CLASS 4 SLIDES

Unit 4. The DOJ/FTC Merger Review Process

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September 7, 2023

Topics

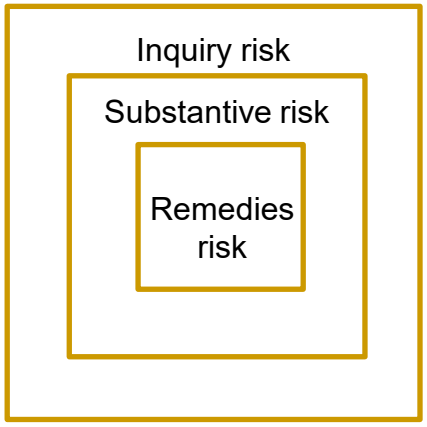
- Inquiry risk: HSR Act merger reviews
- Premerger notification
- Preparing for an investigation
- Initial waiting period investigations
- Second request investigations
- DOJ/FTC merger review outcomes

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—the FTC has no power to issue interim relief
- *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 reasonably well-funded
  - Have the benefit of the HSR Act—
    - Premerger reporting
    - Waiting period before the merger can be consummated
    - Precomplaint investigation tools (second requests, CIDs)
  - Have litigation experience (and young attorneys eager to litigate)
  - 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?

The meaning of beneficial interest has not been litigated

[1] 16 C.F.R. § 801.1(f)(1)(i).

Prima facie reportability[1]

Size of transaction*	Prima Facie Reportability		
Up to and including $111.4 million	Not reportable		
Above $111.4 million up to and including $445.5 million	Reportable if : (1) satisfies the "size of person" test, and (2) no exemption applies	Size of person test	
	Acquiring person		*Acquired person*
	$222.7 million (in total assets or annual net sales)	and	$22.3 million (in total assets or annual net sales of a person engaged in manufacturing)
	Or		
	$222.7 million (in total assets or annual net sales)	and	$22.3 million (in total assets of a person not engaged in manufacturing)
	Or		
	$22.3 million (in total assets or annual net sales)	and	$222.7 million (in total assets or annual net sales)
In excess of $445.5 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, 88 Fed. Reg. 5004 (Jan. 26, 2023) (effective Feb. 27, 2023).

Prima facie reportability

- Simple rule

> If the acquiring person will hold ***$111.4 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***
- NB: Every year the dollar threshold will be adjusted for inflation
  - So in 2024, the threshold number is likely to be higher

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) voids exemption
- Acquisitions of non-U.S. assets
  - Must not generate sales in or into the U.S. of more than $111.4 million
- Acquisitions of non-U.S. voting securities by U.S. persons
  - Issuer does not have assets in the U.S. or sales in or into the U.S. over $111.4 million
- Acquisitions of non-U.S. voting securities by non-U.S. persons that either
  - Do not confer control over the target, or
  - Do not involve assets in the U.S. or sales in or into the U.S. over $111.4 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]
$111.4 million
$222.7 million
$1.1137 million
25% of the voting securities if their value exceeds $2.2274 billion
50% of the voting securities if their value exceeds $111.4 million

[1] *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 88 Fed. Reg. 5004 (Jan. 26, 2023) (effective Feb. 27, 2023).

Filing fees

Some very large changes over the prior year

2022[1]		**2023**[2]	
Value of Transaction[1]	Filing Fee	Value of Transaction[1]	**Filing Fee**
≤ $101.0 million	No filing required	>111.4 million -161,4 million	$30,000
> $101.0 million but < $202.0 million	$45,000	161.5 million - $4999,9 million	$100,000
≥ $202.0 million but < $1.0098 billion	$125,000	$500,000 - $999.9 million	$250,000
≥ $1.0098 billion	$280,000	$1 billion - $1.9 billion	$400,000
		$2 billion - $4.9 billion	$800,000
		$5 billion or more	$2.25 million

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

[1] *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 87 Fed. Reg. 3541 (Jan. 24, 2022) (effective Feb. 23, 2022).
[2] *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 88 Fed. Reg. 5004 (Jan. 26, 2023) (effective Feb. 27, 2023). Congress changed the baseline of the filing fees in the Merger Filing Fee Modernization Act of 2022, contained in the Consolidated Appropriations Act of 2023, Public Law 117-328, Div. GG, 136 Stat. 4459, ____ (Dec. 29, 2022).

HSR Act filing

The FTC has proposed rule changes that, if finalized, would significantly change the nature and amount of information a filing person would be required to submit in an HSR premerger notification.[1]

We will examine first the existing HSR notification regime and at the end of class examine how the proposed rules would change it.

The final rules are likely to be issued in 2024 Q1 with a delayed effective date. The final rules almost surely will be challenged in court as beyond the FTC's authority to promulgate.

