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Unit 4.

# The DOJ/FTC Merger Review Process

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# Topics

- The HSR Act
- Overview of the HSR merger review process
- Premerger notification
- Initial waiting period investigations
- Second request investigations
- DOJ/FTC merger review outcomes

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# The HSR Act

# HSR Act

## ■ Hart-Scott-Rodino Act<sup>1</sup>

- Enacted in 1976 and implemented in 1978
- Applies to large mergers, acquisitions and joint ventures
- Imposes reporting and waiting period requirements on the merging parties
  1. Preclosing reporting to both DOJ and FTC by each transacting party
  2. Post-filing waiting period before parties can consummate transaction
- Authorizes the investigating agency to obtain additional information and documents from parties during the waiting period through a “second request”
- Designed to alert the 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 an 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 an HSR merger review—no immunity attaches to a transaction that has successfully gone through an HSR merger review without an agency challenge

<sup>1</sup> 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<sup>1</sup>
- 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 substantive merger reviews under the HSR Act between the DOJ and FTC<sup>2</sup>
- Once a transaction has been “cleared” to an agency for review, the matter is sent to the appropriate investigating section for review, investigation, and possible challenge

<sup>1</sup> 16 C.F.R. pts 801-803. 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).

<sup>2</sup> Discussed below.

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# Overview: The HSR Review Process

