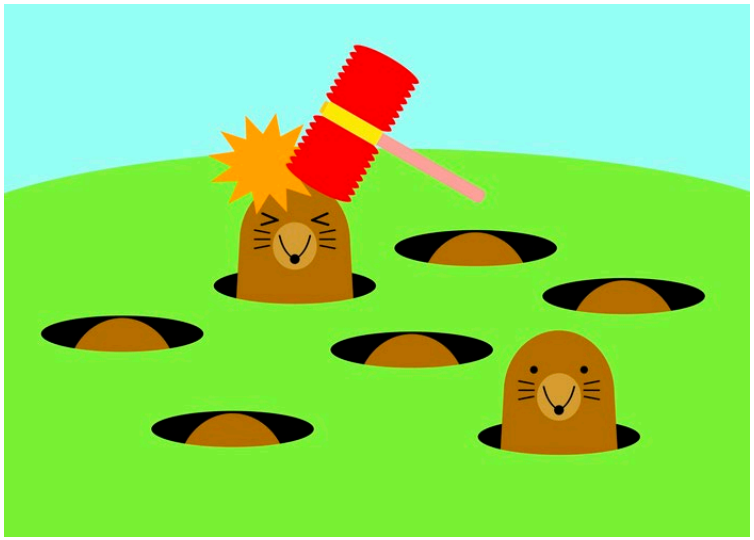
Customer/competitor interviews by staff

- 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 uncritically accept customer complaints 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, who only sees the merger reducing the number of available suppliers
- 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

Respond to staff questions

- Questions may arise as a result of customer and competitor interviews
- Need to anticipate and respond to these quickly
  - Likely hear from staff in the last week of the initial waiting period
  - A failure to negate any staff concerns will almost surely extend the investigation

Think of this as a serious game of Wack-A-Mole



End of the initial waiting period

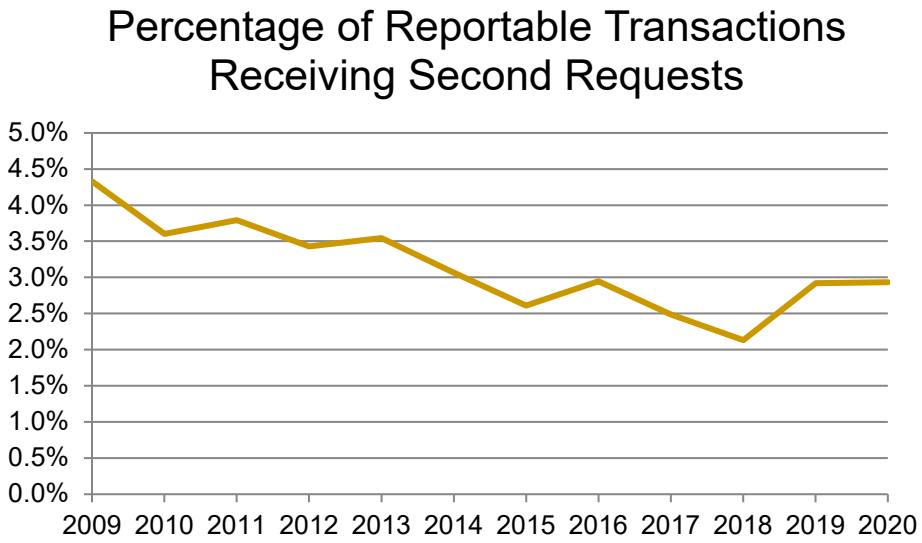
- Three options for the agency
  1. Close the investigation
  2. Issue a second request
     - Most important factors—
       - Incriminating company documents
       - Significant customer complaints
       - Four or less competitors postmerger for horizontal transactions (5 → 4 deals)
         - Maybe 6 → 5 later in the Biden administration
       - Merging parties are uniquely close competitors to one another ("unilateral effects")
       - Merger eliminates a "maverick," an actual potential competitor, or a "nascent competitor"
       - Obvious significant foreclosure possibilities (for vertical transactions)

       NB: Any one of these factors can be sufficient to trigger a second request investigation—it does not take much
     - 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)
  3. 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