[1] *See* Fed. Trade Comm'n, Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42178 (June 29, 2023) (to be codified at 16 C.F.R. Pts. 801-803); Press Release, Fed. Trade Comm'n, FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review (June 27, 2023).

HSR Act filing

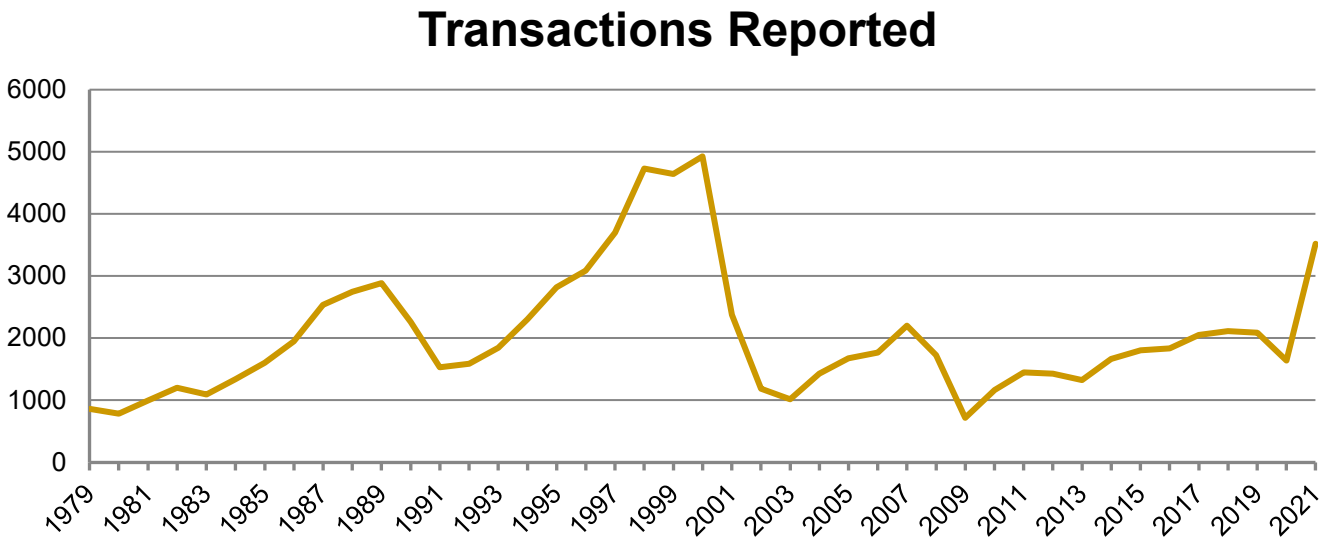
- Uses a prescribed form: Requires no—
  - Market definition
  - Calculation of market shares or market concentration statistics
  - Presentation of any antitrust analysis or defense
- Both the acquiring and acquired persons must submit their own filing
- Key information required:
  1. Transaction documents (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 2021, at App. A, and prior annual reports.

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 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 *final waiting period* of 30 calendar days
      - 10 calendar days in case of a cash tender offer

Early termination

- The investigating agency may grant *early termination* of a waiting period at any time
  - During the initial waiting period
  - Before compliance with the second requests
  - During the final waiting period
- BUT—
  - The Biden enforcement agencies have suspended, whether as a matter of policy or practice, granting early terminations since mid-2021.
  - According to the FTC website, the last early termination was granted on July 21, 2021.[1]

[1] *See* Fed. Trade Comm'n, Legal Library: Early Termination Notices (accessed August 24, 2023).

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
  - In 2023, $50,120 per day for every day of the violation—Equals $18.3 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] 88 Fed. Reg. 1499 (Jan. 11, 2023) (increasing civil penalty from $46,517 to $50,120 per day effective January 11, 2023, 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"