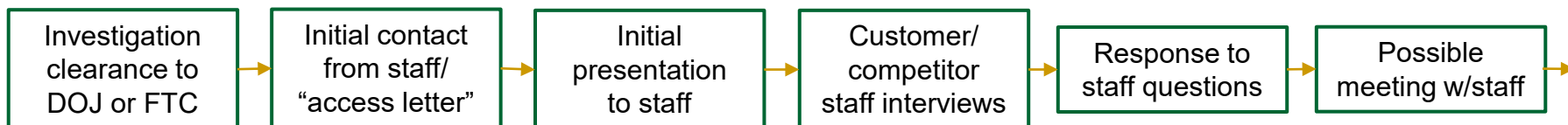
# The HSR review process

## Prefiling/filing

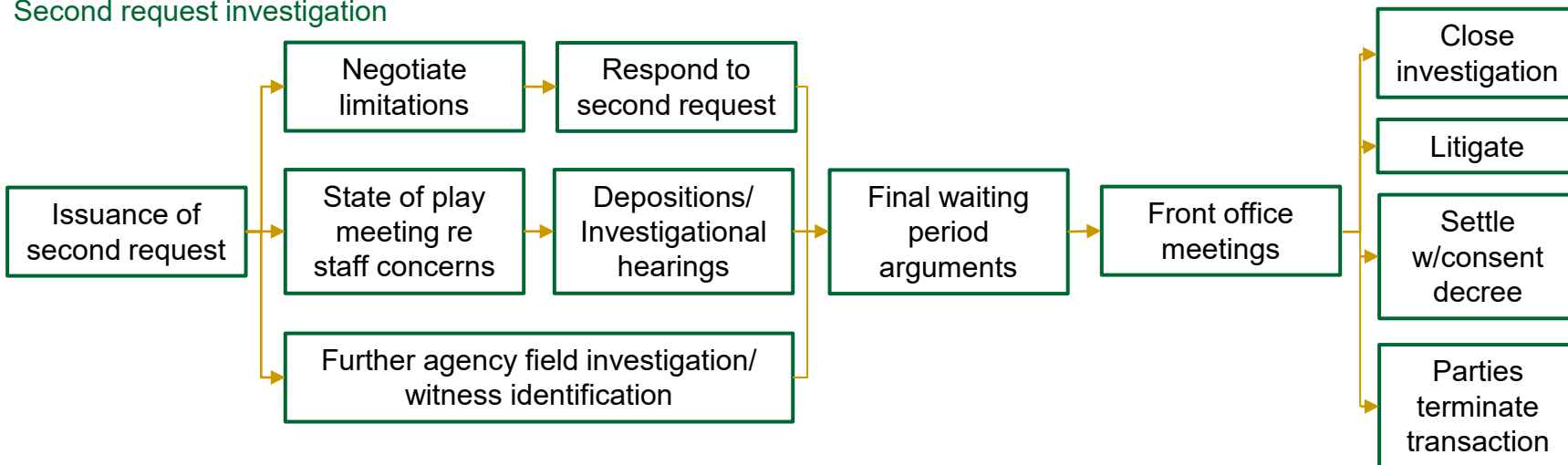


Addressed in Class 8

## Initial investigation

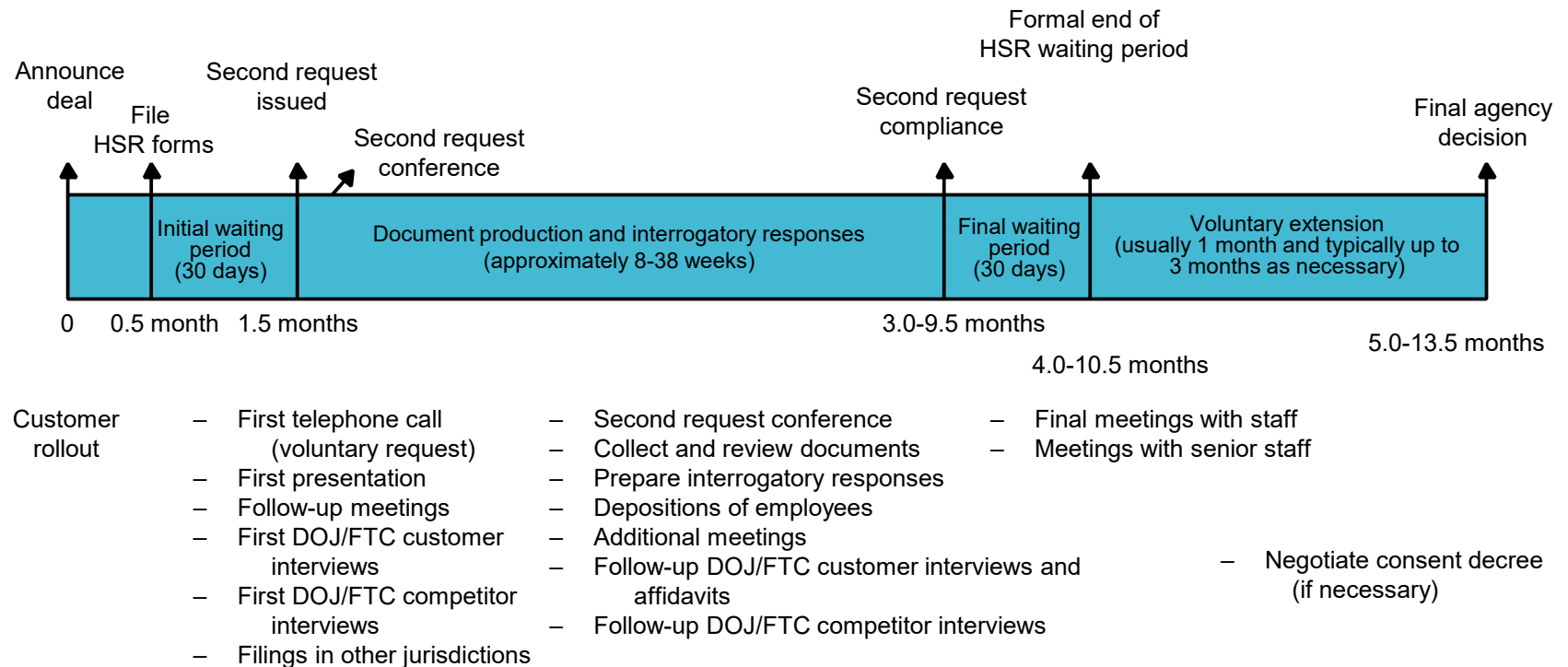


## Second request investigation



# The HSR Act review process

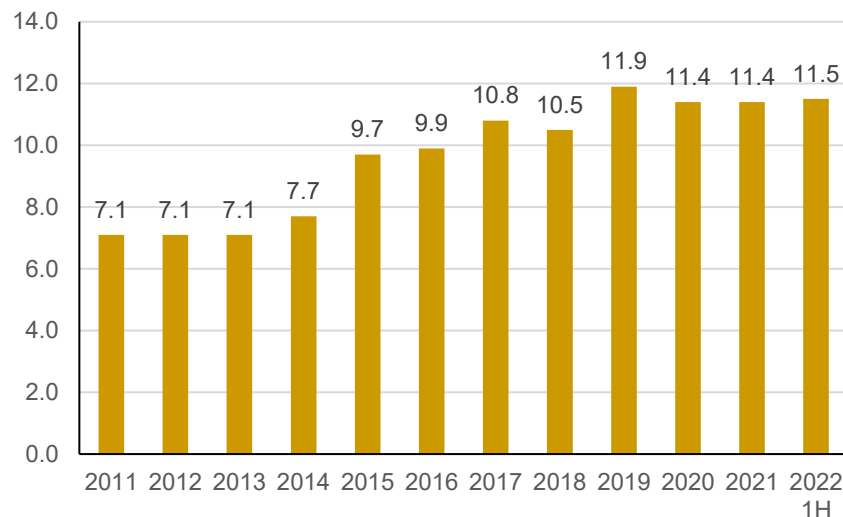
## ■ Typical domestic transaction





# The HSR Act review process

Average Duration of Significant Antitrust Merger Investigations (in months)



Average Duration by Presidential Administration

	Investigations	Average Duration
Obama 2011-2012	56	7.1
Obama (2d term) 2013-2016	119	8.8
Trump 2017-2020	109	11.2
Biden 2021-2022 1H	42	11.4

Source: Dechert LLP, [DAMITT 2021 Report: Merger Investigation Activity Sinks More Deals](#) (Jan. 31, 2022); Dechert LLP, [DAMITT 2016 Year in Review](#) (Jan. 2017). DAMITT is the Dechert Antitrust Merger Investigation Timing Tracker. Dechert defines 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 but issues no closing statement. Dechert calculates the duration of an investigation from the date of deal announcement to the completion of the investigation (presumably including any time necessary to negotiate a consent decree).

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# HSR Act Reportability

# 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 . . . .<sup>1</sup>

## ■ A reportable transaction is one that—

- Involves the acquisition of voting securities or assets
- Satisfies the thresholds for prima facie reportability<sup>2</sup>
- Does not fall into one of the exemptions provided by the HSR Act or implemented by the HSR Rules

## ■ Thresholds are adjusted annually for inflation

- Beginning in FY 2005, the reporting thresholds are adjusted annually 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.

<sup>1</sup> 15 U.S.C.18a(a).

<sup>2</sup> 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”<sup>1</sup>
- Assets
  - No special definition
  - The acquisition of a 50% or greater ownership interest in a noncorporate entity (such as a partnership or LLC) is treated as an acquisition of the entity’s underlying assets
  - An exclusive license is regarded as an asset