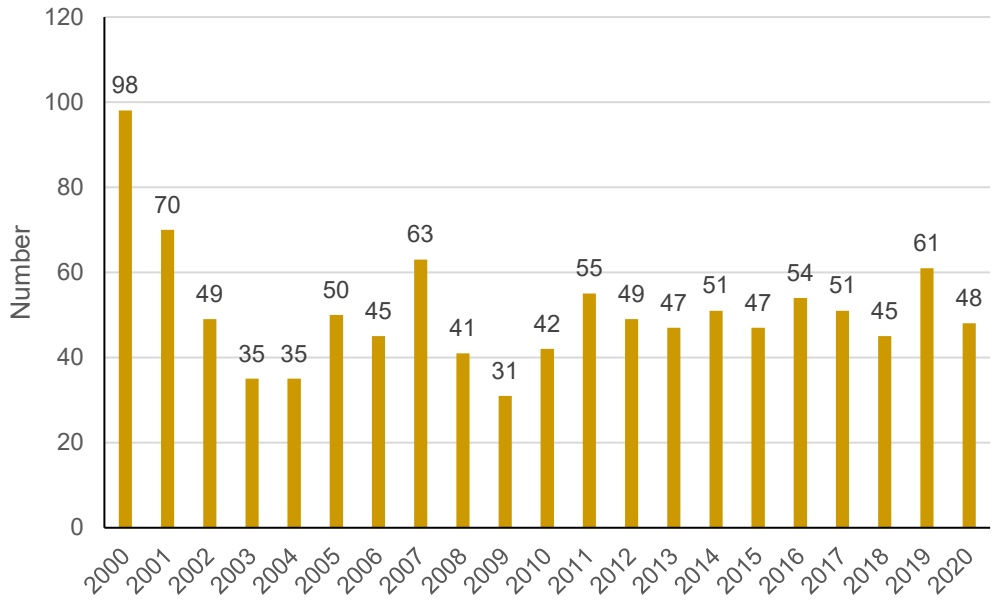
- The HSR Act authorizes investigating agency to issue one request for additional information and documentary material (a "second request") during the initial waiting period to each reporting party
- Issuance of a second request extends waiting period until—
  - All parties comply with their respective 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 2020, at App. A.

Total number of second request investigations

- By year since 2000



Source: Fed. Trade Comm'n & U.S. Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year App. A (for FY 2010 and FY 2020).

The 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
  - Covers all company documents, including e-mail and other electronic documents

The second request

- Typically takes 6-16 weeks to comply
  - Can cover 60-120 custodians in large multiproduct deals
    - In the past, the agencies had made meaningful efforts to reduce this number, targeting 30-35 custodians
    - BUT often condition this on a “timing agreement” and other commitments
    - Today, the agencies are making second requests more onerous to dissuade companies from doing problematic deals
  - 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
  - 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
    - Typically includes the 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
  - Attendance 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
  - Adverse 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
    - *Exception*: In open market transactions, timing depends only on when the acquiring person complies (to avoid delaying tactics by the target in hostile transactions)
  - Ends 30 calendar days later
    - 10 days in a cash tender offer
- The final waiting period is often too short to complete the investigation 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
  - *Conclusion*: The final waiting period provides too little time for the agency to make an informed decision

Timing agreements

- Timing agreements in second request investigations
  - The merging parties can—and typically do—voluntarily commit to give the agency additional time to complete the investigation by executing a contractual timing agreement
    - Commits the parties not to close the transaction for some period of time after the expiration of the HSR Act waiting period
    - Usually in the parties' interest, since the agency will sue to block the transaction if it cannot complete its analysis
      - Provides additional time for agency to complete investigation
      - May be necessary to complete meetings to enable the merging parties to make their arguments
      - Usually better than being sued!
        - The investigating agency will sue to block the transaction if it cannot complete its analysis before the transaction closes
      - May be necessary if a consent decree is being negotiated
  - Typical commitment: An additional 30-60 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

The End of the Investigation

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

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

- Historically, the typical resolution for problematic mergers
- DOJ: Consent decree entered by federal district court
- FTC: Consent order entered by FTC in administrative proceeding