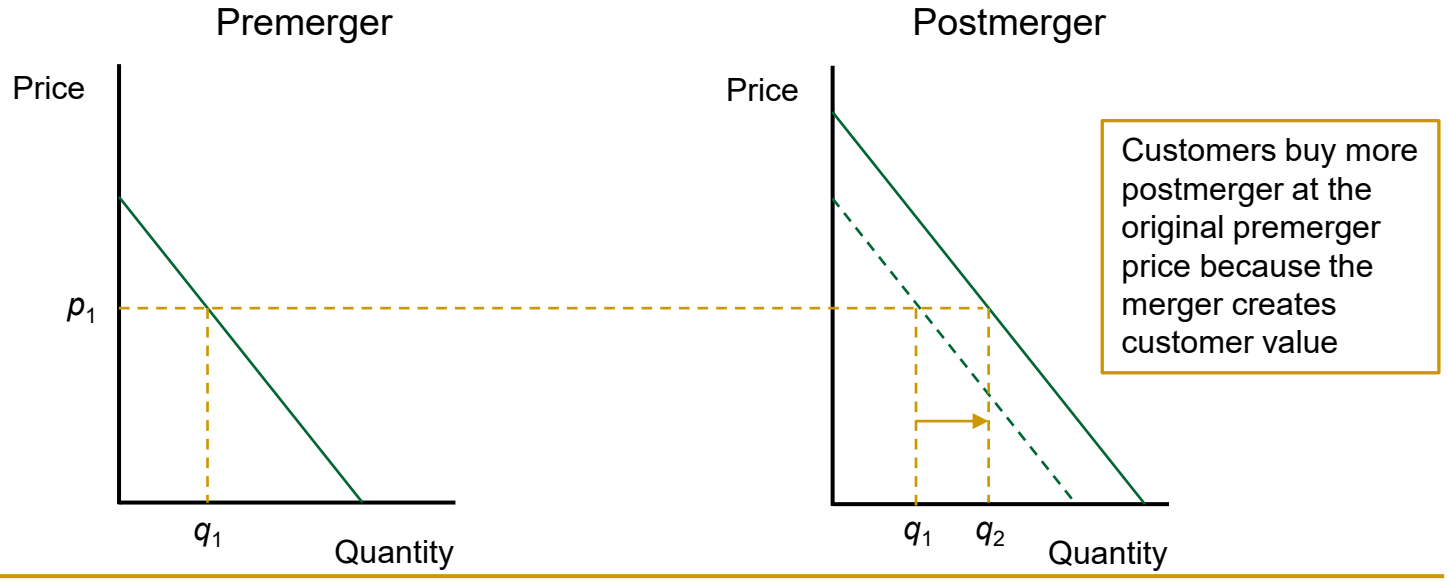
- Which business representative is going to be the most effective in—
  1. Marshalling resources—especially access within the company—to defend the deal?
  2. Leading the defense team within the client?
  3. Working with the merger partner in creating a strong, consistent defense?
  4. Advocating the 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 ("singing from the same song sheet")
  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.*

Aside: Some notes on privilege

- Attorney-client privilege
  - *Rule*: The attorney-client privilege applies to—
    1. A communication
       - Includes verbal exchanges, written correspondence, emails, or any other form of communication
       - The communication may be from the lawyer to the client, from the client to the lawyer, or both
    2. Between an attorney and a client
       - May also encompass agents of either who help facilitate the legal representation
    3. Made in confidence
       - That is, there is an expectation of privacy at the time of the communication, and the communication is not intended to be disclosed to third parties
    4. For the purpose of seeking, obtaining, or providing legal assistance
       - Includes communications from the client containing responses to questions posed by the lawyer
  - *Rule*: The violation of any of these four elements negates the privilege and subjects the communication to discovery
  - *Rule*: The attorney-client privilege shields *communications* from discovery; it does not shield *facts*
    - *Exception*: Facts learned through an attorney-client communication
    - *Possible exception*: Facts learned in collecting information requested by an attorney in order to provide legal advice

      These communications and the underlying facts may also be protected under the work product doctrine

Aside: Some notes on privilege

- The work product doctrine
  - *Ordinary work product*:[1] A party may not discover—
    1. documents and tangible things
    2. that are prepared in anticipation of litigation or for trial
    3. by or for another party or its representative
    4. UNLESS the party shows that it—
       a. has substantial need for the materials to prepare its case and
       b. cannot, without undue hardship, obtain their substantial equivalent by other means
  - *Attorney opinion work product*:[2] The exception does not apply to materials that disclose "the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation"
    - NB: If only a portion of otherwise discoverable material contains attorney opinion work product, the protected attorney opinion work product should be redacted and the rest of the material produced
  - *Rule*: Although the work product doctrine applies only to documents and tangible things, the protection cannot be pierced by inquiring into the content of a protected document without seeking the document itself.[3]

[1] Fed. R. Civ. P. 23(b)(3)(A). Rule 23(b)(3)(A) encapsulates the federal ordinary work product doctrine.
[2] *Id*. 23(b)(3)(B).
[3] *See, e.g.,* Order re Petition to Limit or Quash Subpoenas Ad Testificandum Dated April 24, 2009, File No. 091-0064 (July 21, 2009) (in the FTC's investigation of Thoratec Corp.'s pending acquisition of HeartWare International).