<sup>1</sup> 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 formally closed, Company A is influencing the operational management decisions of Company B. Given this influence, the agencies will view Company A as having obtained a beneficial interest in Company B and hence acquired Company B for HSR Act purposes.

<sup>1</sup> 16 C.F.R. § 801.1(f)(1)(i).

# Prima facie reportability<sup>1</sup>

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  <table style="width: 100%; border: none;"> <tr> <td style="text-align: center;"><i>Acquiring person</i></td> <td style="text-align: center;">Size of person test</td> <td style="text-align: center;"><i>Acquired person</i></td> </tr> <tr> <td style="text-align: center;">\$202.0 million (in total assets or annual net sales)</td> <td style="text-align: center;">and</td> <td style="text-align: center;">\$20.2 million (in total assets or annual net sales of a person engaged in manufacturing)</td> </tr> <tr> <td style="text-align: center;"><i>Or</i></td> <td></td> <td></td> </tr> <tr> <td style="text-align: center;">\$202.0 million (in total assets or annual net sales)</td> <td style="text-align: center;">and</td> <td style="text-align: center;">\$20.2 million (in total assets of a person not engaged in manufacturing)</td> </tr> <tr> <td style="text-align: center;"><i>Or</i></td> <td></td> <td></td> </tr> <tr> <td style="text-align: center;">\$20.2 million (in total assets or annual net sales)</td> <td style="text-align: center;">and</td> <td style="text-align: center;">\$202.0 million (in total assets or annual net sales)</td> </tr> </table>	<i>Acquiring person</i>	Size of person test	<i>Acquired person</i>	\$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)	<i>Or</i>			\$202.0 million (in total assets or annual net sales)	and	\$20.2 million (in total assets of a person not engaged in manufacturing)	<i>Or</i>			\$20.2 million (in total assets or annual net sales)	and	\$202.0 million (in total assets or annual net sales)
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<i>Or</i>																			
\$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.