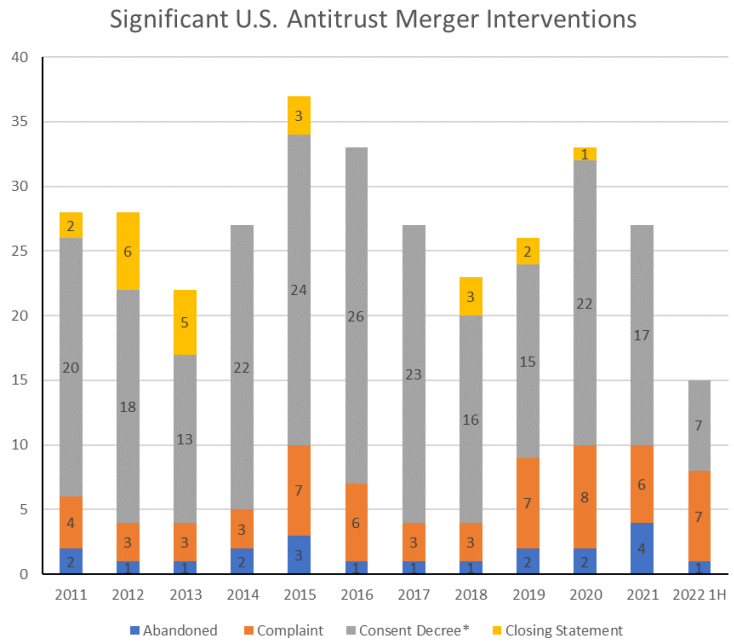
Parties terminate transaction

- 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

"Fix it first"

- Merging parties restructure transaction to eliminate problematic overlap by narrowing assets to be purchased or selling assets to a third party
- Merging parties file new HSR notifications for the restructured transaction
  - HSR reports also may need to be filed for the restructured transaction
- When done to the agency's satisfaction, eliminates the need for a consent decree or other enforcement act

U.S. antitrust merger intervention outcomes



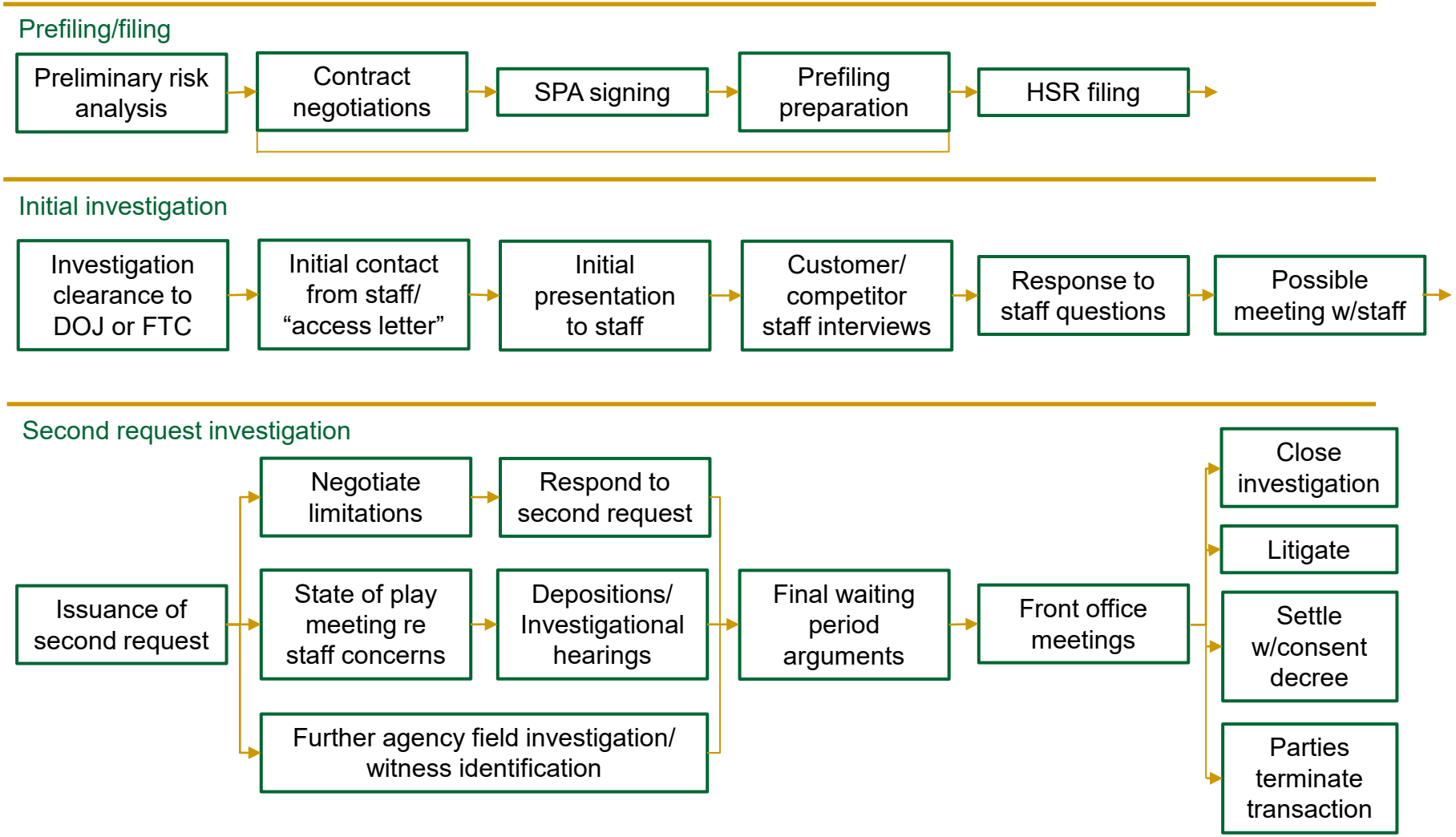
Year	Abandoned	Complaint	Consent Decree*	Closing Statement	Total
2011	2	4	20	2	28
2012	1	3	18	6	28
2013	1	3	13	5	22
2014	2	3	22		27
2015	3	7	24	3	37
2016	1	6	26		33
2017	1	3	23		27
2018	1	3	16	3	23
2019	2	7	15	2	26
2020	2	8	22	1	33
2021	4	6	17		27
2022 1H	1	7	7		15