Aside: Some notes on privilege

- The work product doctrine
  - Public policy behind the work product doctrine
    - *Promote adversarial litigation*: Allows attorneys to prepare for litigation without fear that their strategy, theories, mental impressions, or research will be exposed to their adversaries
    - *Preserves the integrity of the legal process*: Ensuring that attorneys can candidly evaluate and prepare their cases without concern that their work will be revealed
    - *Prevents unfair advantage*: Avoids situations where one party can free-ride off the investigatory and preparatory work of another attorney
  - Work product in investigations
    - Although the work product doctrines do not automatically apply to all investigations, they do apply if the investigation provides reasonable grounds for anticipating litigation
    - *The practice*: Almost all merger investigations by the FTC or DOJ provide reasonable grounds for anticipating litigation and hence triggering work product protections

Aside: Some notes on privilege

- The problem
  - Merging parties would like to share and coordinate their initial analysis and defense of the transaction
  - BUT ordinarily doing so would violate the attorney-client confidentiality requirement, negate any attorney-client privilege, and subject the communications to discovery by a second request, CID, or subpoena in an agency investigation or litigation

The solution: *The "common interest" privilege provides an exception to the confidentiality requirement and retains the attorney-client privilege for communications among parties with a common legal interest*

Aside: Some notes on privilege

- The "common interest" privilege
  - *Rule*: When the communication involves—
    - The sharing of privileged information
    - Among parties with a common legal interest

    the communication remains protected by the attorney-client privilege
  - *Rule*: Apart from this exception, all parties must continue to satisfy the elements of the attorney-client privilege for shared communications to preserve the privilege
  - *History*:
    - The common interest privilege originated as the "joint defense" privilege
    - But the courts expanded it to include communications outside of the context of litigation

Aside: Some notes on privilege

- The "common interest" privilege
  - *Agency practice*: Recognizes communications among merging parties to share and coordinate their analysis and defense of the transaction, including the sharing of--
    - Antitrust *analyses* of the transaction in the course of negotiations
    - Antitrust analyses of the transaction during the investigation
    - Strategies to defend the transaction generally
    - Strategies to settle the investigation of the transaction through a consent decree or "fix it first" restructuring
  - *Query*: Do differences in commercial objectives defeat the common interest privilege in negotiating risk-shifting provisions (e.g., the cap on a divestiture commitment)?
    - Although both parties share the common legal interest in defending the transaction against an antitrust challenge—
      - The seller wants the deal to close regardless of the cost to the buyer of any divestiture, while
      - The buyer wants the deal to close if and only if the costs of divestiture are not so high that they destroy the attractiveness of the transaction
    - As far as I am aware, this situation has not been addressed by a court

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 of filings
  - 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 transaction to a 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

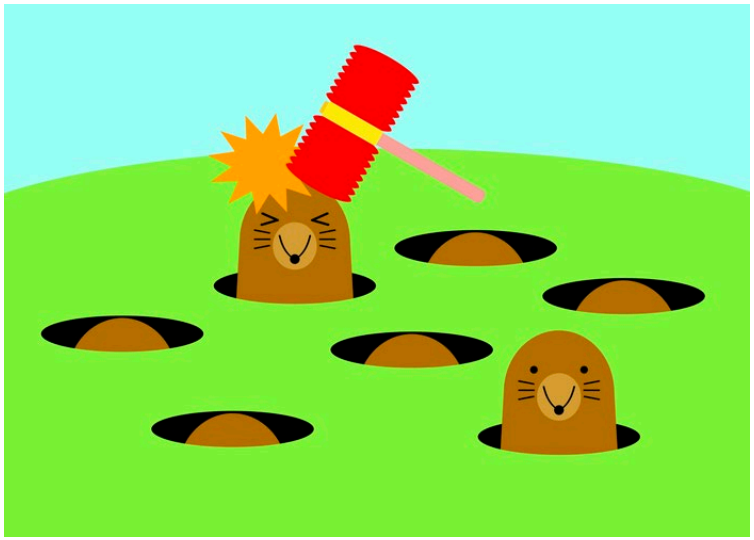
Customer/competitor interviews by staff

- 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

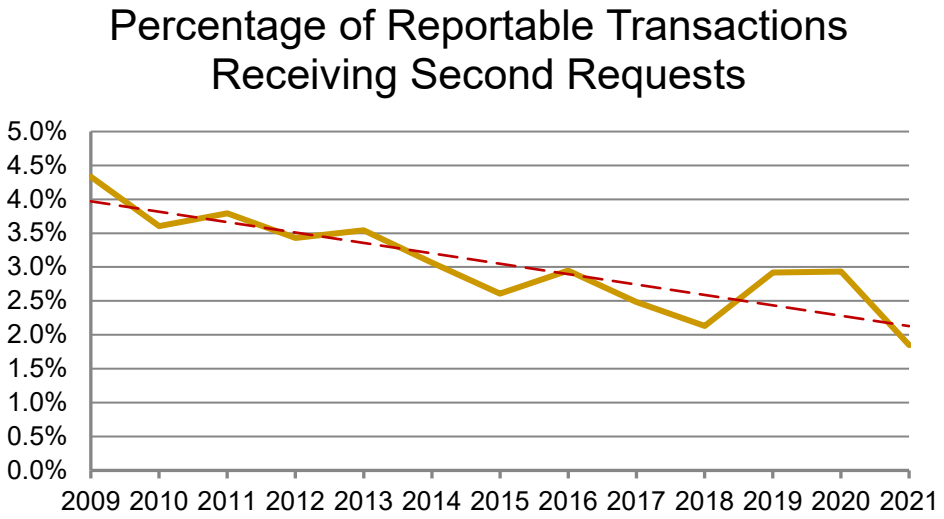
- Three options for the agency
  1. Close the investigation
  2. Issue a second request
     - Most important factors—
       - Incriminating company documents
       - Significant customer complaints
       - Four or less competitors postmerger for horizontal transactions (5 → 4 deals)
         - Maybe 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