<sup>1</sup> 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

- Measuring 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 noncorporate interests to be acquired + value of interests
  - Acquisition must also confer “control” over the acquired person
    - For HSR Act purposes, “control” is defined as the right to 50% or more of the entity’s profits and/or 50% or more of the entity’s assets upon dissolution

# Selected exemptions

- **Intraperson**
  - Acquiring 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) negates the exemption
- **Convertible voting securities**
  - Acquired securities have no present voting rights
  - BUT conversion into a voting security is treated as an acquisition of the voting security
- **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**
  - 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 \$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 <sup>1</sup>
\$101.0 million
\$202.0 million
\$1.0098 million
25% of the voting securities if their value exceeds \$2.0196 billion
50% of the voting securities if their value exceeds \$101.0 million

<sup>1</sup> See Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 87 Fed. Reg. 3541 (Jan. 24, 2022) (effective Feb. 23, 2022).

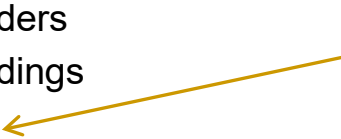
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# Premerger Notification

# HSR Act filing

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

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 response to a second request
    - Agencies have required parties to refile and go through the entire process (including a second second request) when missing 4(c) or 4(d) documents are discovered
  - Also, civil penalties (fines) for closing a transaction without observing the applicable waiting period

# Filing fees

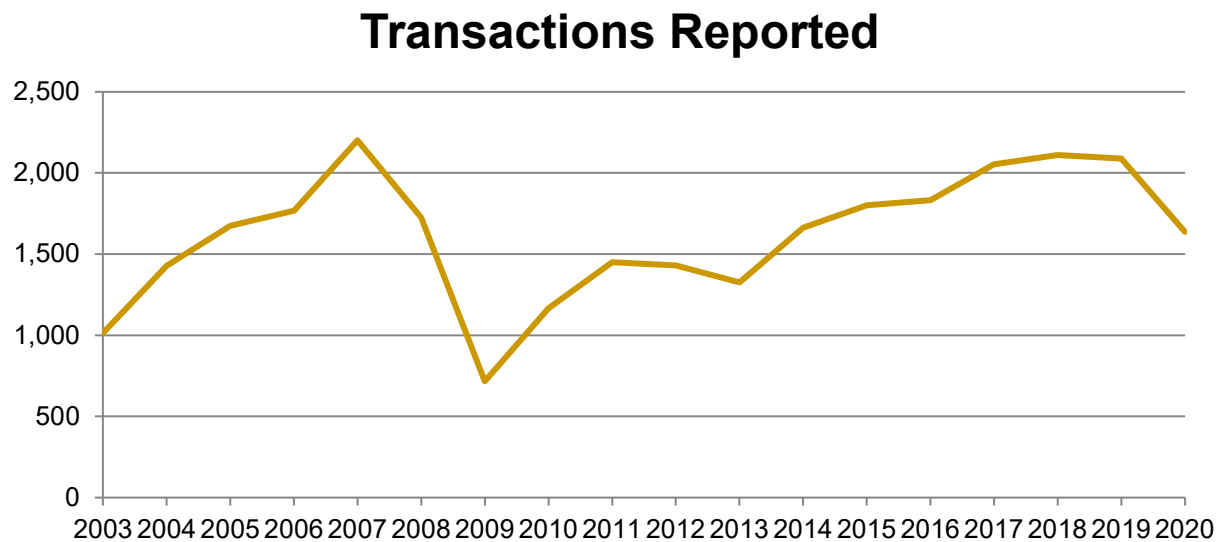
Value of Transaction <sup>1</sup>	Filing Fee
≤ \$101.0 million	No filing required
> \$101.0 million but < \$202.0 million	\$45,000
≥ \$202.0 million but < \$1.0098 billion	\$125,000
≥ \$1.0098 billion	\$280,000

## ■ Observations

- Although both parties have to file, the HSR filing fee is assessed on the acquiring person's filing
- Typically, the merging parties each pay their own expenses, so the acquiring person pays the filing fee
  - But the parties can and sometimes do agree on a different arrangement (e.g., split the fee)

<sup>1</sup> See Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 87 Fed. Reg. 3541 (Jan. 24, 2022) (effective Feb. 23, 2022).

# 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 rule

- 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 the bankruptcy code

## ■ Extended waiting period

- Waiting period extended by the issuance of a second request in the 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<sup>1</sup>

<sup>1</sup> Citing an overload of HSR filings, the FTC and DOJ suspended the practice of granting early termination of the initial waiting period in early 2021. See Press Release, Fed. Trade Comm'n, [FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination](#) (Feb. 4, 2021).