* Includes two "fix it first" resolutions in 2012

Source: Dechert LLP, DAMITT Q2 2022: Is Merger Enforcement Taking a Conservative Turn? (July 26, 2022); Dechert LLP, DAMITT 2018 Year in Review (Jan. 24, 2019). Dechert declines a "significant" investigation as one that involves a deal that is HSR reportable for which the result of the investigation is a consent order, a complaint challenging the transaction, an official closing statement by the reviewing antitrust agency, or the abandonment of the transaction with the antitrust agency issuing a press release. It does not include an indepth second request investigation in which the agency concludes there is no antitrust concern, so in this sense a significant investigation is the same as an intervention outcome. Dechert calculates the duration of an investigation from the date of announcement to the completion of the investigation (presumably including any time necessary to negotiate a consent decree).

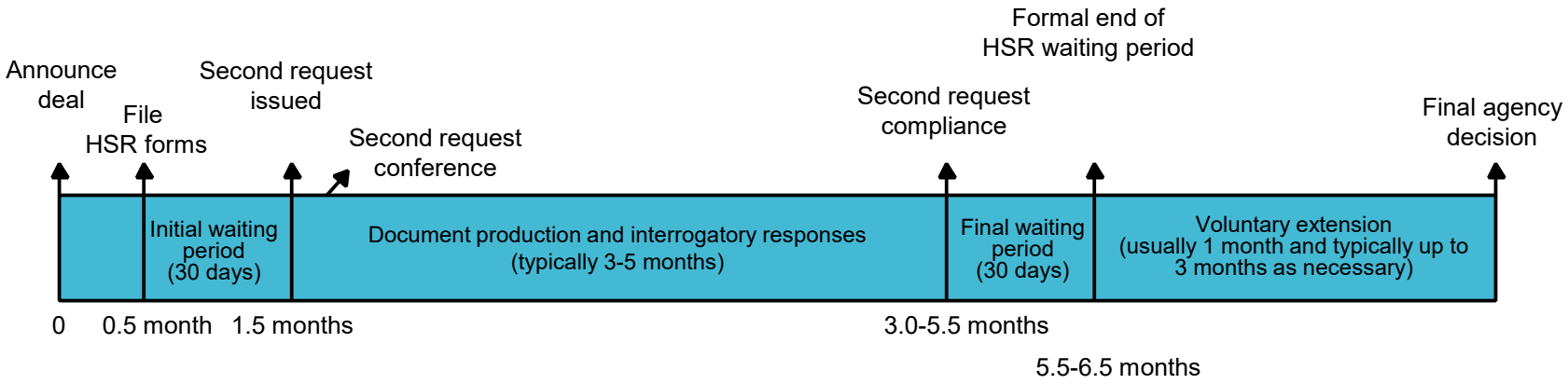
The HSR Review Process: A Summary

The HSR review process



The 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)