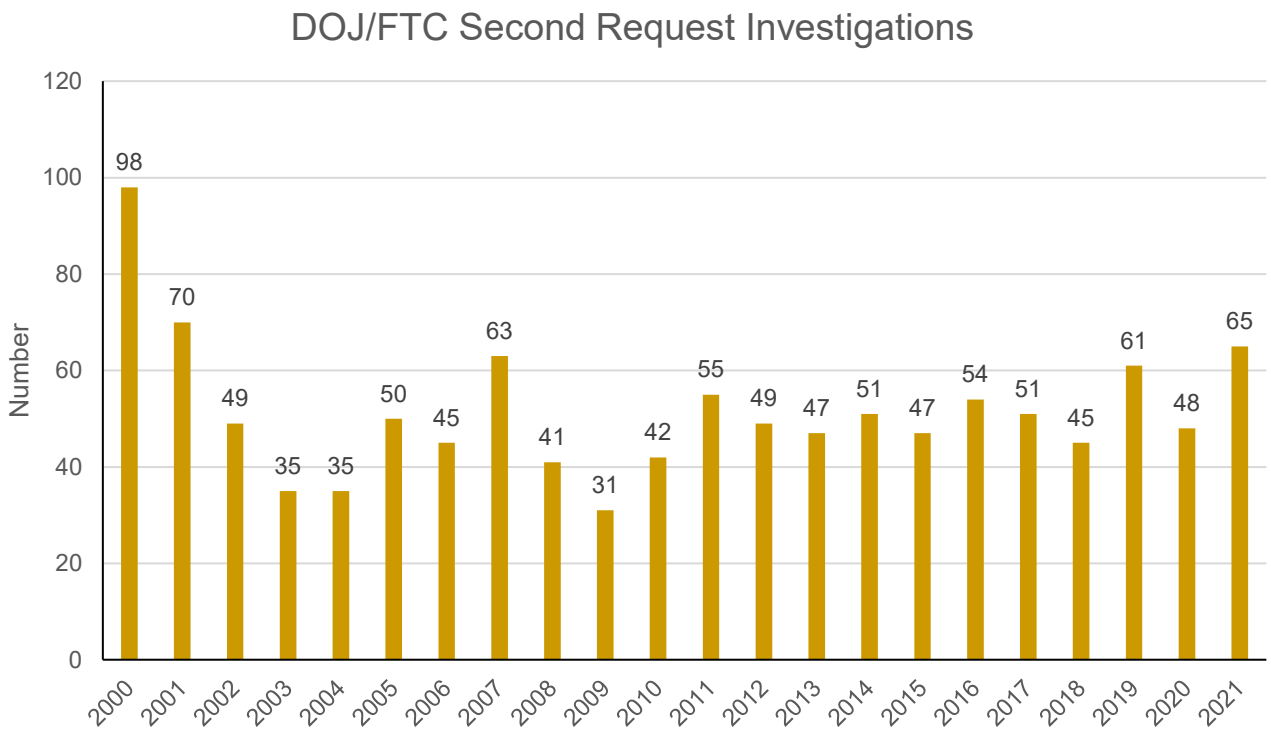
- HSR Act authorizes investigating agency to issue one request for additional information and documentary material (a "second request") during the initial waiting period to each reporting party
- Issuance of a second request extends waiting period until—
  - All parties comply with their respective second 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 2021, 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 2021).

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 potentially 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

- Four 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	FTC Commissioners (meet individually)

Note: The last meeting with the AAG or the Commissioners is sometimes inappropriately called a “last rites” meeting