# 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<sup>1</sup>
- The HSR regulations provide that a person holds (acquires) voting securities or assets when it has a “beneficial interest” in them<sup>2</sup>

## ■ 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 an 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

- \$46,517 per day for every day of the violation—Equals \$17.0 million per year<sup>3</sup>

<sup>1</sup> 15 U.S.C. § 18a(a).

<sup>2</sup> 16 C.F.R. § 801.1(c).

<sup>3</sup> 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)).



# Failure to file

## ■ Violation

- ❑ Failing to file an HSR report and observe the waiting period requirements in a reportable transaction

## ■ Scenarios

### 1. Failure to file at all

- Intentional failure to file
- Inadvertent failure to file
- Improper invocation of an exemption (usually the investment exception)

### 2. 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 material degree of management influence on the current (preclosing) operations of the target
  - Especially decisions regarding how to compete in the marketplace
- 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 \$46,517 per day (in 2022)
  - 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

# Some recent HSR Act enforcement actions

Year	Acquirer	Target	Violation	Reason	Disposition	% of Max
2021	Clarence L. Werner	Werner Enterprises	Failure to file	Inadvertent	\$486,900	0.46%
2021	Biglari Holdings	Cracker Barrel	Failure to file	Inadvertent	\$1,400,000	25.9%
2021	Richard Fairbank	Capital One	Failure to file	Inadvertent	\$637,950	2.3%
2019	Third Point	Dow	Failure to file	Inadvertent	\$609,810	15.2%
2019	Canon	Toshiba Medical	Gun jumping		\$2,500,000 (each party)	39.3%
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	7.6%
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%

# HSR Act enforcement actions

## ■ Factoids

- 68 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 – January 13, 2020: \$42,530 per day
  - January 14, 2020 – January 12, 2021: \$43,280 per day
  - January 13, 2021 to January 9, 2022: \$43,792 per day
  - January 10, 2022 to present: \$45,517 per day

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# Initial Waiting Period Investigations

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# Preliminaries

- The 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 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” process

- The DOJ and FTC jointly decide which, if either, of the agencies will review the reported merger (“clearance”)
  - There is a “liaison agreement” between DOJ and FTC to prevent duplicative investigations
    - If neither the DOJ nor FTC want to open a preliminary investigation—PNO grants early termination of the waiting period
    - If either the DOJ or FTC (but not both) want to open a preliminary investigation—Requesting agency gets clearance to open investigation
    - If both the 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 a 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—
    - Most recent strategic, marketing and business plans
    - Internal and external market research reports for the last three 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)<sup>1</sup>

The request is usually made orally in the first telephone call from the staff and then often followed in writing in what is called a *voluntary access letter* or (equivalently) *voluntary request letter*
  3. Invite the parties to make a presentation to the staff on the competitive merits of the transaction

<sup>1</sup> The agencies do not ask for customer lists in transactions involving consumer goods sold in retail stores, because the agencies believe that retail customers lack the knowledge and sophistication to make good predictions about the competitive effect of the merger.



# Initial merits presentation

- Critical to do completely, coherently, and quickly
  - Often a significant “first mover” advantage to being the first to give the staff a systematic, coherent 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 staff questions, prepare responses, and answer staff questions in the meeting
  - Need to be 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 see in the company documents and hear from customers
    - Staff is strongly biased toward accepting customer view in the event of an inconsistency
  - Need to do the presentation quickly—so it needs to be prepared in advance
    - By the time of the initial call from the investigating staff, usually about 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)
  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 for 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 customer benefits implied by the business model
    - Customers will be better off with the transaction than without it
    - Agencies give little or no 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)
    - NB: Critical that customers confirm that the “alternatives” are in fact realistic suppliers

# Customer/competitor interviews by staff

- Will occupy the bulk of the remaining time in the initial investigation
- The investigating agency will give great weight to customer views
  - *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
    - For example, the CEO of a customer may take a broader and more nuanced view of the transaction than a procurement manager who only sees the loss of an independent supplier
- Competitor conclusions are given little weight
  - *Theory:* Anticompetitive transactions are likely to benefit competitors by raising market prices, so competitor complaints are more likely the result of concerns about procompetitive efficiencies than anticompetitive effect—and the agencies know this
  - 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

1. Close the investigation
2. Issue a second request

### ■ Most important factors (in horizontal transactions)—

- ❑ Incriminating company documents
- ❑ Significant customer complaints
- ❑ Four or fewer competitors postmerger for horizontal transactions (5→ 4 deals)
- ❑ Merging parties are uniquely close competitors to one another (“unilateral effects”)
- ❑ Merger eliminates a disruptive firm (a “maverick”)
- ❑ Obvious significant foreclosure possibilities (for vertical transactions)

NB1: Any one of these factors can be sufficient to trigger a second request investigation

NB2: The workload of the staff can also be a consideration. There are recent transactions where the staff recommended a second request be issued but was overruled by the front office because of resource constraints

### ■ 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

# “Pull and refile”

## ■ The idea

- In some circumstances, the investigating agency may indicate that it may be in the parties’ interest to “pull and refile” their HSR reports
  - Typically, this occurs when the investigating staff has not been able to complete its initial field investigation (especially its customer interviews) but believes given the investigation to date the transaction does not present any antitrust concerns
    - WDC: In my experience, the investigating staff takes suggestions of a “pull and refile” serious—they will not suggest it unless they believe that they can complete the investigation in the extended time period without the need to issue a second request
  - The benefit to the staff is that it does not have to expend the time and effort to prepare a second request, which it otherwise would have to do to continue the investigation under an extended waiting period
- What the agency wants is a few more weeks to complete its initial investigation and hopefully close the investigation without a second request
- *The problem:* The waiting periods under the HSR Act are statutory and hence cannot be extended even if the merging parties want to give the staff more time
- *The solution:*
  - The acquiring person “pulls” (withdraws) its HSR filing for the transaction, returning the transaction to its status before any HSR report was filed
  - Shortly thereafter, the acquiring person refiles (resubmits) an updated HSR report for the transaction, which starts a new HSR initial waiting period (usually 30 calendar days) and gives the staff a new initial waiting period to complete its investigation

# “Pull and refile”

- The mechanics<sup>1</sup>
  - The acquiring person withdraws (“pulls”) its HSR report for a reportable transaction prior to the expiration or early termination of the waiting period and prior to the issuance of a second request
    - Technically, the acquiring person must submit a written request to the FTC PNO to withdraw the filing and state its intention to refile
    - This means there is no HSR filing for the transaction and no waiting period running
  - Within two business days of the withdrawal, the acquiring person resubmits (refiles”) its HSR report updated with any new data, any new 4(c) and 4(d) documents), and a new certification and affidavit
    - The refiling starts a new initial waiting period (usually 30 calendar days)
  - The acquiring party does not have to pay a new filing fee with the refiling of a withdrawn report if—
    - The transaction does not materially change from the one reported in the original filing, and
    - The parties follow the above procedures

NB: The filing fee is waived only for the first “pull and refile” in a transaction

- The agency often grants early termination in the middle of the new initial waiting period<sup>1</sup>

<sup>1</sup> See *Premerger Notification Office*, Fed. Trade Comm’n, [Tips on Withdrawing and Refiling an HSR Premerger Notification Filing](#) (updated September 15, 2017)

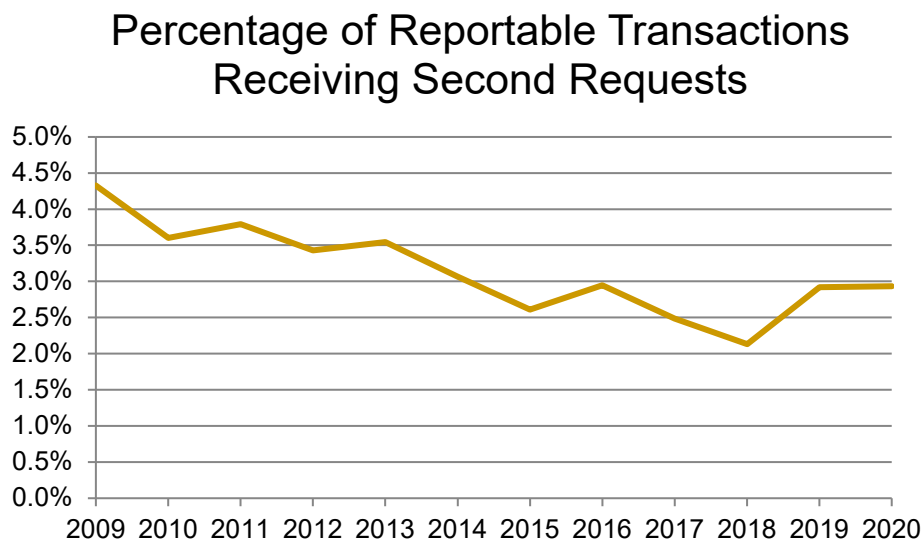
<sup>2</sup> The FTC and DOJ suspended the practice of granting early termination of the initial waiting period. See Press Release, Fed. Trade Comm’n, [FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination](#) (Feb. 4, 2021).