- 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

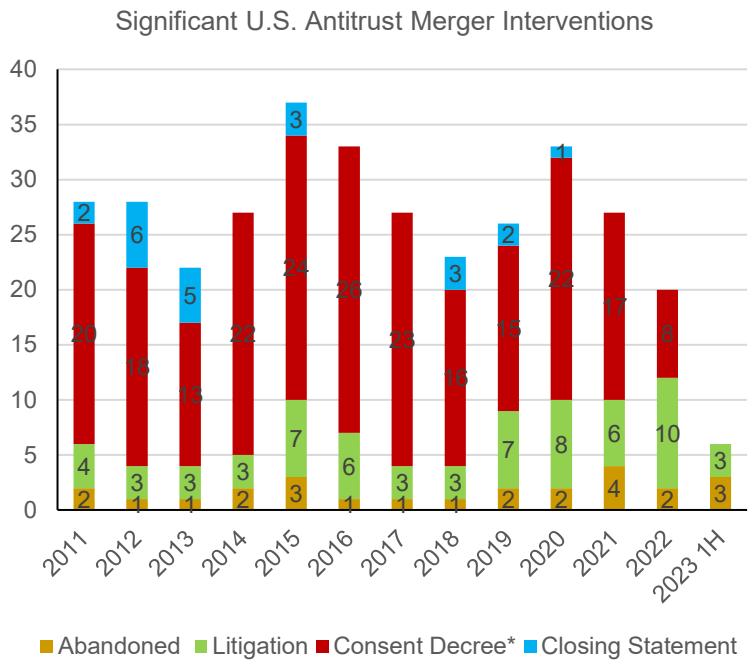
Possible outcomes in DOJ/FTC reviews

Allow deal to close but do not close investigation

- New with the Biden administration
  - No deadline to finish investigation—could remain open indefinitely
  - Agencies send a "preconsumation warning letter" to the parties alerting them to the continuation of the investigation and the possibility of a postclosing challenge[1]
  - Agencies have yet to bring a postclosing challenge to one of these deals

[1] For the FTC's model letter, see Fed. Trade Comm'n, Sample Pre-Consummation Warning Letter. The DOJ and FTC are free to bring Section 7 actions even after the conclusion of an HSR merger review. The most notable modern example is the FTC's challenge initiated in 2020 of Facebook's acquisition of Instagram in 2012 and WhatsApp in 2014. Complaint for Injunctive and Other Equitable Relief, FTC v. Facebook, Inc., No. 1:20-cv-03590 (D.D.C. filed Dec.9, 2020). The district court rejected Facebook's effort to dismiss the complaint as untimely. See FTC v. Facebook, Inc., 560 F. Supp. 3d 1, 30-32 (D.D.C. 2021).

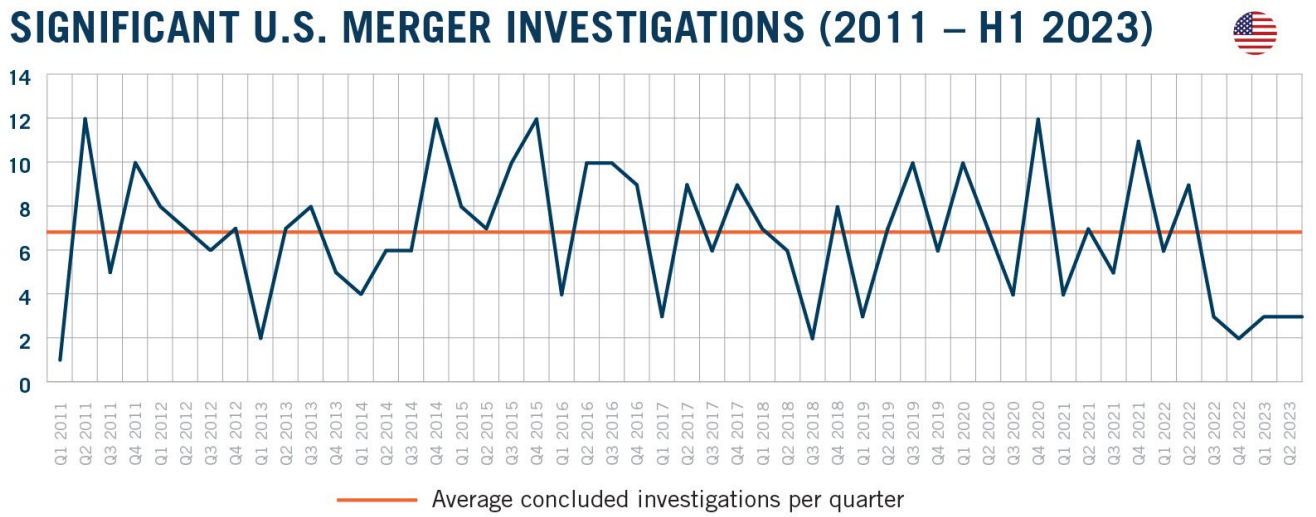
U.S. antitrust merger intervention outcomes



Year	Consent Decree*	Abandoned	Litigation	Closing Statement	c1
2011	20	2	4	2	28
2012	18	1	3	6	28
2013	13	1	3	5	22
2014	22	2	3		27
2015	24	3	7	3	37
2016	26	1	6		33
2017	23	1	3		27
2018	16	1	3	3	23
2019	15	2	7	2	26
2020	22	2	8	1	33
2021	17	4	6		27
2022	8	2	10		20
2023 1H		3	3		6

Source: Dechert LLP, DAMITT Q2 2023: When Avoiding Settlements, Does Merger Enforcement Settle for Less? (July 26, 2023). 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 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).

Outcomes in "significant" investigations



- Dechert concludes:

> These numbers demonstrate the extent to which the agencies' avoidance of settlements has reduced overall enforcement activity. Historically, most enforcement actions by the U.S. agencies resulted in consent decrees. The decline in these settlements, however, has not been matched by a corresponding bump in complaints or abandoned transactions. . . . As a result, it is hard to see what the U.S. agencies have gained through their new approach to settlements, especially as the agencies have struggled to defend the complaints that have been filed in court. As of the end of Q2 2023, the agencies have only successfully blocked one transaction through a complaint filed under the Biden administration.

Source: Dechert LLP, DAMITT Q2 2023: When Avoiding Settlements, Does Merger Enforcement Settle for Less? (July 26, 2023).

Update:
New Proposed HSR Notification Changes

Proposed HSR notification changes

- Background
  - On June 27, the FTC announced that it, with the DOJ's concurrence, would be publishing a Notice of Proposed Rulemaking (NPRM) to amend the rules governing the HSR notification process[1]
  - As proposed, the rule would—
    - fundamentally change the HSR notification process, *and*
    - significantly increase the cost, burden, and timing for parties filing HSR notifications
  - This is the first fundamental revision of the HSR reporting requirements since the original form was issued 45 years ago
- Timing
  - The rulemaking is subject to q 60-day public comment period
    - On August 4, the FTC extended the public comment period to September 27, 2023[2]
  - The final rules are likely to be issued in 2024 Q1
    - The effective date is likely to be sometime later

[1] *See* Press Release, Fed. Trade Comm'n, FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review (June 27, 2023). The NPRM was published on June 29. Fed. Trade Comm'n, Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42178 (June 29, 2023) (to be codified at 16 C.F.R. Pts. 801-803) ("HSR NPRM"); [2] 15 U.S.C. § 18a(d)(1).

[2] *See* Press Release, Fed. Trade Comm'n, FTC and DOJ Extend Public Comment Period by 30 Days on Proposed Changes to HSR Form (Aug. 4, 2023).

Key proposed changes

- Competition analysis
  - Narrative explanation of any current and potential future horizontal overlaps between the parties
    - For each overlap, sales information, customer information (including contact information), and a description of any licensing arrangements, noncompete agreements, and nonsolicitation agreements
  - Narrative explanation of any vertical relationships between the parties
  - More granular geographic information at the street-address level for certain overlaps
  - More expansive information regarding acquisitions in the last 10 years of businesses that offer a product that overlaps with the other party
  - Projected revenue streams for pre-revenue companies
  - Information regarding customers for overlapping products and services, including customer contact information
  - Mandatory disclosure of required foreign merger control filings

Key proposed changes

- Information about the transaction
  - Narrative explanation of each strategic rationale for the transaction
    - With citations to supporting documents
  - A diagram of the deal structure with an explanation of all the entities involved persons involved in the transaction
  - A detailed transaction timeline of key dates and conditions to closing
- Required business documents
  - Broadening the scope of Item 4(c) and 4(d) documents that analyze the transaction to include—
    - Documents prepared by or for "supervisory deal team leads" in addition to officers and directors; *and*
    - Drafts (not just final versions) of all responsive documents
  - Full English translations of all foreign-language documents submitted with the HSR filing
  - Board reports and certain semi-annual and quarterly ordinary course business plans that evaluate the competitive aspects of any overlapping product or service.

Key proposed changes

- Information about the reporting company
  - A description of each of the filer's businesses and products/services
    - Can be extensive for conglomerates and private equity (PE) funds
  - Expanding the requirements for identifying minority investors
  - Sweeping new requirements to identify officers, directors, and board observers for all entities within the acquiring and acquired person (or in the case of unincorporated entities, individuals exercising similar functions), as well as those who have served in the position within the past 2 years
  - Identification of the company's communications and messaging systems
  - Certification that the company has taken steps to suspend ordinary document destruction practices for documents and information "related to the transaction," regardless of whether the transaction raises any substantive antitrust issues

Key proposed changes

- Labor markets
  - Provide the aggregate number of employees of the company for each of the five largest occupational categories by six-digit Standard Occupational Classification (SOC) codes
    - The SOC is an employee classification system developed by the Department of Labor Statistics.
  - Indicate the five largest 6-digit SOC codes in which both parties (the acquiring person and the acquired entity) employ workers
    - For each overlapping 6-digit SOC code, list each Employee Research Service (ERS) commuting zone in which both parties employ workers and provide the aggregate number of classified employees in each ERS commuting zone
      - The ERS was developed and maintained by the Department of Agriculture
  - Identify any penalties or findings issued against the filing person by the U.S. Department of Labor's Wage and Hour Division (WHD), the National Labor Relations Board (NLRB), or the Occupational Safety and Health Administration (OSHA) in the last five years and/or any pending WHD, NLRB, or OSHA matters