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# 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 the waiting period until—
  - All parties comply with their respective second requests, *and*
  - Observe a final waiting period (usually 30 days) following compliance

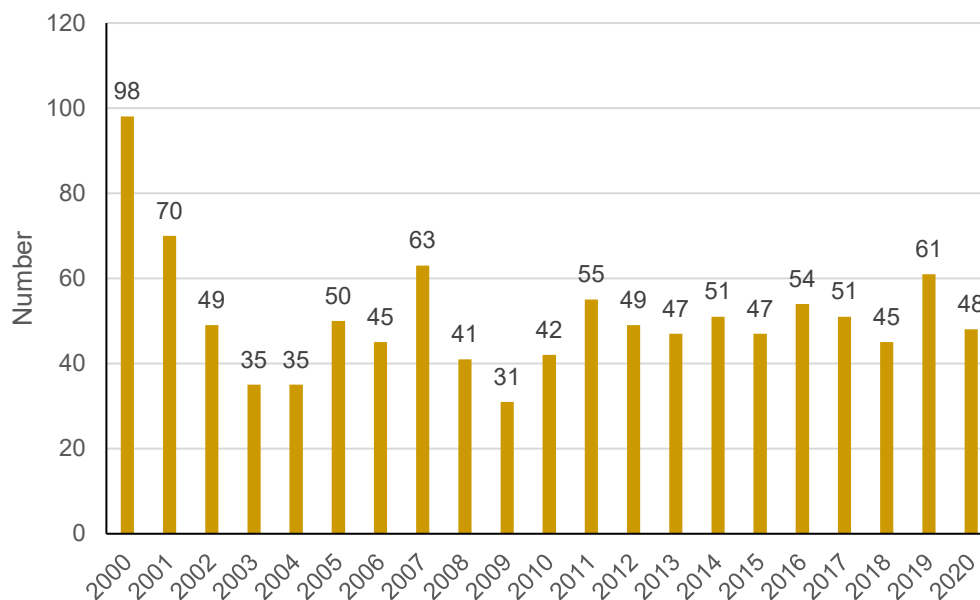


Source: Fed. Trade Comm'n & U.S. Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2020, at App. A.



# 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).

# Second request investigations

**TABLE I  
FISCAL YEAR 2020<sup>1</sup>  
ACQUISITIONS BY SIZE OF TRANSACTION (BY SIZE RANGE)<sup>2</sup>**

TRANSACTION RANGE (SMILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS <sup>3</sup>				
	NUMBER <sup>4</sup>	PERCENT	NUMBER		PERCENT OF TRANSACTION RANGE GROUP			NUMBER		PERCENT OF TRANSACTION RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
50M - 100M	27	1.7%	1	0	3.7%	0.0%	3.7%	0	0	0.0%	0.0%	0.0%
100M - 150M	250	15.8%	17	4	6.8%	1.6%	8.4%	3	0	1.2%	0.0%	1.2%
150M - 200M	269	17.0%	13	3	4.8%	1.1%	5.9%	3	2	1.1%	0.7%	1.9%
200M - 300M	190	12.0%	14	4	7.4%	2.1%	9.5%	4	1	2.1%	0.5%	2.6%
300M - 500M	210	13.3%	9	12	4.3%	5.7%	10.0%	1	4	0.5%	1.9%	2.4%
500M - 1000M	400	25.3%	25	19	6.3%	4.8%	11.0%	7	8	1.8%	2.0%	3.8%
Over 1000M	234	14.8%	27	21	11.5%	9.0%	20.5%	5	10	2.1%	4.3%	6.4%
<i>ALL TRANSACTIONS</i>	1,580	100.0%	106	63	6.7%	4.0%	10.7%	23	25	1.5%	1.6%	3.0%

Source: Fed. Trade Comm'n & U.S. Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2020, 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 customize them with additional specifications for each transaction
    - Covers e-mail and other electronic documents as well as hard copy materials
  - Typically takes 6-20 weeks to comply (but some companies take much longer)
    - Often covers 60-120 custodians
    - 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
    - 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)
  - Location: Typically Washington, D.C.
  - Can be compelled
    - Civil Investigative Demand (CID) by the DOJ
    - Subpoena by the FTC
  - Transcribed and under oath (sometimes videotaped)
  - 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
    - In investigations where litigation is likely, the agency typically also retains outside experts