Key proposed changes

- Agreement documents
  - Current rule:
    - A filing requires a copy of the most recent version of—
      - the contract or agreement, *or*
      - letter of intent (LOI) to merge or acquire
    - The letter of intent can be bare bones and not include even the basic terms of an agreement
  - Proposed rule
    - Requires:

> [C]opies of all documents that constitute the agreement(s) related to the transaction, including, but not limited to, exhibits, schedules, side letters, agreements not to compete or solicit, and other agreements negotiated in conjunction with the transaction.[1]

    - Documents that constitute the agreement must be executed, but draft documents will suffice *if* they provide sufficient detail" about the transaction:

> If there is no definitive executed agreement, provide a copy of the most recent draft agreement or term sheet that provides *sufficient detail* about the scope of the entire transaction that the parties intend to consummate.[2]

    - While the proposed rules do not define "sufficient detail," the agencies likely will demand something like a detailed term sheet
      - Bare bones LOIs that have been acceptable in the past almost surely will not be sufficient
      - This means that negotiations will have to be much further along than they are today in many deals

[1] HSR NPRM, 88 Fed. Reg. at 42213. [2] *Id*.

Some observations

- Deficiencies in filing
  - Documents
    - Currently, a party's failure to submit all 4(c) and 4(d) document with the original filing can make the filing inoperative and, once discovered, require the party to make a new complete filing, which starting the running of a new HSR waiting period
    - The proposed expanded document requirements increases the risk that required documents will be missed and that the agencies will reject the original filing as deficient
  - Narratives
    - Currently, an HSR filing does not require the creation of any new narratives
    - The proposed changes require the creation of narratives describing the strategic rationale for the transaction, horizontal overlaps, and supply relationships, raising the possibility that the agency will find the narratives "inadequate" and refuse to recognize the filing as effective
  - Agreement documents
    - Currently, a filing can be made on a bare bones letter of intent
    - The proposed rules require that if the absence of an executed definitive agreement, the parties can file only if the letter of intent or term sheet contains "sufficient detail" about the scope of the transaction, raising the possibility that the agency will find that these documents provide insufficient detail and therefore refuse to recognize the filling as effective

Disputes over the sufficiency of a filing may need to be resolved in a declaratory judgment action in a federal district court

The upshot

- The existing way
  - The reporting regime since the HSR Act was put into effect in 1978 has been to ask for only the minimal information necessary to determine whether to open a preliminary investigation during the initial waiting period
  - In the preliminary investigation, additional information to inform the agency whether to issue a second request was obtained through:
    1. The presentations by the merging parties
    2. Responses by the merging parties to a “voluntary request letter” for documents, data, and other information
    3. Responses by the merging parties to other questions from the investigating staff
    4. Telephone interviews with customers, competitors, industry analysts, and other third parties
    5. Internet research on the merging parties and the products of interest
    6. Presentations, if any, by firms and interest groups opposing the deal
- Under the proposed rules
  - Much of the information the investigation agency gathered from the merging parties during the preliminary investigation will now be required as part of the HSR notification form

The upshot

- The burden
  - In FY 2021[1]—
    - 3413 transactions were reported
    - Clearance was granted to open preliminary investigations in 270 transaction (7.9%)
    - Second requests were issued in 65 transactions (1.9%)

If the proposed rules had been in effect in FY 2021, the burden of the additional reporting requirements would have been imposed on 3142 reportable transactions where neither the DOJ nor the FTC had sufficient concern to request clearance to open a preliminary investigation

[1] Fed. Trade Comm'n & U.S. Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2021, at Ex. A, Table I.

Likely challenges

- If the final rules look like the proposed rules, the final rules will almost certainly be challenged in court as being outside of the authority of the FTC to promulgate
  1. The delegation of rulemaking authority is limited to "necessary and appropriate" documents and information to enable the agencies to determine whether the reported transaction violates the antitrust laws[1]
  2. Under the current reporting regime, the agencies notification of pending reportable transactions—Internet research, voluntary access letters, second requests, and field investigations with customers and competitors provide the agencies all the information they need to determine whether a transaction violates the antitrust laws
  3. This is confirmed by the fact that since 1978, when HSR reporting began, the agencies have challenged only a handful of reportable transactions (say, less than four) that were "cleared" in the merger review
     - Under *DuPont/GM*, laches does not run against the DOJ or the FTC, so a postclearance Section 7 challenge—even 30 years after the closing—is not time barred
     - The fact that the agencies are not bringing postclearance challenges indicates that the agencies are able to determine whether a transaction violates Section 7 under the historical reporting regimes, so that the additional requirements are neither "necessary" or "appropriate"

[1] 15 U.S.C. § 18a(d)(1). Also, look at the legislative history of the HSR Act discussed above.