# 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

*An investigation that cannot reasonably be completed in the time available is detrimental to the parties: If the agency has serious concerns when times runs out, it will initiate litigation and continue the investigation in postcomplaint discovery*

# Timing agreements

- “Timing agreements”
  - Concept
    - Contractual commitments by the merging parties not to close the transaction for a period of time after the expiration of the HSR Act waiting period
  - Agencies like to negotiate timing agreements early in a second request investigation so that they know how much time they have before the deal can close to complete their investigation
  - Typically will accept 60 days beyond the normal expiration of the waiting period
    - 30 days for the staff (making a total of 60 days for the staff after second request compliance)
    - 30 days for the front office
  - Parties typically agree to a timing agreement—but negotiate the duration
    - Provides additional time for the agency to complete its investigation
    - May be necessary to complete meetings to enable the merging parties to make their arguments before senior agency management and the AAG/Commissioners
      - In the absence of a timing agreement, 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 or having meetings to hear 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
    - Almost surely will be necessary if the merging parties want to negotiate a consent settlement

# Timing agreements

- A timing agreement does not technically extend the HSR Act waiting period
  - Surprisingly, many members of the bar (and some attorneys in the enforcement agencies) believe that the parties can voluntarily “extend” the HSR Act waiting period
  - The FTC Premerger Notification Office’s position, on advice from the FTC General Counsel, 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
  - Timing agreements are enforceable in court through contract or detrimental reliance, not as a violation of the HSR Act
    - I am unaware of any instance where the parties have breached a timing agreement and there are no enforcement precedents
    - However, there is little doubt that a court faced with a breach would summarily enforce the timing agreement through an injunction for specific performance
  - The fact that a timing agreement does not extend the HSR Act waiting period has significant implications for “gun-jumping” violations, which cannot occur after the waiting period has ended

# The final arguments

- Four formal meetings at the end of the investigation

	DOJ	FTC
Meeting 1	Investigating staff	Investigating staff
Meeting 2	Section Chief & staff	Assistant Director & staff
Meeting 3	Deputy Assistant Attorneys General (legal and economics)	Directors meeting (Bureau of Competition/ Bureau of Economics)
Meeting 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 so they can address them at the meetings?



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# 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

- 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

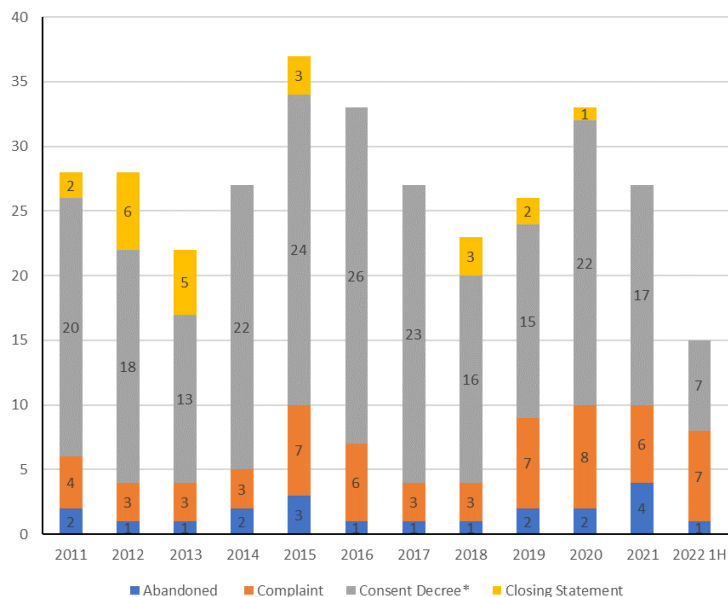
- Parties will not settle at the agency's ask and will not litigate, or
- Agency concludes that no settlement will resolve the agency's concerns and the parties will not litigate
  - Examples: AT&T/T-Mobile, NASDAQ/NYSE Euronext

"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

Significant U.S. Antitrust Merger Interventions



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	0	27
2015	3	7	24	3	37
2016	1	6	26	0	33
2017	1	3	23	0	27
2018	1	3	16	3	23
2019	2	7	15	2	26
2020	2	8	22	1	33
2021	4	6	17	0	27
2022 1H	1	7	7	0	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 defines 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 in-depth 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).